

IN THE COMMON PLEAS COURT OF CLARK COUNTY, OHIO

STATE OF OHIO,

CASE NO. 23CR0567

Plaintiff, Clark County, Ohio

FILED

JAN 29 2024

Common Pleas Court
Melissa M. Tuttle, Clerk

Judge Rastatter

-VS-

Hermanio Joseph

Defendant.

**Response in Opposition to
Defendant's Motion to Dismiss**

Now comes the State of Ohio, by and through Assistant Prosecuting Attorney Kevin J. Miller, and does hereby submit the following response in opposition to defendant's motion to dismiss.

MEMORANDUM

On or about August 22, 2023, in the area of State Route 41 east of Milepost 25, in German Township Clark County, Ohio the defendant was driving a 2010 Honda Odyssey. The defendant went left of the clearly marked yellow centerline, traveling into the opposing lane. The defendant then struck a Northwestern School bus that was traveling in the lane the defendant drove into. After the initial impact, the bus traveled off the north side of State Route 41 and overturned. An occupant of the bus was ejected from the bus and suffered fatal injury when the bus overturned. The investigation of this crash revealed the defendant, at the time of the offense, did not have a valid license. The defendant was subsequently indicted for Vehicular Homicide under R.C. 2903.06(A)(3)(a) with a specification under R.C. 2903.06(C) that alleges the defendant did not have a license at the time of the offense. The defendant was also charged with one count of Involuntary Manslaughter R.C.

2903.04(A). The specification enhances the 2903.06(A)(3)(a) from a misdemeanor of the first degree to a felony of the fourth degree.

(C) Whoever violates division (A)(3) of this section is guilty of vehicular homicide. Except as otherwise provided in this division, vehicular homicide is a misdemeanor of the first degree. **Vehicular homicide committed in violation of division (A)(3) of this section is a felony of the fourth degree** if, at the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, **did not have a valid driver's license**, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code

R.C. 2923.06

The defendant alleges in their motion to dismiss that the State is not contesting the validity of the Mexican driver's license. This is not true the State does allege that the license was invalid for a multiple reasons. First, Special Agent Albert Upchurch from Homeland Security, who is on the State's witness list and his investigation was mentioned in discovery, investigated the license and confirmed that it was invalid with the Mexican government. The license was not issued from an approved location and was therefore invalid. The second reason is that that Mexico is not one of the listed countries under the The United Nations Conference on Road and Motor Transport. (Convention of Road Traffic Geneva, 19 September 1949, Chapter XI) The defendant has resided in the country for over a year and never received a valid state driver's license. Third, the issue as whether the license was valid is an issue of fact for the State to prove and be weighed by a jury and should not be used as grounds for a dismissal.

The State also opposes the defendant's arguments with regards to what the code section applies to this case. The defendant cites 2903.06(A)(4) as follows;

Section 2903.06(A)(4) states that whoever as a result of committing a minor misdemeanor under R.C. Section 2003..06(B)(D) is guilty of vehicular manslaughter, a misdemeanor of the second degree. The statute further provides “If at the time of the offense the offender was driving without a valid drivers license, temporary permit...t” then the defendant is guilty of the vehicular manslaughter a misdemeanor of the first degree.

Defendant’s Motion to Dismiss, pg2.

The defendant’s cite is incorrect R.C. 2903.06(A)(4) states;

As the proximate result of committing a violation of any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor or of a municipal ordinance that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any provision of any section contained in Title XLV of the Revised Code that is a minor misdemeanor.

R.C. 2903.06 (Page, Lexis Advance through File 13 of the 135th General Assembly (2023-2024)).

The State argues that 2903.06(A)(4) is not relevant to the above captioned case as the defendant was not indicted under that code section. As stated previously the defendant was indicted under 2903.06(A)(3(a) which only requires the State to prove that while operating a motor vehicle the defendant caused the death of another negligently and if the defendant did not have a valid license as the time of the incident the offense is a felony of the fourth degree.

Second, there is no “R.C. 2003..06(B)(D).” The State is assuming this is a typo and believes defendant was referring to 2903.06(D) as this is the section that refers to vehicular manslaughter. 2903.06(D) states, “Whoever violates division (A)(4) of this section is guilty of vehicular manslaughter. Except as otherwise provided in this division, vehicular manslaughter is a misdemeanor of the second degree.” *R.C. 2903.06* (Page, Lexis Advance through File 13 of the 135th General Assembly (2023-2024)). The State argues that section

2903.06(D) only applies to 2903.06(A)(4) and is not relevant to the above captioned case because again the defendant is charged under 2903.06(A)(3)(a).

Third, the defendant argues that the 1988 case *State v. Volpe* controls and that specific provisions prevail over general statutes. While this is true in part the Supreme Court of Ohio ruled in 1990 case *State v. Chippendale*, 52 Ohio St. 3d 118.(see attached) that if the manifest legislative intent was to allow both the general and specific provision to be pursued coextensively the specific provision would not prevail over the general statute.

In *Chippendale*, the defendant was convicted of Involuntary Manslaughter 2903.04, Aggravated Vehicular Homicide 2903.06 and Vehicular Homicide 2903.07(statute was repealed when combined into 2903.06). The case presented the question of whether the State could charge and try defendant for both involuntary manslaughter under a general provision and aggravated vehicular homicide under a special provision. The Supreme Court noted that both the general and specific provisions dealt with the same course of conduct. The Supreme Court held that the offenses were of similar import. The Supreme Court also ruled that the manifest legislative intent was that the two statutes be enforced coextensively;

It is true that in *Volpe*, supra, at 193, 527 N.E. 2d at 820, we said that where two different statutes "* * *" provide for different penalties for the same conduct, they cannot be construed to give effect to both." This is a correct statement of the law when the legislature has expressed its intent that a special provision prevail over a general one, as was the case in *Volpe*, supra. Additionally, we now hold that where the legislative intent is manifest that general and special provisions be applied coextensively and where the provisions are allied offenses of similar import, then the prosecution may charge on and try both, but the defendant may be sentenced upon his or her conviction for only one of the offenses.

State v. Chippendale, 52 Ohio St. 3d 118, 122, 556 N.E.2d 1134, 1138, 1990 Ohio LEXIS 267, *14.

The Supreme Court in *Chippendale* held that the legislature clearly intended to permit the charge of manslaughter against person involved in vehicular fatalities despite the more specific provision for aggravated vehicular and vehicular homicide. *Id.* at 122. Therefore, the general provision of involuntary manslaughter and specific provision of vehicular homicide can be pursued coextensively by the State.

For the aforementioned reasons the State requests the defendant's motion be denied without a hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Motion to Consolidate was made available to Terry Hart on the same date as filing by Kevin J. Miller.

Kevin J. Miller (0095231)
Assistant Clark County Prosecutor



State v. Chippendale

Supreme Court of Ohio

April 11, 1990, Submitted ; June 27, 1990, Decided

No. 89-812

Reporter

52 Ohio St. 3d 118 *; 556 N.E.2d 1134 **; 1990 Ohio LEXIS 267 ***

THE STATE OF OHIO, APPELLANT, v.
CHIPPENDALE, APPELLEE

Prior History: [***1] CERTIFIED by the Court of Appeals for Warren County, No. CA88-07-054.

Disposition: *Judgment reversed.*

Core Terms

offenses, special provision, vehicular homicide, general provision, involuntary manslaughter, aggravated, manifest, prevail, allied, sentenced, court of appeals, coextensively, provisions, similar import, motor vehicle, animus

Case Summary

Procedural Posture

Defendant was convicted of involuntary manslaughter and vehicular homicide in the common pleas court. The Court of Appeals for Warren County (Ohio) reversed defendant's convictions, stating that the specific statutory provisions of aggravated vehicular homicide, Ohio Rev. Code Ann. § 2903.06, and vehicular homicide, § 2903.07, prevailed over the general provision of involuntary manslaughter, § 2903.04. The State appealed.

Overview

The case presented the question of whether the State could charge and try defendant for both involuntary manslaughter under a general provision, Ohio Rev. Code Ann. § 2903.04, and aggravated vehicular homicide under a special provision, Ohio Rev. Code Ann. § 2903.06. The court noted it was clear that the general provision, Ohio Rev. Code Ann. § 2903.04(B), and the special provision, § 2903.06(B), both dealt with

the same course of conduct. Therefore, the court proceeded to the second step in its analysis to determine whether § 2903.04(B) and § 2903.06 were allied offenses of similar import. The court held that a violation of § 2903.06 would of necessity have resulted in the violation of § 2903.04(B), involuntary manslaughter, and concluded the two crimes were of similar import. The court stated that the manifest legislative intent was that the two statutes be enforced coextensively, and held that the court of appeals erred in holding that the legislature expressed an intent to have the offense of aggravated vehicular homicide prevail over the offense of involuntary manslaughter. The common pleas court properly sentenced defendant on the offense carrying a greater penalty.

Outcome

The court reversed the decision of the court of appeals which reversed defendant's involuntary manslaughter conviction, and reinstated the judgment and sentence of the common pleas court.

LexisNexis® Headnotes

Criminal Law & Procedure > Criminal
Offenses > Lesser Included Offenses > General
Overview

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

HN1  **Criminal Offenses, Lesser Included Offenses**

It is a well-established principle of statutory construction that specific statutory provisions prevail over conflicting

general statutes. In recognition of this principle, the General Assembly enacted Ohio Rev. Code Ann. § 1.51, which deals with the proper application of general and special or local provisions, and provides that if a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail. Thus, it is critical in the first instance to determine whether the statutes upon which the prosecution seeks to proceed are general, special or local. If the statutes are general and do not involve the same or similar offenses, then § 1.51 is inapplicable. However, if one of the statutes is general and one specific and they involve the same or similar offenses, the court must then ask whether the offenses constitute allied offenses of similar import. To be allied offenses, the elements of the offenses must correspond to such a degree that the commission of one crime will result in the commission of the other.

Criminal Law & Procedure > Criminal
Offenses > Lesser Included Offenses > General
Overview

Governments > Legislation > Interpretation

HN2[↓] Criminal Offenses, Lesser Included Offenses

If a court is treating allied offenses, then, according to Ohio Rev. Code Ann. § 2941.25(A), the indictment or information may contain counts for all such offenses, but the defendant may be convicted of, that is, sentenced on, only one. There is only one exception to this rule. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses. Ohio Rev. Code Ann. § 2941.25(B). Indeed, statutes falling under this single exception would be outside the purview of Ohio Rev. Code Ann. § 1.51, as the court would be viewing several offenses with different time frames or separate animuses. To summarize, Ohio Rev. Code Ann. § 1.51 comes into play only when a general and a special provision constitute allied offenses of similar import and additionally do not constitute crimes committed separately or with a separate animus for each crime. When this is the case, the court must

proceed with its analysis of § 1.51.

Admiralty & Maritime Law > Maritime Personal
Injuries > General Overview

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Voluntary
Manslaughter > General Overview

Torts > ... > Elements > Causation > General
Overview

Criminal Law & Procedure > ... > Vehicular
Crimes > Reckless Driving > General Overview

Criminal Law & Procedure > ... > Vehicular
Crimes > Vehicular Homicide > General Overview

Criminal Law & Procedure > ... > Vehicular
Crimes > Vehicular Homicide > Elements

Transportation Law > Private
Vehicles > Snowmobiles

HN3[↓] Admiralty & Maritime Law, Maritime Personal Injuries

Ohio Rev. Code Ann. § 2903.04(B) pertains to the commission of a misdemeanor that proximately causes the death of another and is a general provision. On the other hand, Ohio Rev. Code Ann. §§ 2903.06, .07, which pertain to recklessly or negligently causing the death of another while operating a specified vehicle, are special provisions. It is clear that the general provision, § 2903.04(B), and the special provision, § 2903.06(B), both deal with the same course of conduct. Section 2903.04(B) states that no person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor, while § 2903.06 states that no person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall recklessly cause the death of another.

Criminal Law & Procedure > Criminal
Offenses > Lesser Included Offenses > General
Overview

Governments > Legislation > Interpretation

Criminal Law & Procedure > ... > Accusatory
Instruments > Indictments > General Overview

HN4[↓] Criminal Offenses, Lesser Included Offenses

Where two different statutes provide for different penalties for the same conduct, they cannot be construed to give effect to both. This is a correct statement of the law when the legislature has expressed its intent that a special provision prevail over a general one. Where the legislative intent is manifest that general and special provisions be applied coextensively and where the provisions are allied offenses of similar import, then the prosecution may charge on and try both, but the defendant may be sentenced upon his or her conviction for only one of the offenses.

Criminal Law & Procedure > ... > Accusatory
Instruments > Indictments > General Overview

HN5[↓] Accusatory Instruments, Indictments

There is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context.

Headnotes/Summary

Headnotes

Criminal law -- Statutory construction -- R.C. 2903.04(B) is a general provision while R.C. 2903.06 and 2903.07 are special provisions -- Determining prosecutor's ability to charge on general and special provisions under R.C. 1.51 -- Prosecution may charge only the special provision, when.

Syllabus

[*118] O.Jur 3d Criminal Law §§ 1793, 1795.

1. R.C. 2903.04(B), which pertains to the commission

of a misdemeanor that proximately causes the death of another, is a general provision. R.C. 2903.06 and 2903.07, which pertain to recklessly or negligently causing the death of another while operating a specified vehicle, are special provisions.

O.Jur 3d Statutes §§ 128, 129, 130.

2. Where it is clear that a general provision of the Criminal Code applies coextensively with a special provision, [***6] R.C. 1.51 allows a prosecutor to charge on both.

3. Where it is clear that a special provision prevails over a general provision or the Criminal Code is silent or ambiguous on the matter, under R.C. 1.51, a prosecutor may charge only on the special provision.

On August 4, 1987, defendant-appellee Scott Chippendale went to Palmer David Whitt's home with Mark Scott. The three decided to go swimming in the Little Miami River, at Caesar's Creek, with two other friends, Joel Moreland and Todd Morris. On the way to Caesar's Creek the group stopped to buy a case (twenty-four) and a six-pack of beer. Chippendale drove the group to a parking spot where he left his 1980 white and blue Dodge pickup truck. They walked down together to Caesar's Creek, arriving at about 2:30 p.m. Chippendale testified at trial that he consumed four or five beers and also worked on a swing pulley system while at Caesar's Creek.

At approximately 4:30 or 5:00 p.m. it began raining, so the boys returned to Chippendale's parked pickup truck. At approximately 6:00 p.m., the boys left the parking area in Chippendale's truck. The party eventually approached the intersection of U.S. Route 42 and Middletown Road, driving westbound on Middletown Road. Chippendale was unable to stop in time to prevent his truck from going through a stop sign into this intersection, and striking a northbound light [***2] blue 1983 Toyota Corolla that contained Hobert Baker and Winifred Baker, his wife who was seven months' pregnant. As a result of this collision, Mrs. Baker was thrown approximately twenty-five to thirty feet from the Toyota. She died as a result of her injuries. The baby was delivered successfully on that day.

Sergeant Douglas Keiter of the State Highway Patrol arrived on the scene, spoke with Chippendale, and detected the odor of alcohol on him. When Keiter asked Chippendale how much Chippendale had had to drink,

Chippendale initially answered, [*119] "Nothing," then amended his answer to, "Well, three to four beers earlier."

Keiter also testified that Middletown Road east of the intersection was in generally good condition for a country road and that he did not detect any oil on that section of roadway. Keiter also commented on a "faint grinding type of a pavement scratching" on the westbound lane of Middletown Road, running in the intersection, into the northbound lane of U.S. Route 42, indicating recent braking action.

Soon after the accident Chippendale was taken to Middletown Hospital where he was given his rights and then questioned by Trooper Dennis Gorski of the State Highway [***3] Patrol. Chippendale submitted to a blood-alcohol test at approximately 8:30 p.m.; the results indicated Chippendale's blood-alcohol level at the time of testing was .11 percent. Toxicologist Leonard J. Porter testified that the two-hour delay between the accident and the time the sample was taken could only have decreased the amount of alcohol in Chippendale's bloodstream. Porter also stated that at the time of the accident Chippendale's blood-alcohol percentage would have been .03 higher. Lieutenant Blaine Keckley of the State Highway Patrol crime laboratory declared that a lack of refrigeration during the transit of the sample could have caused a drop in the amount of alcohol in the blood sample if the container had not been tightly sealed.

On September 14, 1987, Chippendale was indicted for one count of involuntary manslaughter, a third degree aggravated felony, R.C. 2903.04(B), and one count of aggravated vehicular homicide, a fourth degree felony, R.C. 2903.06.¹ A jury trial was held on May 16 and 17, 1988, after which Chippendale was convicted of involuntary manslaughter and vehicular homicide, R.C. 2903.07, a lesser-included offense of aggravated vehicular homicide. [***4] Chippendale was sentenced on June 28, 1988 for involuntary manslaughter and received two to ten years in the Ohio State Reformatory, which was suspended on the condition that he go through five years' probation, be incarcerated for six months in the Warren County Jail, and have his driving privileges suspended for five years.

Chippendale appealed his conviction for involuntary

manslaughter and his sentence to the Court of Appeals for Warren County, which reversed the conviction and sentence based upon our decision in State v. Volpe (1988), 38 Ohio St. 3d 191, 527 N.E. 2d 818. The court of appeals stated that the specific statutory provisions of aggravated vehicular homicide, R.C. 2903.06, and vehicular homicide, R.C. 2903.07, must prevail over the more general provision of involuntary manslaughter, R.C. 2903.04. That court so held because it believed R.C. 1.51 (entitled "Special or local provision prevails over general; exception") clearly mandated that special provisions under these circumstances must prevail over a general provision [***5] when an irreconcilable conflict arises between these provisions. The court remanded for sentencing on the vehicular homicide conviction, since Chippendale had not appealed that conviction.

Finding its decision to be in conflict with the decision of the Court of Appeals for Clark County in State v. Davis (1983), 13 Ohio App. 3d 265, 13 OBR 329, 469 N.E. 2d 83, the court of [*120] appeals certified the record of the case to this court for review and final determination.

Counsel: Timothy A. Oliver, prosecuting attorney, and Carolyn A. Benninghoff, for appellant.

Ruppert, Bronson, Chicarelli & Smith Co., L.P.A., and James D. Ruppert, for appellee.

Gregory A. White, urging reversal for *amicus curiae* Ohio Prosecuting Attorneys Association.

Judges: Wright, J. Moyer, C.J., Sweeney, Holmes, Douglas and Resnick, JJ., concur. H. Brown, J., dissents.

Opinion by: WRIGHT

Opinion

[**1136] This case presents the question of whether the state may charge and try a defendant for both involuntary manslaughter under a general provision, and aggravated vehicular homicide under a special provision. We answer this question in the affirmative, as the manifest legislative intent is that the two statutes be enforced coextensively. We therefore reinstate the decision and sentence of the Court of Common Pleas of Warren County.

¹ Aggravated vehicular homicide is now an aggravated felony of the third degree, the same as involuntary manslaughter under R.C. 2903.04(B).

I
HN1 [↑] It is a well-established principle of statutory construction that specific statutory provisions prevail **[**7]** over conflicting general statutes. *Volpe, supra*, at 193, 527 N.E. 2d at 820. In recognition of this principle, the General Assembly enacted R.C. 1.51, which deals with the proper application of general and special or local provisions, and reads:

"If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

Thus, it is critical in the first instance to determine whether the statutes upon which the prosecution seeks to proceed are general, special or local. If the statutes are general and do not involve the same or similar offenses, then R.C. 1.51 is inapplicable.

However, if one of the statutes is general and one specific and they involve the same or similar offenses, we must then ask whether the offenses constitute allied offenses of similar import. To be allied offenses, " * * the elements of the offenses [must] correspond to such a degree that **[***8]** the commission of one crime will result in the commission of the other * * *." *Newark v. Vazirani* (1990), 48 Ohio St. 3d 81, 549 N.E. 2d 520, syllabus. **HN2** [↑] If we are treating allied offenses, then, according to R.C. 2941.25(A), "the indictment or information may contain counts for all such offenses, but the defendant may be convicted of [that is, sentenced on] only one." There is only one exception to this rule: " * * If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of [that is, sentenced on] both offenses." *Vazirani, supra*, at the syllabus; R.C. 2941.25(B). Indeed, statutes falling under this single exception would be outside the purview of **[**1137]** R.C. 1.51, as we are viewing several offenses with different time frames or separate animuses.

To summarize, R.C. 1.51 comes into play only when a general and a special provision constitute allied offenses of similar import and additionally do not constitute crimes committed separately or with a separate animus for each crime. When this is the case, we must proceed with our analysis of R.C. 1.51.

Where it is clear that a general provision **[***9]** of the Criminal Code applies **[*121]** coextensively with a special provision, R.C. 1.51 allows a prosecutor to charge on both. Conversely, where it is clear that a special provision prevails over a general provision or the Criminal Code is silent or ambiguous on the matter, under R.C. 1.51, a prosecutor may charge only on the special provision. The only exception in the statute is where " * * the general provision is the later provision and the manifest intent is that the general provision prevail." Thus, unless the legislature enacts or amends the general provision later in time and manifests its intent to have the general provision apply coextensively with the special provision, the special provision must be the only provision applied to the defendant.

II

Having laid out the proper framework to analyze general and special provisions, we turn to Chippendale's specific situation. Chippendale, as stated, was charged with involuntary manslaughter, R.C. 2903.04(B), and with aggravated vehicular homicide, R.C. 2903.06.

HN3 [↑] R.C. 2903.04(B), which pertains to the commission of a misdemeanor that proximately causes the death of another, is a general provision. ² On the other hand, R.C. [***10] 2903.06 and 2903.07, which pertain to recklessly or negligently causing the death of another while operating a specified vehicle, are special provisions. ³ It is clear that the general provision, R.C. 2903.04(B), and the special provision, R.C. 2903.06(B), both deal with the same course of conduct.

Therefore we must proceed to the second step in our analysis and determine whether R.C. 2903.04(B) and 2903.06 are allied offenses of similar import. In *State v. Davis* (1983), 13 Ohio App. 3d 265, 270, 13 OBR 329, 334, 469 N.E. 2d 83, 88, the Court of Appeals for Clark County dealt with this question and applied our holdings on facts quite **[***11]** similar to the facts in this case.

² R.C. 2903.04(B) states:

"No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor."

³ R.C. 2903.06 states:

"No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall recklessly cause the death of another."

The court in *Davis* said:

"In the present matter the conduct involved was that of the defendant immediately prior to the collision. R.C. 2903.06, aggravated vehicular homicide, requires the reckless operation of a motor vehicle resulting in the death of another. Consequently, the defendant must be recklessly operating his vehicle, which is of itself a misdemeanor. Thus, a violation of R.C. 2903.06 will of necessity result in the violation of R.C. 2903.04(B), involuntary manslaughter. Consequently we conclude the two crimes are of similar import."

We agree and next ask whether the allied offenses with which Chippendale was charged were committed separately in time or with a separate animus for each offense under R.C. 2941.25(B). It is beyond dispute that the offenses with which Chippendale was charged occurred at one moment in time, the moment the accident occurred. Indeed the jury found that Chippendale was at that moment operating a motor vehicle negligently and that such conduct was the proximate cause of the death of Mrs. Baker, whose fatal injuries occurred at that moment. It is also clear that Chippendale [*122] had only one intent [***12] or animus during this rapid series of events.

Since the offenses for which Chippendale was charged are allied offenses that occurred in one series of events and with one [***1138] animus, we must now determine the effect of R.C. 1.51 on the general and special provisions with which Chippendale was charged. As we stated earlier, where a general and a special provision cover the same conduct, the legislature may expressly mandate that such provisions are to run coextensively. *Volpe, supra*; R.C. 1.51. In fact, the legislative history of R.C. 2903.04 manifests such an intent. Before amendment, the section of the House Bill that dealt with involuntary manslaughter, then R.C. 2903.05(B), specifically excluded aggravated vehicular homicide and vehicular homicide from constituting offenses under that section. Sub. H.B. No. 511, 109th General Assembly (1972), quoted in Goldsmith, *Involuntary Manslaughter: Review and Commentary on Ohio Law* (1979), 40 Ohio St. L.J. 569, 573, footnote 31. As the court in *State v. Davis, supra*, at 269, 13 OBR at 333, 469 N.E. 2d at 88, noted, the legislature, in enacting the final version of the involuntary manslaughter section, at R.C. 2903.04, removed [***13] this vehicular exemption. The court in *Davis* was quite correct in stating that the legislature declined to take advantage of this perfect opportunity to exclude vehicular deaths from the ambit of R.C.

2903.04. *Id.* at 270, 13 OBR at 334, 469 N.E. 2d at 88. We now hold that the court in *Davis* and those courts adopting its position were correct in declaring that the legislature clearly intended " * * * to permit a charge of manslaughter against persons involved in vehicular fatalities despite the more specific provisions for aggravated vehicular and vehicular homicide." *Id.*

Therefore the court of appeals in this case erred when it rejected the reasoning of the court of appeals in *Davis* and of those courts adopting the *Davis* court's reasoning. The court of appeals further erred when it failed to properly apply our decision in *State v. Volpe, supra*. These errors led the court of appeals to incorrectly reverse Chippendale's conviction and sentence on involuntary manslaughter.

Clearly, Chippendale's case involves a manifest legislative intent to have the general and special provisions at issue applied coextensively. Conversely, *Volpe, supra*, involved [***14] the legislature's manifesting an intent to have a special provision (prohibiting possession and control of a gambling device, R.C. 2915.02(A)(5)), prevail over a general provision (prohibiting possession and control of criminal tools, R.C. 2923.24).

It is true that in *Volpe, supra*, at 193, 527 N.E. 2d at 820, we said that HN4 [T] where two different statutes " * * * provide for different penalties for the same conduct, they cannot be construed to give effect to both." This is a correct statement of the law when the legislature has expressed its intent that a special provision prevail over a general one, as was the case in *Volpe, supra*. Additionally, we now hold that where the legislative intent is manifest that general and special provisions be applied coextensively and where the provisions are allied offenses of similar import, then the prosecution may charge on and try both, but the defendant may be sentenced upon his or her conviction for only one of the offenses.

We note finally that this holding is consistent with United States Supreme Court pronouncements in this area. That court, in *United States v. Batchelder* (1979), 442 U.S. 114, dealt with several federal statutes [***15] and penalties, each prohibiting a previously [*123] convicted felon from receiving a firearm that had traveled in interstate commerce. The court stated:

HN5 [T] " * * * [There] is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes

with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. * * * *Id. at 125.*

The court of appeals erred in holding that the legislature expressed an intent to [***1139] have the offense of aggravated vehicular homicide prevail over the offense of involuntary manslaughter. Thus, we find that under *R.C. 2941.25*, the prosecution properly charged Chippendale under both of these offenses and the trial court properly sentenced Chippendale on only one of these offenses, albeit on the offense carrying a greater penalty.

The decision of the court of appeals is reversed and the decision and sentence of the court of common pleas are reinstated.

*Judgment reversed [***16]* .

Dissent by: BROWN

Dissent

H. Brown, J., dissenting.

The majority opinion correctly notes that " a violation of *R.C. 2903.06* [aggravated vehicular homicide] will of necessity result in a violation of *R.C. 2903.04(B)*, involuntary manslaughter." However, it fails to note that violation of *R.C. 2903.07*, vehicular homicide, produces the same result. *R.C. 2903.07(A)* provides:

"No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall *negligently* cause the death of another." (Emphasis added.)

The negligent operation of a motor vehicle will almost always be a misdemeanor. See, e.g., *Stout v. Ellinger* (1951), 154 Ohio St. 418, 43 O.O. 346, 96 N.E. 2d 249 (failure to obey a stop sign in violation of predecessor to *R.C. 4511.43* is negligence *per se*). Therefore, where a person causes the death of another by negligently operating a motor vehicle, he will be guilty of both involuntary manslaughter, *R.C. 2903.04*, and vehicular homicide, *R.C. 2903.07*.

In enacting the vehicular homicide statutes, the General Assembly made a clear distinction between reckless

and negligent conduct. *R.C. 2903.06*, which requires [***17] a *mens rea* of recklessness, was a fourth degree felony; while *R.C. 2903.07*, which requires only negligence, was (and is) a first degree misdemeanor. Yet, under the majority's interpretation, both kinds of conduct may, at the prosecutor's option, be converted to a third degree felony by charging the offender under *R.C. 2903.04(B)*. Thus, the majority has written the legislature's distinction out of the law. Our duty is to harmonize the law, not to rewrite it.

The distinction between aggravated vehicular homicide and vehicular homicide is critical in the instant case, since *appellee was found not guilty of aggravated vehicular homicide*, but guilty of vehicular homicide as a lesser-included offense. Thus, the majority has wiped out the finding in defendant's favor by a jury.

Accordingly, I would affirm the judgment of the court below.

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