Appellate Court Decisions - Week of 1/25/16

First Appellate District of Ohio

***State v. Brown*, 2016-Ohio-310**

Sentencing: Agreed Sentence: Earned Credit: Transitional Control: Judicial Release

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130120_01292016.pdf

Summary from the First District:

"The trial court lacked the authority to limit the defendant's eligibility to earn days of credit for participation in approved programs under R.C. 2967.193 as part of its sentence, and that part of the defendant's sentence is vacated, even though the defendant agreed to this restriction as a condition of his jointly recommended and subsequently imposed 12-year prison term. [*State v. Livingston*, 2014-Ohio-1637, 9 N.E.3d 1117 (1st Dist.), followed.]

"The trial court has the statutory authority and wide discretion to disapprove and block an eligible offender's participation in the transitional-control program, and to deny judicial release, and where the defendant agreed that he would not participate in these programs as a condition of his 12-year prison term, the trial court's imposition of an agreed sentence including these restrictions was authorized by law."

***State v. Pippin*, 2016-Ohio-312**

Appellate Review: Jurisdiction

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-150061_01292016.pdf

Summary from the First District:

"Where the trial court failed to dispose of four charges of the severed, ten-count indictment, the trial court's entry convicting the defendant on the other six charges is not a final, appealable order under Crim.R. 32(C) and R.C. 2505.02, because the entry does not dispose of all the charges in the action."

Second Appellate District of Ohio

Nothing new.

Third Appellate District of Ohio

Nothing new.

Fourth Appellate District of Ohio

Nothing new.

Fifth Appellate District of Ohio

***State v. Brandon*, 2016-Ohio-271**

Search: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2016/2016-Ohio-271.pdf

The trial court erred in denying appellant's motion to suppress the search of his car and person. The police officers did not stop the vehicle appellant was driving. The officers were in an unmarked, undercover vehicle and never activated their lights or siren. The officers never motioned or requested Brandon to pull over or stop the vehicle. Neither officer ordered appellant to exit his car. Appellant voluntarily got out of the car to speak with the officers. The officers asked appellant to come to the station to talk to them. Appellant agreed, but only if he could drive himself. The officers did not agree to that, but instead did a pat-down of appellant, put him in the car, and searched his vehicle. Appellant was not under arrest and the officers, at that point, had no legitimate reason for placing appellant in the unmarked vehicle and transporting him. The officers expressed no reasonable, articulable suspicion appellant was armed. Appellant never consented to the search of his car or person.

Sixth Appellate District of Ohio

Nothing new.

Seventh Appellate District of Ohio

Nothing new.

Eighth Appellate District of Ohio

***State v. Saunders*, 2016-Ohio-292**

***Batson*: Ineffective Assistance**

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-292.pdf

Summary from the Eighth District: "Once the defense counsel challenged a juror's dismissal based on the juror's race, it was incumbent on the court to conduct a *Batson* hearing to decide if there was merit to defense counsel's challenge. Defense counsel's failure to implore the judge to conduct a *Batson* hearing does not constitute ineffective assistance of counsel." The case was reversed and remanded for a new trial.

***State v. Halstead*, 2016-Ohio-290**

Sentencing: Allied Offenses: Felonious Assault: Kidnapping

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-290.pdf

The trial court erred in failing to merge appellant's convictions for felonious assault and kidnapping where appellant robbed the victim at knife-point, then knocked the victim to the ground and slashed his throat with the knife. Based on those facts, the kidnapping and felonious assault were part of the same animus and caused the same harm.

Ninth Appellate District of Ohio

Nothing new.

Tenth Appellate District of Ohio

Nothing new.

Eleventh Appellate District of Ohio

Nothing new.

Twelfth Appellate District of Ohio

***State v. Marcum*, 2016-Ohio-263**

Sentencing: Allied Offenses: Rape: Sexual Battery

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/12/2016/2016-Ohio-263.pdf

The trial court erred in failing to merge for sentencing purposes appellant's convictions for rape and sexual battery because they were allied offenses of similar import.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

***Montgomery v. Louisiana*, No. 14-280**

(This is a big one. Read the syllabus.)

Full Decision: http://www.supremecourt.gov/opinions/15pdf/14-280_4h25.pdf

***Miller v. Alabama*: Retroactivity: Juveniles: Mandatory Life Without Parole**

Syllabus of the Court:

Petitioner Montgomery was 17 years old in 1963, when he killed a deputy sheriff in Louisiana. The jury returned a verdict of "guilty without capital punishment," which carried an automatic sentence of life without parole. Nearly 50 years after Montgomery was taken into custody, this Court decided that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on " 'cruel and unusual punishments.' " *Miller v. Alabama*, 567 U. S. ____, ____. Montgomery sought state collateral relief, arguing that *Miller* rendered his mandatory life-without-parole sentence illegal. The trial court denied his motion, and his application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that *Miller* does not have retroactive effect in cases on state collateral review.

Held:

1. This Court has jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*. Pp. 5–14.

(a) *Teague v. Lane*, 489 U. S. 288, a federal habeas case, set forth a framework for the retroactive application of a new constitutional rule to convictions that were final

when the new rule was announced. While the Court held that new constitutional rules of criminal procedure are generally not retroactive, it recognized that courts must give retroactive effect to new watershed procedural rules and to substantive rules of constitutional law. Substantive constitutional rules include "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," *Penry v. Lynaugh*, 492 U. S. 302, 330. Court-appointed amicus contends that because *Teague* was an interpretation of the federal habeas statute, not a constitutional command, its retroactivity holding has no application in state collateral review proceedings. However, neither *Teague* nor *Danforth v. Minnesota*, 552 U. S. 264—which concerned only *Teague*'s general retroactivity bar for new constitutional rules of criminal procedure—had occasion to address whether States are required as a constitutional matter to give retroactive effect to new substantive rules. Pp. 5–8.

(b) When a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. This conclusion is established by precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application. As *Teague*, supra, at 292, 312, and *Penry*, supra, at 330, indicate, substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful. In contrast, where procedural error has infected a trial, a conviction or sentence may still be accurate and the defendant's continued confinement may still be lawful, see *Schriro v. Summerlin*, 542 U. S. 348, 352–353; for this reason, a trial conducted under a procedure found unconstitutional in a later case does not automatically invalidate a defendant's conviction or sentence. The same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment. See *United States v. United States Coin & Currency*, 401 U. S. 715, 724. By holding that new substantive rules are, indeed, retroactive, *Teague* continued a long tradition of recognizing that substantive rules must have retroactive effect regardless of when the defendant's conviction became final; for a conviction under an unconstitutional law "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment," *Ex parte Siebold*, 100 U. S. 371, 376–377. The same logic governs a challenge to a punishment that the Constitution deprives States of authority to impose, *Penry, supra*, at 330. It follows that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. This Court's precedents may not directly control the question here, but they bear on the necessary analysis, for a State that may not constitutionally insist that a prisoner remain in jail on federal habeas review may not constitutionally insist on the same result in its own postconviction proceedings. Pp. 8–14.

2. *Miller*'s prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that, under the Constitution, is retroactive in cases on state collateral review. The "foundation stone" for *Miller*'s analysis was the line of precedent holding certain punishments disproportionate when applied to juveniles, 567 U. S., at ___, n. 4. Relying on *Roper v. Simmons*, 543 U. S. 551, and *Graham v. Florida*,

560 U. S. 48, *Miller* recognized that children differ from adults in their "diminished culpability and greater prospects for reform," 567 U. S., at ____, and that these distinctions "diminish the penological justifications" for imposing life without parole on juvenile offenders, id., at ____. Because *Miller* determined that sentencing a child to life without parole is excessive for all but " 'the rare juvenile offender whose crime reflects irreparable corruption,' " id., at ____, it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—i.e., juvenile offenders whose crimes reflect the transient immaturity of youth, *Penry*, 492 U. S., at 330. *Miller* therefore announced a substantive rule of constitutional law, which, like other substantive rules, is retroactive because it " 'necessarily carr[ies] a significant risk that a defendant' "— here, the vast majority of juvenile offenders—" 'faces a punishment that the law cannot impose upon him.' " *Schriro*, supra, at 352.

A State may remedy a *Miller* violation by extending parole eligibility to juvenile offenders. This would neither impose an onerous burden on the States nor disturb the finality of state convictions. And it would afford someone like Montgomery, who submits that he has evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change. Pp. 14–21.

2013–1163 (La. 6/20/14), 141 So. 3d 264, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion.

***Muscchio v. United States*, No. 14-1095**

Appeal: Sufficiency

Full Decision: http://www.supremecourt.gov/opinions/15pdf/14-1095_2d8f.pdf

Syllabus of the Court:

Petitioner Musacchio resigned as president of Exel Transportation Services (ETS) in 2004, but with help from the former head of ETS's information-technology department, he accessed ETS's computer system without ETS's authorization through early 2006. In November 2010, Musacchio was indicted under 18 U. S. C. §1030(a)(2)(C), which makes it a crime if a person "intentionally accesses a computer without authorization *or exceeds* authorized access" and thereby "obtains . . . information from any protected computer." (Emphasis added.) He was charged in count 1 with conspiring to commit both types of improper access and in count 23 with making unauthorized access "[o]n or about" November 24, 2005. In a 2012 superseding indictment, count 1 dropped the charge of conspiracy to exceed authorized access, and count 2 changed count 23's date to "[o]n or about" November 23–25, 2005. Musacchio

never argued in the trial court that his prosecution violated the 5-year statute of limitations applicable to count 2. See §3282(a). At trial, the Government did not object when the District Court instructed the jury that §1030(a)(2)(C) "makes it a crime . . . to intentionally access a computer without authorization *and* exceed authorized access" (emphasis added), even though the conjunction "and" added an additional element. The jury found Musacchio guilty on counts 1 and 2. On appeal, he challenged the sufficiency of the evidence supporting his conspiracy conviction and argued, for the first time, that his prosecution on count 2 was barred by §3282(a)'s statute of limitations. In affirming his conviction, the Fifth Circuit assessed Musacchio's sufficiency challenge against the charged elements of the conspiracy count rather than against the heightened jury instruction, and it concluded that he had waived his statute-of-limitations defense by failing to raise it at trial.

Held:

1. A sufficiency challenge should be assessed against the elements of the charged crime, not against the elements set forth in an erroneous jury instruction. Sufficiency review essentially addresses whether the Government's case was strong enough to reach the jury. A reviewing court conducts a limited inquiry tailored to ensuring that a defendant receives the minimum required by due process: a "meaningful opportunity to defend" against the charge against him and a jury finding of guilt "beyond a reasonable doubt." *Jackson v. Virginia*, 443 U. S. 307, 314–315. It does this by considering only the "legal" question "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id., at 319. A reviewing court's determination thus does not rest on how the jury was instructed. The Government's failure to introduce evidence of an additional element does not implicate these principles, and its failure to object to a heightened jury instruction does not affect sufficiency review. Because Musacchio does not dispute that he was properly charged with conspiracy to obtain unauthorized access or that the evidence was sufficient to convict him of the charged crime, the Fifth Circuit correctly rejected his sufficiency challenge. Pp. 5–8.

2. A defendant cannot successfully raise §3282(a)'s statute-ofl-imitations bar for the first time on appeal. Pp. 8–11.

(a) A time bar is jurisdictional only if Congress has "clearly state[d]" that it is. *Sebelius v. Auburn Regional Medical Center*, 568 U. S. ___, ___. Here, the "text, context, and relevant historical treatment" of §3282(a), *Reed Elsevier, Inc. v. Muchnick*, 559 U. S. 154, 166, establish that it imposes a nonjurisdictional defense that becomes part of a case only if a defendant raises it in the district court. The provision does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms. It thus stands in marked contrast to §3231, which speaks squarely to federal courts' general criminal subject-matter "jurisdiction" and does not "conditio[n] its jurisdictional grant on" compliance with §3282(a)'s statute of limitations. Id., at 165. The history of §3282(a)'s limitations bar further confirms that the provision does not impose a jurisdictional limit. See *United States v. Cook*, 17 Wall. 168, 181; *Smith v. United States*, 568 U. S. ___, ___. Pp. 8–10.

(b) Because §3282(a) does not impose a jurisdictional limit, the failure to raise the defense at or before trial is reviewable on appeal— if at all—only for plain error. A district court's failure to enforce an unraised limitations defense under §3282(a) cannot be a plain error, however, because if a defendant fails to press the defense, it does not become part of the case and, thus, there is no error for an appellate court to correct. Pp. 10–11.

590 Fed. Appx. 359, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court.