

Appellate Court Decisions - Week of 11/18/13

APPELLATE MUSINGS

Revisiting *State v. Pariag*, Slip Opinion No. 2013-Ohio-4010.

We reported the decision in *Pariag* in a previous email, but thought it best to bring it to your attention again as we recently faced this issue in our Fresh Start Clinic. In *Pariag*, the defendant was charged with possession of drugs of abuse and drug paraphernalia, as well as a traffic offense. The drug charges were dismissed after the defendant pled to the traffic offense. The defendant applied to have the record of the dismissed drug charges sealed, and the trial court granted the application. The State appealed, arguing that because the traffic conviction was not eligible to be sealed and the drug charges arose from the same incident as the traffic conviction, R.C. 2953.61 precluded the expungement of the dismissed drug charges. The Tenth District Court of Appeals upheld the expungement; however, the Ohio Supreme Court agreed with the State and remanded the case to the trial court to determine whether the dismissed drug charges arose as the result of or in connection with the same act that led to the driving offense.

In our Fresh Start Clinic case, we have a woman who was speeding and driving without a license; she then was charged with vandalism (later reduced and convicted of criminal damaging) when she kicked the window out of the police cruiser. We are taking the position that the two charges did not arise from the same act; once she stopped her car, the act of speeding and driving without a license was over. There was a separate, new act when she kicked out the window. Therefore, the criminal damaging conviction should be sealed. Attorneys who are working in the clinic will want to keep their eye out for this potential issue. Hopefully, once the legislature is cognizant of the fact that traffic offenses may now keep a defendant from having his or her other criminal charges sealed, they will amend R.C. 2953.61.

First Appellate District of Ohio

State v. Bohannon, 2013-Ohio-5101

Sentencing: Postrelease Control

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130014_11202013.pdf

Summary from the First District:

“The trial court did not specifically state that it was considering the existence of substantial grounds for mitigation under R.C. 2929.12(C)(4), but it was not required to make findings on the record, and an appellate court will presume from a silent record that the trial court considered the appropriate factors unless the defendant affirmatively shows that the court failed to do so.

Because the sentencing court failed to notify the defendant at the sentencing hearing about postrelease control, that part of the defendant's sentence related to postrelease control is void, and the cause must be remanded solely for a correction of the postrelease-control defect."

State v. Tucker, 2013-Ohio-5102

Sex Offenses

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130026_11202013.pdf

Summary from the First District:

"The trial court did not err in overruling defendant's motion seeking relief from his duty to register as a sex offender on the ground that his abduction crimes against a seven-year-old child and a one-year-old child had not been committed with a sexual motivation: defendant was required to register under the 2003 Am.Sub.S.B. No. 5 amendments to former R.C. Chapter 2950 ("Megan's Law") not as a sex offender, but as a child-victim oriented offender, a designation based upon the ages of defendant's victims and not upon the existence of a sexual motivation for his crimes."

State v. Muchmore, 2013-Ohio-5100

Search and Seizure: OVI: Intoxilyzer 8000

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120830_11202013.pdf

Summary from the First District:

"The trial court erred in granting the defendant's motion to suppress the results of his 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, which references the qualifications of personnel, only mention "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.)

The trial court erred in granting the defendant's motion to suppress the result of his breathalyzer test on the basis that the state had failed to substantially comply with

the three-year record keeping requirement in Ohio Adm.Code 3701-53-01(A)(1) because the state had failed to produce one week of records relating to the Intoxilyzer 8000 machine 4096 from the Ohio Department of Health website, where the administrative regulation only required the state to retain the “results” of the breathalyzer tests, and the state had produced a log book from the police department where the machine was located which contained the test results for that week.”

State v. McNett, 2013-Ohio-5099

Search and Seizure: OVI: Intoxilyzer 8000

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120824_11202013.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, which references the qualifications of personnel, only mention “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.)

The trial court erred in granting the defendant’s motion to suppress the result of her breathalyzer test on the basis that the state had failed to substantially comply with the three-year record keeping requirement in Ohio Adm.Code 3701-53-01(A)(1) because the state had failed to produce one week of records relating to the Intoxilyzer 8000 machine 4096 from the Ohio Department of Health website, where the administrative regulation only required the state to retain the “results” of the breathalyzer tests, and the state had produced a log book from the police department where the machine had been located, which contained the test results for the missing week.”

State v. Sweeting, 2013-Ohio-5097

Sentencing: Postrelease Control

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120733_11202013.pdf

Summary from the First District:

“Where the trial court failed to make the required statutory findings under R.C. 2929.14(C)(4) to impose consecutive prison terms, those portions of the trial court’s judgments imposing consecutive prison terms are contrary to law and must be vacated.

Where the trial court failed to comply with the statutory postrelease-control-notification requirements after imposing prison terms for felony offenses, those parts of the sentences are void, and the cause must be remanded for the trial court to properly notify the defendant about postrelease control.”

Second Appellate District of Ohio

State v. Martin, 2013-Ohio-5050

Plea: No Contest: Waiver of Right to Challenge Pretrial Determination

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/2/2013/2013-ohio-5050.pdf>

Martin pled no contest to domestic violence after the trial court made a pre-trial determination that his step-sister was a family or household member for the purposes of the domestic violence statute. He appealed his conviction, arguing that he did not reside with and was not “related by affinity” to his step-sister. The Second District affirmed his conviction because by pleading no contest, he “essentially admitted that [his step-sister] was a member of his household when he assaulted her.” ... “If he wanted to challenge the trial court’s pre-trial determination, Martin should have proceeded to a jury trial, a bench trial, or trial by stipulation. By pleading no contest to domestic violence, Martin admitted the truth of the allegations in the indictment and waived his right to challenge what constitutes a ‘family or household member’ as used in R.C. 2919.25(F).”

Eighth Appellate District of Ohio

State v. C.K., 2013-Ohio-5135

Expungement: Murder

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/8/2013/2013-ohio-5135.pdf>

Where C.K.'s murder conviction was vacated on appeal, the trial court did not err in granting his motion to seal the record because the court properly weighed the statutory factors, and it does not matter that there is no statute of limitations for murder and there were no DNA specimens involved.

C.K. was indicted for murder under R.C. 2903.02(A) with one- and three-year firearm specifications. He proceeded to a jury trial, but one of the prosecution's questions of the primary witness led to the declaration of a mistrial. A second trial commenced later, and C.K. was convicted by a jury of murder with both specifications. He was sentenced to 15 years to life on the murder and a mandatory three years on the firearm specification. However, he successfully appealed that conviction, which the Eighth District reversed as against the manifest weight of the evidence. The state, later, dismissed the case without prejudice.

C.K. filed an application to seal all the official records and a motion to dismiss the underlying criminal charges with prejudice. The state filed a brief in opposition to both. The trial court held a hearing on the motions, granting the application to seal all records, but denied the motion to dismiss the charges with prejudice.

The state appealed, arguing that C.K. "was not eligible to have his records sealed because there is not statute of limitations for the crime of murder." The Eighth District disagreed and affirmed the grant of the application to seal all records. The Eighth District said the following:

"In the case at hand, it is undisputed that the underlying criminal complaint was dismissed and that no charges were pending against appellee at the time he filed his application to seal his criminal record. Moreover, the record reflects that the trial court adequately balanced the competing interests of the parties before determining that appellee's interest in obtaining gainful employment was not outweighed by the legitimate needs of the government to maintain the records.

"Because the trial court properly weighed the relevant factors delineated under R.C. 2953.52(B)(2) and (B)(4), we are unable to conclude that the trial court abused its discretion.

"Finally, we find no merit to the state's argument that the trial court's judgment was improper based on the fact that the statute of limitations on the dismissed murder charge has not, and can not, expire. While a trial court must determine pursuant to R.C.

2953.52(B)(2)(a)(ii) whether the relevant statute of limitations has expired if the complaint, indictment, or information in the case was dismissed without prejudice, such a determination only becomes relevant if R.C. 2953.52(B)(3) applies. In the case at hand, R.C. 2953.52(B)(3), which involves the sealing of records of DNA specimens, samples, and profiles, was not at issue. Accordingly, the statute of limitations period on the dismissed murder charge was not a relevant factor to be considered by the trial court during its R.C. 2953.52(B)(4) analysis. *See* R.C. 2953.52(B)(4) (noting that the determinations described in (B)(4) are separate from the determinations described in division (B)(3) of the section).”

Eleventh Appellate District of Ohio

State v. Williams, 2013-Ohio-5076

Search: Motion to Suppress: Privacy

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/11/2013/2013-ohio-5076.pdf>

Statements recorded between the defendant and his mother in a secure police waiting area should have been suppressed where they were recorded using a camera hidden in a thermostat and nothing about the room suggested that activity in the room was being, or could be, recorded. However, because the remaining evidence of the defendant’s guilt was overwhelming, the error was harmless.

Williams was indicted on “once count of felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2) and (D)(1)(a), with a firearm specification pursuant to R.C. 2941.145; and one count of aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01(A)(1) and (C), with a firearm specification pursuant to R.C. 2941.145.” He filed a motion to suppress statements he made at the police department, including private conversations, that were improperly recorded by a hidden surveillance device.

A suppression hearing revealed the following facts: “Detective Wayne Mackey, of the Warren Police Department, indicated he was the lead investigator assigned to a shooting and robbery that occurred on April 12, 2011, at the North End Market in Warren, Ohio. During the investigation, a DNA sample was taken from a drink bottle the victim said had been brought to the counter by shooter during the robbery. The initial investigation, however, yielded no suspects.

“Four months after the robbery, the Warren police received a report from the Ohio Bureau of Criminal Identification and Investigation (‘BCI’) on August 15, 2011, regarding a ‘hit,’ i.e. a match, with DNA from the Combined DNA Index System (‘CODIS’), a database that includes DNA records of convicted felons. The BCI report indicated that DNA from a major and a minor contributor had been recovered from the drink bottle found at the scene. The victim was identified as the major contributor. The

minor contributor was most probably Williams, whom the report concluded could not be excluded as the source of the sample by a ratio of one in 5,807 unrelated persons.

“On August 17, 2011, a warrant was issued for Williams’ arrest. Later that evening, Williams turned himself in at the Warren Police Department. Detective Mackey testified that at this point, Williams was in custody and was not free to leave.

“Detective Mackey met with Williams and his mother in a secure waiting area at the station to conduct an interview. Williams did not request a lawyer but wanted his mother present during the interview. Detective Mackey then escorted Williams and his mother to an interview room in a secure and the non-public area of the police station.

“The interview room contained a desk and a couple of chairs. There were no windows or mirrors. Essentially, there was nothing in the room that would lead any person to believe there was any way to view into the room, or anything that would have been recognized as a record or monitoring device. There was no sign indicating that recording might be taking place. Detective Mackey testified there was a video and audio recording device hidden in the thermostat and that the rooms are monitored for safety purposes. He further testified that Williams was familiar with the interview room, as he had previously been interviewed therein by other detectives regarding another matter. No evidence in the record indicates that Williams’ familiarity with the room included knowledge of the hidden recording device.

“Detective Mackey left Williams and his mother alone in the room with the door closed while he went to retrieve a *Miranda* waiver form and case file. Detective Mackey turned on the recording device just after leaving the room, which recorded a conversation between Williams and his mother. Detective Mackey testified that Williams and his mother did not indicate they wanted to talk alone, request privacy, or ask not to be recorded.

“While alone with his mother, Williams admitted to being at the North End Market on the day of the incident. He assured her he was innocent and claimed he had frequented the store even after the shooting. Williams insisted he was being ‘railroaded.’

“The recording then shows Detective Mackey, after he re-entered the room, reading Williams his constitutional rights. Detective Mackey testified that Williams indicated he understood the rights and initialed each line on the form. Williams did not request an attorney and agreed to give the detective a statement. Williams stated he did not know or remember if he had been in the store on the exact date the victim was shot and robbed. Williams told Detective Mackey that he was a regular customer at the store, where he usually purchased the same chips, drink, and a Black and Mild cigar. Williams denied shooting the victim.”

The trial court denied the motion to suppress, holding that there was no reasonable expectation of privacy for conversations in the interview room. The case proceeded to a jury trial and Williams was found guilty of both counts, including the firearms specifications. He was sentenced to seven years for the felonious assault, seven years for

the aggravated robbery, and three years each for the firearm specifications, all to be served consecutively, for a total prison term of 20 years.

On appeal, Williams argued, among other things, that “he was entitled to an expectation of privacy and that the surreptitious recording on the conversation between [himself] and his mother violated [his] rights under the Fourth Amendment to the United States Constitution.”

On this issue, the Eleventh District said the following: “The problem in this case is that the interrogation room contained no indicia that the activity *could* be monitored or recorded. Except for the table and chairs, it was an empty room, with no windows or other means of viewing into the room. The only other discernible object in the room was a thermostat. It is not reasonable to suggest that most people would expect a thermostat to be a video and audio recording and monitoring device. If the police truly believe that no reasonable person would have an expectation of privacy in such a room, the recording equipment should not need to be disguised.

“The reasons given for hiding a recording device in a thermostat are unconvincing. It is disingenuous to assert that the reason for the recording device is to protect against escape, suicide attempts, or the passing of contraband between persons. These goals are readily accomplished with visible equipment. Indeed, if the purpose is to discourage nefarious conduct within interview rooms, a visible camera would be more valuable because its presence would deter such conduct. Hidden recording devices are quite obviously intended to secretively gather evidence for use in criminal proceedings.

“The interview room used in this case is actually designed and arranged to suggest activity in the room is not being recorded. As a result, a reasonable person, regardless of his status, would have an expectation that he is *not* being monitored. Thus, the statements should have been suppressed.”

However, the Eleventh District ended up holding that the error was harmless because “the remaining evidence provided overwhelming proof of Williams’ guilt.”

Supreme Court of Ohio

***State v. McDonald*, Slip Opinion No. 2013-Ohio-5042**

Criminal Procedure: R.C. 2945.75: Requirements For Verdicts Indicating Enhanced Degree Of Offense: R.C. 2921.331

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2013/2013-ohio-5042.pdf>

“In this case, which involves a felony enhancement for failure to comply with the signal or order of a police officer under R.C. 2921.331(C)(5)(a)(ii), we consider whether a jury’s verdict complies with the requirements of R.C. 2945.75. Specifically, we consider whether a jury verdict that includes a finding of “substantial risk of serious physical harm to persons or property,” the enhancement element of R.C. 2921.331(C)(5)(a)(ii), is sufficient to sustain a third-degree-felony conviction for a violation of R.C. 2921.331(B) when the verdict sets forth the degree of the offense and also fails to refer to or include language from R.C. 2921.331(B). Pursuant to R.C. 2945.75, we find that such a verdict supports only a misdemeanor conviction.”

“To properly convict McDonald of a violation of R.C. 2921.331(B) as enhanced by R.C. 2921.331(C)(5)(a)(ii), the verdict would have to either state that McDonald was guilty of a third-degree felony or set forth the additional elements that transform the failure to comply with the order or signal of a police officer from a misdemeanor to a third-degree felony. There is no dispute that the verdict at issue failed to state that McDonald was guilty of a third-degree felony. The dispute in this case is whether the verdict sufficiently set forth the elements that lead to a felony conviction. We hold that the verdict in this case was deficient in that regard.

“The verdict form stated that the jury found McDonald guilty of ‘Failure to Comply with Order or Signal of Police Officer And Cause A Substantial Risk of Serious Physical Harm To Persons or Property.’ As stated above, ‘failure to comply with an order or signal of a police officer’ is the name of a violation of either R.C. 2921.331(A)—a general failure to comply with the order of a police officer—or R.C. 2921.331(B)—willful flight in a motor vehicle from a police officer. Only a violation of R.C. 2921.331(B) can be the basis of an enhancement under R.C. 2921.331(C)(5)(a)(ii) for creating a substantial risk of injury or damage to property.

“A violation of R.C. 2921.331(B) can also serve as the predicate for a fourth-degree felony under R.C. 2921.331(C)(4) if the offender was fleeing from an officer immediately after the commission of a felony, or for a third-degree felony under R.C. 2921.331(C)(5)(a)(i) if the operation of the vehicle ‘was a proximate cause of serious physical harm to persons or property.’ And it makes sense that a violation of R.C. 2921.331(B) should be the gateway to more serious vehicular offenses, since in comparison to R.C. 2921.331(A), it involves more significant criminal activity. R.C.

2921.331(A) can apply to an offender who is not even in an automobile and who simply ignores an officer's traffic signal. R.C. 2921.331(B), on the other hand, requires the operation of a motor vehicle and the willful eluding or fleeing from a police officer after receiving a visible or audible signal to stop, a purposeful flouting of a police officer's signal and an attempt to escape.

"The only path to a felony conviction for failure to comply with the order or signal of a police officer is through R.C. 2921.331(B). If only one type of failure to comply can lead to a felony, the particular elements of that type of failure to comply constitute one part of R.C. 2945.75's 'one or more additional elements [that] make[] an offense one of more serious degree.' The first element of a felony charge under R.C. 2921.331 is that the failure to comply involved willful elusion or flight from a police officer. Without that element, there can be no felony.

"The verdict form in this case does not indicate that the elements of R.C. 2921.331(B) are implicated. Therefore, the verdict form the jury signed does not set forth the additional elements that enhance the crime of failure to comply from a misdemeanor to a felony; it therefore supports only a misdemeanor conviction.

"If the jury had believed that McDonald had simply failed to comply with the order of Officer Runyon but did not see or hear the signal or intentionally flee him, but in failing to comply managed to create a substantial risk to injury to persons or property, the very verdict form used in this cause would have fit that conclusion. And that conclusion would have yielded a misdemeanor, because it would have reflected only a violation of R.C. 2921.331(A). That verdict for and a verdict form supporting a felony cannot be identical; a felony verdict form—if it does not state a degree of the offense—must state the elements that distinguish it from a misdemeanor offense."

State v. Holdcroft, Slip Opinion No. 2013-Ohio-5014

Postrelease Control: Resentencing

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2013/2013-ohio-5014.pdf>

"In this case, we must again consider when a trial court has the authority to correct a sentence when one of the sanctions originally imposed by the trial court is void. Who hold that a trial court cannot add a term of postrelease control as a sanction for a particular offense after the defendant has already served the prison term for that offense, even if the defendant remains in prison for other offenses."

"Together, all of these cases provide a clear demonstration of the role that a defendant's legitimate expectation of finality plays in constraining a court's authority to review a sentence, and three principles provide a framework for future reference. First, when a sentence is subject to direct review, it may be modified; second, when the prison-sanction portion of a sentence that also includes a void sanction has not been completely

served, the void sanction may be modified; and third, when the entirety of a prison sanction has been served, the defendant's expectation of interest in finality in his sentence becomes paramount, and his sentence for that crime may no longer be modified. Put another way, either the defendant or the state may challenge any aspect of a sentence so long as a timely appeal is filed. *See, e.g.*, R.C. 2953.08 and [*United States v. DiFrancesco*, 449 U.S. 117, 132, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980)]. But once the time frame for filing an appeal has run, Ohio courts are limited to correcting a void sanction. [*State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶27]. And once the prison-sanction portion of a sentence for a crime has been fully served, the structure of Ohio felony sentencing law and the defendant's legitimate expectation of finality in his sentence prevent a court from further modifying the sentence for the crime in any way. A trial court does not have the authority to resentence a defendant for the purpose of adding a term of postrelease control as a sanction for a particular offense after the defendant has already served the prison term for that offense. Although it is true that some other sanctions (such as restitution) may be outstanding, a sentence served is a sentence completed."

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.