# Appellate Court Decisions - Week of 1/28/13

*Note: Anything that has "OVERVIEW" in front of it is the Lexis summary of a case.*

## First Appellate District of Ohio

***State v. Gee*, Appeal No. C-120247, Trial No. B-1105103-B**

**Felonious Assault: Aggravated Assault: Manifest Weight**

**Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120247_01302013.pdf**

**A delay before fighting to go home and put on shoes and to return with a deadly weapon negated defendant-appellant's argument that he should have been convicted of aggravated assault instead of felonious assault under the premise that he acted in a sudden passion or sudden fit of rage.**

Gee appealed his conviction for felonious assault, arguing essentially that he should have been convicted of aggravated assault, not felonious assault.

Gee and his co-defendant agreed to fight the victim and another person. Gee and his co-defendant asked to delay the fight so they could put on shoes. The two went and put on shoes, but also returned with a baseball bat and a large piece of wood. The victim's partner fled, but the victim stayed to fight and was beaten with the weapons.

Gee argued that he should have been convicted of aggravated assault because he acted under the influence of sudden passion or in a sudden fight of rage brought on by serious provocation. The First District was not persuaded that such was the case because of the delay in getting shoes and returning with deadly weapons.

***State v. Edwards*, Appeal No. C-110773, Trial No. C-11CRB-30403**

**Self-Defense: Weight of the Evidence**

**Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120247_01302013.pdf**

**Defendant presented evidence creating presumption of self-defense in an aggravated menacing case where victim approached defendant's car while defendant was in it and tried to open the door, so defendant pointed a gun at the victim. The State, however, successfully rebutted the presumption and defendant's conviction was affirmed.**

**Summary from the First District:**

Defendant's aggravated-menacing conviction was not contrary to the manifest weight of the evidence: R.C. 2901.05 gave rise to a presumption that defendant had acted in self-defense, when the record supported the finding of the trial court, sitting as the trier of fact, that the victim had been "in the process of unlawfully and without privilege to do so entering" defendant's vehicle; but the record also supported the court's conclusion that the state had successfully rebutted the self-defense presumption by sustaining its burden of proving by a preponderance of the evidence that defendant, in pointing a gun at the victim, had not acted upon a bona fide belief that he was in imminent danger of death or great bodily harm.

***State v. Gilbert*, Appeal No. C-110382, Trial No. B-091283**

**Jurisdiction/Venue: Procedure/Rules: Pleas**

**Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-110382_01302013.pdf**

**Ohio courts lack the authority to reconsider their own valid final judgments in a criminal case.**

**Summary from the First District:**

The trial court acted without authority when it granted the state's motion to vacate defendant's guilty pleas for breach of his plea agreement and then convicted him upon guilty pleas to offenses charged in the same indictment: Ohio courts lack the authority to reconsider their own valid final judgments in a criminal case; defendant's convictions upon his original pleas became final when the court sentenced him and journalized a judgment of conviction in conformity with Crim.R. 32(C); the parties to the plea agreement could not, by agreement or acquiescence, confer upon the trial court the authority to reconsider the judgment of conviction; and none of the legislatively or judicially created exceptions to the finality rule applied. [*See* CONCURRENCE: Under the current state of the law, the trial court lacked the authority to grant the state's postconviction motion to enforce a breached plea agreement.] [*But see* DISSENT: The trial court retained jurisdiction to grant the state's motion collaterally attacking the judgment of conviction in a criminal case where the judgment was procured by fraud because the defendant breached the plea agreement, and where the defendant, by not objecting below, waived any error.]

***State v. Cowins*, Appeal No. C-120191, Trial No. B-1103580**

**Constitutional Law: Criminal: R.C. 2941.25 – Sentencing**

**Full Decision: [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120191_02012013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120191_02012013.pdf)**

**A defendant can still be convicted and sentenced separately on allied offenses of similar import even if they occurred during the same activity if they occurred with a separate animus.**

**Summary from the First District:**

The Confrontation Clause bars the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.

The threshold inquiry is whether the challenged out-of-court statements were testimonial in nature and needed to be tested by confrontation; statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution, but the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.

Violations of the Confrontation Clause, even if preserved for appellate review, are subject to a harmless-error analysis, and such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt.

Under R.C. 2941.25, if a defendant's conduct results in the commission of allied offenses of similar import subject to merger, the defendant may ordinarily be convicted of only one of the offenses; but if the defendant commits each offense with a separate animus, then convictions may be entered for all the offenses.

While a kidnapping is implicit within every aggravated robbery, where the restraint is prolonged and the restraint is so substantial as to demonstrate a significance independent of the robbery, there exists a separate animus to support the kidnapping conviction.

Because the defendant was sentenced after the effective date of 2011 Am.Sub.H.B. 86, the trial court was required to make findings before it imposed consecutive sentences, and where the court did not make the required findings, the challenged sentences were contrary to law, and the case must be remanded for resentencing.

## Eighth Appellate District of Ohio

Christine Jones (the new director of the Appellate Division at the Public Defender) pointed out the following case to me:

***State v. West*, 2012 Ohio 6138, 2012 Ohio App. LEXIS 5293 (8th Dist., December 27, 2012)** (and co-defendant's appeal which affirms this decision: *State v. West*, 2013 Ohio 96, 2013 Ohio App. LEXIS 65 (8th Dist., January 17, 2013))

**Sentencing: Allied Offenses: Cultivation and Trafficking Marijuana**

**Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/8/2012/2012-ohio-6138.pdf**

**(co-defendant: http://www.sconet.state.oh.us/rod/docs/pdf/8/2013/2013-ohio-96.pdf )**

**It is possible to commit trafficking and cultivation (of marijuana) offenses with the same conduct and with a single state of mind, so they can be merged for sentencing purposes under R.C. 2941.25.**

The defendant in this case was sentenced to 16 years in prison, which included two 8-year consecutive sentences for illegal manufacture or cultivation of marijuana and drug trafficking convictions. The Eighth District said the following regarding the determination of whether two offenses are allied offenses of similar import:

> "First, courts must determine 'whether it is possible to commit one offense *and* commit the other with the same conduct ***.' (Emphasis sic and citation omitted.) [*State v. Johnson*, 128 Ohio St.3d 153, 2010 Ohio 6314, 942 N.E.2d 1061, ¶ 48]. Second, '[i]f multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' ' *Id.* At ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008 Ohio 4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). 'If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.' *Johnson* at ¶ 50."

Count 1 of defendant's indictment charged that he "did knowingly cultivate marijuana or knowingly manufacture or otherwise engaged in any part of the production of a controlled substance, and the drug involved in the violation was marijuana ***." Count 2 of the indictment charged that he "did knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person ***."

Under R.C. 2925.01(F), "'[c]ultivate' includes planting, watering, fertilizing, or tilling." Under R.C. 2925.01(J)

> "'[m]anufacture means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, re-packaging, labeling, and other activities incident to production."

The Eighth District found that based on those definitions, it is possible to commit trafficking and illegal cultivation or manufacture of marijuana with the same conduct, which satisfies the first prong of the *Johnson* test above. In this case, the Eighth District also held that the second prong of the *Johnson* test was met because the brothers (and co-defendants) committed the offenses with a single state of mind – in other words, they were growing the marijuana specifically to traffick it. Therefore, in this case the two counts should have merged for the purposes of sentencing.

## Supreme Court of Ohio

*Nothing new.*

## Sixth Circuit Court of Appeals

***United States v. Sanford*, No. 11-1847, 2012 FED App. 1255N (6th Cir.), 2012 U.S. App. LEXIS 25121 (Decided and Filed: December 4, 2012, published January 28, 2013)**

**Federal Firearms Law: 18 U.S.C. § 922(g)(9): Misdemeanor Crime of Domestic Violence**

**Full Decision: http://www.ca6.uscourts.gov/opinions.pdf/13a0022p-06.pdf**

**Ineligibility for a concealed carry permit as a result of a domestic assault conviction (Michigan) restricts one's ability to transport firearms, so until that restriction is lifted, one's civil rights have not been fully restored. Therefore, while under the restriction, it is a violation of 18 U.S.C. § 922(g)(9) for such a person to possess firearms.**

**(Note: A misdemeanor domestic violence conviction may not actually fall within the federal "misdemeanor crime of domestic violence" statute, 18 U.S.C. § 922(g)(9). See *United States v. White*, 606 F.3d 144 (4th Cir. 2010) (holding that Virginia domestic assault and battery statute did not qualify); *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008) (holding that battery under Wyoming law did not necessarily qualify as a misdemeanor crime of domestic violence); *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001) (holding that all Maine assault convictions against a domestic partner qualified).)**

The defendant in this case, a Michigan resident, was indicted for violating 18 U.S.C. § 922(g)(9), which makes it unlawful for a person who has been convicted of a misdemeanor crime of domestic violence to possess any firearm. The defendant had two prior domestic assault convictions in Michigan and was found to have possessed multiple firearms. The defendant moved to dismiss the indictment under 18 U.S.C. § 921(a)(33)(B)(ii), which states:

> "A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] for purposes of this chapter if the conviction … is an offense for which the person … has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, or receive firearms."

The defendant argued that his prior convictions should not count as predicate offenses because his civil rights had been restored upon his release from incarceration, but that argument failed in the district court because it reasoned that his convictions restricted his ability to transport a firearm.

The parties to this case did not dispute that the defendant's domestic assault convictions in Michigan qualify as crimes of domestic violence. (The argument that domestic assault convictions don't qualify s misdemeanor crimes of domestic violence has actually had some success, but defendant did not make the argument.) This appeal instead focused on the "rights restoration" exception in § 921(a)(33)(B)(ii), under which a person is not considered to have been convicted of a misdemeanor crime of domestic violence for purposes of § 922(g)(9) if that person has had his or her civil rights restored. The defendant argued that his civil rights were full restored upon release from incarceration and therefore his domestic assault convictions could not serve as predicate offenses for the purposes of § 922(g)(9).

The Sixth Circuit focused on the fact that § 921(a)(33)(B)(ii) has an "unless clause": the exception applies "unless the … restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." Under Michigan law, the defendant's domestic assault convictions made him ineligible for a concealed weapons permit for eight years after each conviction.

The Sixth Circuit held that the defendant's ineligibility for a concealed weapons permit restricts his ability to transport firearms sufficiently to trigger the "unless clause."

This holding was based on the following from the United States Supreme Court decision *Caron v. United States*, 524 U.S. 308, 315 (1998):

> "[A] state weapons limitation on an offender activates the uniform federal ban on possessing any firearms at all. This is so even if the guns the offender possessed were ones the State permitted him to have. The state

> has singled out the offender as more dangerous than law-abiding citizens, and federal law uses the determination to impose its own broader stricture."

## Supreme Court of the United States

*Nothing new.*