Appellate Court Decisions - Week of 10/28/13

First Appellate District of Ohio

State v. Wulsin, 2013-Ohio-4777

Search and Seizure: OVI

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120876_10302013.pdf

Summary from the First District:

The trial court erred in granting the defendant's motion to suppress the results of her breathalyzer test on the basis that the Department of Health had failed to promulgate the necessary requirements for obtaining an access card required for operation of the Intoxilyzer 8000: although R.C. 3701.143 and Ohio Adm.Code 3701-53-07 mention only "permits" and do not mention "access cards," this court has held that the Department of Health's interpretation that the access card referenced in Ohio Adm.Code 3701-53-09(D) is the type of permit issued to an operator of an Intoxilyzer 8000 machine under Ohio Adm.Code 3701-53-07(E) is a reasonable interpretation of the administrative regulations; therefore, Ohio Adm. Code 3701-53-07(E) provides the qualifications that operators of the Intoxilyzer 8000 machine must satisfy in order to obtain an operator access card. (*State v. McMahon*, 1st Dist. Hamilton No. C-120728, 2013-Ohio-2557, followed.)

State v. Jacquillard, 2013-Ohio-4778

Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130021_10302013.pdf

Summary from the First District:

The trial court erred by imposing consecutive sentences without making the statutory findings required by R.C. 2929.14(C).

Where the plea form signed by the defendant contained accurate information regarding the defendant's postrelease-control obligations and the consequences for violating those obligations, but the court misinformed the defendant about that information during a verbal exchange at the sentencing hearing, the trial court failed to comply with its duty to notify the defendant about postrelease control.

Under R.C. 2967.191, the defendant was entitled to credit for time incarcerated in another jurisdiction while awaiting extradition if the incarceration was related to the offenses for which the defendant was convicted and sentenced; therefore, the trial court

erred in denying the defendant credit for time served while incarcerated in Florida and awaiting extradition to Ohio without first determining whether that incarceration was related to the offenses for which the defendant was convicted and sentenced.

***State v. Jones*, 2013-Ohio-4775**

Indictment/Complaint: Obstructing: Evidence

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120570_10302013.pdf

Summary from the First District:

The trial court did not err by denying the defendant's motion to dismiss the complaints for endangering children and obstructing official business because the record does not demonstrate that the defendant was prejudicially mislead by the state's omission from the endangering-children complaint the relevant subsection of the charging statute, or that plain error resulted from the state's omission of a material element of each offense.

The defendant's convictions for endangering children and obstructing official business were supported by the evidence where a passenger in the defendant's vehicle overdosed on heroin in the presence of the defendant's young child, and the defendant's lie to an officer investigating the overdose at the hospital had hampered and impeded the officer's investigation of the child endangerment.

***State v. Schneider*, 2013-Ohio-4789**

OVI

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120786_11012013.pdf

Summary from the First District:

The state demonstrated substantial compliance with Ohio Adm.Code 3701-53-05(F)'s requirement that a urine specimen be refrigerated "[w]hile not in transit or under examination," where a state trooper transported an unrefrigerated urine specimen from the district of the Cincinnati Police Division where it had been obtained to his assigned post of the Ohio State Highway Patrol in Batavia, Ohio, where he needed to complete paperwork and mail the specimen to the patrol's crime lab; the specimen was "in transit" for purposes of the regulation during the approximately 19 hours that the trooper had the specimen in his possession between its collection and its mailing. [*But see* DISSENT: The urine specimen was not "in transit" for the nearly 19 hours that the trooper had the unrefrigerated specimen in his possession from its collection to its mailing, and therefore, the state did not demonstrate substantial compliance with Ohio Adm.Code 3701-53-05(F).]

Fifth Appellate District of Ohio

***State v. Fox*, 2013-Ohio-4786**

Search and Seizure

Full Decision: http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2013/2013-ohio-4786.pdf

A police officer did not have a reasonable suspicion to detain the defendant where the officer observed the defendant and a woman, who he knew to be a drug user, parked in front of an open business in a high crime area and the defendant was bent over in his seat.

A police officer observed a vehicle in the front parking lot of a video store, which was open for business. The officer circled the block and saw that the vehicle, which had two occupants, had not moved. He recognized the driver as someone police knew to use heroin, but didn't know her name. He also observed the passenger sort of bent over.

The officer made contact with the woman in the driver's seat the man in the passenger's seat. The woman did not have a driver's license on her, and a check revealed that she did not have a valid driver's license. The officer then issued her a citation for not having a valid operator's license.

Because there were two suspects, the officer called for backup. When his backup arrived, she had a drug dog with her. They conducted a sniff of the vehicle. The woman and the man were removed from the vehicle and patted down. The man was placed in a cruiser but the woman was left out. As the drug dog was sniffing the vehicle, the first officer observed the man bent over the back of his cruiser. Being suspicious, he opened the cruiser door and saw the man had his shoe half off. When the man removed his shoe per the officer's request, a syringe with heroin in it was found inside. The other officer and her drug dog discovered a soda can with the bottom cut off, scorch marks on it, and a cotton ball inside.

The man filed a motion to suppress. It was sustained by the trial court and the state appealed. The state argued on appeal that the officer conducted a Terry stop because he knew the area to be high crime area, he recognized the occupants as known drug users, and he saw the man bend down in his seat. The Fifth District affirmed the trial court's suppression of the evidence. It said, "[t]he mere fact that the vehicle was parked at the edge of the parking lot during business hours and that [the man] bent down or was slumped down in his seat were not sufficient basis for detaining the occupants of the car."

Supreme Court of Ohio

***State v. Clark*, 2013-Ohio-4731**

Confrontation Clause: R.C. 2151.421

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-4731.pdf

"1. At a minimum, when questioning a child about suspected abuse in furtherance of a duty pursuant to R.C. 2151.421, a teacher acts in a dual capacity as both an instructor and as an agent of the state for law-enforcement purposes.

"2. Statements elicited from a child by a teacher in the absence of an ongoing emergency and for the primary purpose of gathering information of past criminal conduct and identifying the alleged perpetrator of suspected child abuse are testimonial in nature in accordance with *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534."

Syllabus of the Court:

"The issue in this case is whether the trial court violated Darius Clark's constitutional right to confront the witnesses against him when it admitted a hearsay statement that three-and-a-half-year-old L.P. made to his preschool teacher, Debra Jones, in response to questions asked about injuries to his eye and marks on his face observed upon his arrival at a preschool day care.

"In *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the court enunciated the primary-purpose test to determine whether a statement made to a law-enforcement officer or an agent of law enforcement in the course of an investigation is testimonial or nontestimonial.

"We adopted that test in *State v. Siler*, holding: " 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' " 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, paragraph one of the syllabus, quoting *Davis* at 822.

"At the time Jones questioned L.P., she acted as an agent of the state for purposes of law enforcement because at a minimum, teachers act in at least a dual capacity, fulfilling their obligations as both instructors and also as state agents to report suspected child abuse pursuant to R.C. 2151.421, which exposes them to liability if they fail to fulfill this mandatory duty. Because the circumstances objectively indicate that no ongoing emergency existed and that the primary purpose of the questioning was to establish or prove past events potentially relevant to a later prosecution, the statement L.P. made to this preschool teacher is testimonial in nature, and its admission into evidence violated

Clark's right to confront witnesses under the Sixth Amendment to the United States Constitution."

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.