

## Appellate Court Decisions - Week of 10/24/16

**NOTE: It was brought to my attention that some were under the impression this weekly e-mail is a comprehensive list of appellate decisions throughout Ohio. My apologies if I created that misconception – it was not my intention. Unfortunately, I simply do not have time for that to be the case because thousands of opinions are released each year.**

**This is only comprehensive for First District opinions (not First District judgment entries). The other cases are a selection of cases I find interesting culled from the list compiled by the OSBA every day. If I use quotations around the entire summary and write Summary from the X District, that is a summary written by that court, not me. Otherwise, I wrote the summary.**  
**– Josh Thompson**

**For a comprehensive list of cases released, go here:**  
<https://www.supremecourt.ohio.gov/ROD/docs/>

### First Appellate District of Ohio

#### ***State v. Brand, 2016-Ohio-7456***

**Evidence: Other Acts: Photo ID**

**Full Decision:**

<http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-7456.pdf>

#### **Summary from the First District:**

“The trial court erred in admitting other-acts evidence of prior crimes committed by defendant to show proof of defendant’s identity, because the prior crimes did not share common features with the crimes for which defendant was on trial and did not establish a scheme or plan identifiable only to defendant where the only common feature of the crimes was that they involved the robberies of drug dealers; however, the error was not prejudicial in light of the other evidence of defendant’s guilt.

“The trial court did not abuse its discretion in responding to a question from the jury by reading back to the jury during deliberations a portion of the testimony of a state’s witness.

“Because the photographic lineup from which the state’s witness identified defendant was not unduly suggestive, the trial court did not err in failing to grant the defendant’s motion to suppress the eyewitness identification.”

## **State v. McGee, 2016-Ohio-7510**

**Evidence: Present-Sense Impression: Confrontation Clause: Sufficiency: Weight**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-150496\\_10282016.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-150496_10282016.pdf)

### **Summary from the First District:**

“The trial court did not commit plain error in allowing the state to introduce a taped call between the homicide victim and a 911 operator in which the victim told the operator that the defendant had threatened to kill him, because the tape was admissible as an excited utterance under Evid.R. 803(2): although the record did not indicate exactly how much time had elapsed between the defendant’s threat and the victim’s 911 call, a review of the 911 call shows that the victim had still been under stress from the defendant’s threat at the time of the call—the victim could not remember his apartment number, and he told the operator to have emergency services ‘[g]et here on the double.’

“The defendant’s Confrontation-Clause rights were not violated when the state introduced evidence of the victim’s 911 call to police where the record demonstrates that the primary purpose of the victim’s statements to the 911 operator was to obtain police assistance in an ongoing emergency: the statements described a present, hostile situation in which the victim anticipated that the defendant would arrive at his home within minutes, the defendant carried weapons, the defendant had threatened the victim’s life, and the victim requested immediate police assistance for the situation.”

“Sufficient evidence existed to support the defendant’s carrying-a-concealed-weapon conviction, and it was not against the manifest weight of the evidence where the defendant told police that he had been wearing a large coat had kept the gun in his back pocket until the victim had opened his apartment door.

“Sufficient evidence existed to support the defendant’s tampering-with-evidence conviction, and it was not against the manifest weight of the evidence where the defendant’s specific intent to impair the investigation after the shooting can be inferred from the fact that police could not find the gun at the victim’s apartment, and the defendant refused to tell police a consistent story when asked what he had done with the gun after the shooting.”

### **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

*Nothing new.*

## Sixth Appellate District of Ohio

**State v. Warnka, 2016-Ohio-7423**

Court Costs

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2016/2016-Ohio-7423.pdf>

**The trial court erred in imposing the costs of confinement on Appellant without specifying the actual costs of confinement and the amount Appellant is able to pay.**

## Seventh Appellate District of Ohio

*Nothing new.*

## Eighth Appellate District of Ohio

**State v. Durham, 2016-Ohio-7394**

Sentencing: Consecutive Sentences

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-7394.pdf>

**Summary from the Eighth District: “Appellant entitled to be sentenced under H.B. 86 because although he committed his crimes before the passage of S.B. 2, he was not convicted and sentenced until after H.B. 86 was enacted. The record does not show that the trial court analyzed whether consecutive sentences were not disproportionate to the seriousness of appellant's conduct. Appellant's issue on appeal that the trial court erred by not allowing appellant to inspect the grand jury proceedings is not properly before this court.”**

**Cleveland v. Schornstein Holdings, L.L.C., 2016-Ohio-7479**

Health Code Violation: Community Control Violation: Notice

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-7479.pdf>

Summary from the Eighth District: “Health code violation; community control violation; notice. The housing court failed to provide adequate notice to defendant landlord in its original sentencing entry regarding the consequences of a violation of defendant’s community control sanctions and, therefore, improperly imposed on defendant a fine exponentially greater than the fine for the underlying offense.”

**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. Rodriguez, 2016-Ohio-7436**

Jury Instruction: Lesser-Included: Aggravated Robbery: Robbery

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/12/2016/2016-Ohio-7436.pdf>

In Appellant’s aggravated robbery trial, the trial court erred in not instructing the jury on the lesser-included offense of robbery where the victim had previously testified under oath that Appellant did not have a weapon at the time of the incident, no weapon was ever recovered, and Appellant testified he did not have a weapon. The fact that Appellant asserted he was not involved in the incident at all did not change the necessity of the instruction.

**Supreme Court of Ohio**

*Nothing new.*

**Sixth Circuit Court of Appeals**

*Nothing new.*