Appellate Court Decisions - Week of 11/4/13

First Appellate District of Ohio

State v. Winningham, 2013-Ohio-4872

Search and Seizure: GPS

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120788_11062013.pdf

Summary from the First District:

"The trial court did not err in overruling the defendant's supplemental motion to suppress evidence seized from his vehicle after police had tracked him using a GPS device placed on the vehicle pursuant to two separate search warrants where the warrants were issued based on information from an informant that indicated that the defendant was engaged in drug trafficking and was likely to drive to Chicago and return with marijuana, where any technical violations of Crim.R. 41 were non-fundamental and did not rise to the level of Fourth Amendment violations, and where none of the technical violations of Crim.R. 41 prejudiced the defendant or resulted from intentional or deliberate conduct designed to violate the rule. [*See* SEPARATE CONCURRENCE: The placement and maintaining of the GPS device on the defendant's vehicle did not violate Crim.R. 41 because the GPS device was installed within Crim.R. 41's three-day time requirement; further, no warrant was required for the search of the vehicle when the defendant returned to Ohio from Chicago.]"

State v. Oh, 2013-Ohio-4940

Procedure/Rules: Miranda: Foreign National:
Motion to Suppress: Crim.R. 15: Confrontation Clause

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130182_11082013.pdf

Summary from the First District:

"A police officer's failure to inform a foreign-national defendant of his rights under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, (1970) 21 U.S.T. 77, T.I.A.S. No. 6820, was not a distinct ground to suppress statements by the defendant or to dismiss the indictment.

The trial court did not err in denying the defendant's motion to suppress statements made to police where the totality of the circumstances showed that the defendant's statements were made voluntarily: even though the defendant was a foreign national who had not been informed of his consular rights, had not had prior experience with the American criminal-justice system, and had been "hung over" during the police

interview, the defendant had been informed of his *Miranda* rights through an interpreter, he had indicated that he comprehended those rights, he had expressly waived those rights, and the interview had not been lengthy or intense, nor had any deprivation or threats occurred.

The trial court did not abuse its discretion in allowing the state to depose the sole complaining witness, a permanent resident of a foreign country, prior to trial under Crim.R. 15 where the state contended that the witness intended to move out of the country permanently within the next couple of weeks, a trial date had yet to be scheduled, and the state would be prevented from issuing a subpoena for the witness once the witness was out of the country.

Although the defendant argues that the trial court's allowance of a pretrial deposition of the complaining witness violated his Sixth Amendment rights under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and Evid.R. 804(B) because the state failed to show that the witness was unavailable for trial or that a reasonable effort had been made to secure the witness's presence at trial, the defendant cannot demonstrate prejudice where the defendant pled no contest to the offenses in the indictment prior to any ruling by the trial court admitting the deposition at trial."

***In re: J.K.*, 2013-Ohio-4938**

Juvenile: Procedure/Rules: Juv.R. 29(F)(2)(d)

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120857_11082013.pdf

Summary from the First District:

"The juvenile court erred by dismissing a robbery charge against a juvenile upon the court's unsupported findings that the state had failed to comply with discovery and had disregarded an order of a visiting judge.

The juvenile court erred by dismissing a robbery charge "in the best interest of the juvenile" because Juv.R. 29(F)(2)(d) permits a dismissal based on the best interests of the child and the community only when the allegations of the complaint, indictment, or information are admitted or proven, neither of which occurred in this case."

Fifth Appellate District of Ohio

***State v. Hooper*, 2013-Ohio-4898**

Manifest Weight: Trespass: Ineffective Assistance of Counsel

Full Decision: http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2013/2013-ohio-4898.pdf

Appellant's conviction for criminal trespass was not supported by sufficient evidence where no evidence was presented that he did not have a privilege or right to enter the property in question. Trial counsel was ineffective for objecting to the introduction of a receipt into evidence that could have been exculpatory and could have resulted in a different outcome at trial.

John Dennis, an employee of Sargent Enterprises, entered onto Liberty Castings property, as a subcontractor, to haul away iron scrap and sand. When he entered on to the property, he saw a blue pickup truck on the property. He saw two men taking materials from the scrap bin and loading them into the truck. He tried to stop the truck, but failed. He testified that he saw scrap iron in the back of the truck as it exited the property.

After an investigation, police found the suspect vehicle and conducted an investigative stop. There was scrap metal in the truck bed. Hooper, the appellant here, admitted that the two men had been scrapping the day before, but didn't remember going to Liberty Castings. While searching the truck, the officer found a receipt from AZ Recycling in Columbus for 1,5000 pounds of metal listed as "GL shreddable." Hooper was listed as the customer, and he received $153 for the metal. The receipt was dated Aug. 17, 2012, at 3:29 p.m., and the indicated time-in was 2:55 p.m. The Liberty Castings incident was called into police at 2:00 p.m. Hooper was charged with theft and criminal trespass. He was found guilty of both charges, sentenced to 18 months of community control on both counts, including seven days in jail and a $100 fine on each charge.

The Fifth District found that Hooper's theft conviction was supported by sufficient evidence. It did, however, find that his conviction for criminal trespass was not supported by the sufficiency of the evidence because no evidence was presented indicating that Hooper did not have a privilege or right to enter on to Liberty Castings' property.

Hooper also argued that his trial counsel was ineffective for objecting to the introduction of the receipt from AZ Recycling as evidence, as that evidence could have exonerated him of the theft charge. The Fifth District found that, based on the testimony presented at trial, there was a reasonably probability that introducing the receipt indicating payment for a different type of metal than that found at Liberty Castings could have resulted in a different outcome at trial. It said counsel should have

recognized the exculpatory nature of the receipt. Therefore, it found that trial counsel was ineffective.

Sixth Appellate District of Ohio

***State v. Williams*, 2013-Ohio-4838**

Restitution: R.C. 2929.18(A)

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/6/2013/2013-ohio-4838.pdf

The trial court erred in ordering appellant to pay $1700 in restitution to the Ohio Bureau of Criminal Investigation for the amount it expended in buying drugs from him.

Appellant pleaded no contest to one count of trafficking in cocaine. He was sentenced to 18 months in prison and ordered to pay court costs along with the costs of his court-appointed attorney. He was also ordered to pay restitution in the amount of $1,700 to the Ohio Bureau of Criminal Investigation (BCI) for the money BCI spent pursuing drug buys with him. Appellant's counsel objected to the order of restitution. The Sixth District held that the order of restitution was in error.

Eighth Appellate District of Ohio

***State v. Jones*, 2013-Ohio-4915**

Search: Motion to Suppress

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/8/2013/2013-ohio-4915.pdf

The trial court did not err in granting a motion to suppress where a single trash pull, yielding materials for making methamphetamine, that immediately preceded the issuance of a search warrant was insufficient to establish probable cause. The only other evidence prior to the trash pull was that there were reports that a woman named Lauren was "cooking meth on Rowley [Avenue]" and that appellant matched the vague description of an "overweight African American female."

Tenth Appellate District of Ohio

***State v. Banks*, 2013-Ohio-4890**

Expungement

Full Decision: http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2013/2013-ohio-4890.pdf

The trial court erred in granting an application to seal the record of conviction for appellant, who had been convicted to two misdemeanors, where appellant filed his application prior to the enactment of S.B. No. 337 because S.B. No. 337 does not apply retroactively to applications. (A new application filed after S.B. No. 337 would have solved the problem).

Twelfth Appellate District of Ohio

***State v. Rabe*, 2013-Ohio-4867**

Sentencing: OVI: R.C. 2929.13-15

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/12/2013/2013-ohio-4867.pdf

Summary from Twelfth District Judge Rodenberg:

"**Facts:**

- Appellant appeals from an entry denying his motion to correct an unlawful sentence imposed on him after he violated the terms of his community control."

"R.C. 2929.13(G)(1) and 2929.13(G)(2); R.C. 2929.14(A)(1), 2929.14(B)(4), 2929.15(B)(2) and 4511.19(G)(1)(d)(i); Operating a Motor Vehicle Under the Influence; Community Control Violation:

- The trial court erred in finding that it was authorized under R.C. 2929.14(B)(4) to impose a 29-month prison sentence on appellant for violating the terms of his community control, which sanction had been imposed on him, along with a mandatory 60-day term of local incarceration under R.C. 4511.19(G)(1)(d)(i), after he was convicted for a fourth time of operating a motor vehicle under the influence of alcohol or drugs (OVI), a fourth-degree felony. The first paragraph of R.C. 2929.14(B)(4) applies only where a fourth-degree felony OVI offender is being originally sentenced and only where the trial court chooses to impose on the offender a 60-day mandatory prison term under R.C. 2929.13(G)(2) rather than a mandatory term of *local* incarceration under R.C. 2929.13(G)(1). Since R.C. 2929.14(B)(4) did not apply, R.C. 2929.14(A) did apply, and under R.C. 2929.14(A)(1), the maximum prison sentence that can be imposed for a fourth-degree felony offense is 18 months."

***State v. Johnson*, 2013-Ohio-4865**

Search and Seizure: Warrantless GPS: Suppression

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/12/2013/2013-ohio-4865.pdf

Summary from Twelfth District Judge Rodenberg:

"**Facts:**

- Appellant appeals from the denial of his motion to suppress evidence obtained through the warrantless attachment and subsequent monitoring of a GPS tracking device on the exterior of his vehicle. The GPS device was placed on appellant's vehicle prior to the United States Supreme Court's opinion in *United States v. Jones*, ___ U.S. ___, 132 S.Ct. 945 (2012), which held that the government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search within the context of the Fourth Amendment. Appellant argues that the good faith exception to the exclusionary rule does not apply as no binding appellate precedent permitting the use of a GPS device without the authorization of a warrant existed at the time the police attached the GPS device to appellant's car?

"**Good faith exception to the exclusionary rule; examine culpability of law enforcement; deterrence benefits weighed against social costs of exclusion; good faith belief of police**:

- In determining whether exclusion of evidence obtained from the warrantless attachment and subsequent monitoring of a GPS device is appropriate the court is required to weigh the costs of suppression against the deterrence benefits of suppression. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when police act with an objectively reasonable good faith that their conduct is lawful or when their conduct involves only isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way.
- In the present case, police acted with a reasonable good-faith believe that their conduct was lawful as, at the time the GPS device was attached to appellant's car, the United States Supreme Court had sanctioned the use of beeper technology without a warrant in *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1983), at least one circuit court had determined that the warrantless placement and a subsequent monitoring of a GPS device on a vehicle was not a violation of a defendant's Fourth Amendment rights, and the officer placing the GPS device had consulted with fellow officers, other law enforcement agencies, and a prosecutor about the legality of placing the device. Because suppression of the evidence would not yield appreciable deterrence and law enforcement acted with an objectively reasonable good faith belief that their conduct was lawful, the trial court did not err in denying appellant's motion to suppress."

***State v. Haralson*, 2013-Ohio-4868**

Sentencing: Driver's License Suspension: R.C. 2925.03(G)

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/12/2013/2013-ohio-4868.pdf

Summary from Twelfth District Judge Rodenberg:

"**Facts:**

- Plaintiff-appellant appeals from the Warren County Court of Common Pleas decision terminating defendant-appellee's driver's license suspension following his conviction for trafficking in marijuana.

"**Terminate driver's license suspension; expiration of two years; R.C. 2925.03(G):**

- The trial court erred in terminating appellee's driver's license suspension following his conviction for trafficking in marijuana as the request was premature and contrary to the plain language found in R.C. 2925.03(G), which allows the trial court to terminate a properly imposed driver's license suspension only upon the expiration of two years (1) 'from the day on which the offender's sentence was imposed;' or (2) 'from the day on which the offender was finally released from a prison term under the sentence,' whichever is later."

***State v. Durham*, 2013-Ohio-4764**

Motion to Suppress: Sentencing

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/12/2013/2013-ohio-4764.pdf

Summary from Twelfth District Judge Rodenberg:

"Facts:

- Defendant-appellant appeals from his conviction and sentence he received in the Warren County Court of Common Pleas after a jury found him guilty of one count of possession of heroin and one count of possession drug abuse instruments.

"**Motion to suppress, *Miranda* warnings, custodial interrogation:**

- The trial court did not err in denying appellant's motion to suppress any statements made to police officers after being removed from his semi-truck as he was not subject to a custodial interrogation requiring him to be advised of his *Miranda* warnings. Rather, the officers' questioning was merely to investigate allegations they received from his female passenger that he was driving while under the influence of heroin.

"Motion to suppress; probable cause to search vehicle; contraband:

- The trial court did not err in denying appellant's motion to suppress as the search of his semi-truck was supported by probable cause. Appellant's female passenger in his semi-truck informed officers that appellant was driving while under the influence of heroin and that he had heroin and syringes in his vehicle, all of which was corroborated by the officers' observations of fresh track marks on appellant's arm.

"Sentencing; maximum sentence; clearly and convincingly contrary to law; R.C. 2953.08(G)(2); possession of heroin; possession of drug abuse instruments:

- The trial court's decision sentencing appellant to the maximum total sentence of 12 months in jail for possession of heroin and drug abuse instruments was supported by the record and otherwise not contrary to law where there was evidence indicating appellant was operating his semi-truck while under the influence of heroin.

"Sentencing; costs of prosecution; court costs; mandatory; R.C. 2947.23(A)(1)(a):

- The trial court did not err in its decision ordering appellant to pay the costs of his prosecution as the imposition of prosecution costs is statutorily mandated under R.C. 2947.23(A)(1)(a) regardless of appellant's ability to pay court costs.

"Sentencing; fees and expenses; court-appointed attorney; ability to pay:

- The trial court erred in ordering appellant to pay the fees and expenses of his court-appointed attorney without making an affirmative determination on the record as to whether appellant had, or reasonably may be expected to have, the means to pay all or some part of the costs of the legal services rendered to him.

***State v. Liso*, 2013-Ohio-4759**

Resentencing

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/12/2013/2013-ohio-4759.pdf

Summary from Twelfth District Judge Rodenberg:

"Facts:

- Appellant appeals his rape conviction after a jury trial where the trial court admitted appellant's confession that he had oral sex with a ten-year-old child.

"Confession:

- Appellant's confession was not involuntarily given where the totality of the circumstances, balanced against a lie told by police, demonstrated that appellant's will was not overborne.

"Ineffective Assistance of Counsel:

- Appellant did not receive ineffective assistance of counsel where not calling a particular witness was sound trial strategy. Also, the results of the motion to suppress would not have been different had trial counsel challenged the voluntariness of appellant's statement rather than the waiver of appellant's *Miranda* rights.

"Resentencing:

- The trial court lacked jurisdiction to resentence appellant from a ten-year sentence to ten years to life while appellant's appeal was pending before this court."

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

***Burt v. Titlow*, 571 U.S. _____ (2013)**

Ineffective Assistance of Counsel

Full Decision: http://www.supremecourt.gov/opinions/13pdf/12-414_5h26.pdf

Syllabus from the Supreme Court of the United States:

"Respondent Titlow and Billie Rogers were arrested for the murder of Billie's husband. After explaining to respondent that the State's evidence could support a conviction for first-degree murder, respondent's attorney negotiated a manslaughter plea in exchange for an agreement to testify against Billie. Three days before Billie's trial, respondent retained a new attorney, Frederick Toca, who demanded an even lower sentence in exchange for the guilty plea and testimony. The prosecutor rejected the proposal, and respondent withdrew the original plea. Without that testimony, Billie was acquitted. Respondent was subsequently convicted of second-degree murder. On direct appeal, respondent argued that Toca provided ineffective assistance by advising withdrawal of the plea without taking time to learn the strength of the State's evidence. The Michigan Court of Appeals rejected the claim, concluding that Toca's actions were reasonable in light of his client's protestations of innocence. On federal habeas review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), concluded that the Michigan Court of Appeals' ruling was reasonable on the law and facts, and denied relief. The Sixth Circuit reversed. It found the factual predicate for the state court's decision – that the plea withdrawal was based on respondent's assertion of innocence – an unreasonable interpretation of the factual record, given Toca's explanation at the

withdrawal hearing that the decision to withdraw was made because the State's original plea officer was higher than the sentencing range provided by the Michigan guidelines. It also found no evidence in the record that Toca adequately advised respondent of the consequences of withdrawal.

"*Held*: The Sixth Circuit failed to apply the "doubly deferential" standard of review recognized by the Court's case law when it refused to credit the state court's reasonable factual finding and assumed that counsel was ineffective where the record was silent. Pp. 4-11.

(a) AEDPA recognizes the federalism principle that state courts are adequate forums for the vindication of federal statutory and constitutional rights. It erects a formidable barrier to federal habeas relief for prisoners whose [*3] claims have been adjudicated in state court, requiring them to "show that the state court's ruling . . . was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U. S. ___, ___, 131 S. Ct. 770, 178 L. Ed. 2d 624, 641. Pp. 4-6.

(b) Here, the record readily supports the Michigan Court of Appeals' factual finding that Toca advised withdrawal of the guilty plea only after respondent's proclamation of innocence. The facts that respondent passed a polygraph test denying being in the room when Billie's husband was killed, discussed the case with a jailer who advised against pleading guilty if respondent was indeed innocent, and hired Toca just three days before Billie's trial at which respondent had agreed to self-incriminate, strongly suggest that respondent had second thoughts about confessing in open court and proclaimed innocence to Toca. The only evidence cited by the Sixth Circuit for its contrary conclusion was that Toca's sole explanation at the withdrawal hearing focused on the fact that the State's plea offer was substantially higher than that provided by the Michigan guidelines. The Michigan Court of Appeals was well aware of Toca's representations [*4] to the trial court and correctly found nothing inconsistent about a defendant's asserting innocence on the one hand and refusing to plead guilty to manslaughter accompanied by higher-than-normal punishment on the other. Accepting as true the Michigan Court of Appeals' factual determination that respondent proclaimed innocence to Toca, the Sixth Circuit's Strickland analysis cannot be sustained. More troubling is that court's conclusion that Toca was ineffective because the record contained no evidence that he gave constitutionally adequate advice on whether to withdraw the plea. The Sixth Circuit turned on its head the principle that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," Strickland v. Washington, 466 U. S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674, with the burden to show otherwise resting squarely on the defendant, id., at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The single fact that Toca failed to retrieve respondent's file from former counsel before withdrawing the guilty plea cannot overcome Strickland's strong presumption of effectiveness. In any event, respondent admitted in open court that former counsel had explained the [*5] State's evidence and that it would support a first-degree murder conviction. Toca was justified in relying on this admission to conclude that respondent understood the strength of the prosecution's case. Toca's conduct in this litigation was

far from exemplary, but a lawyer's ethical violations do not make the lawyer per se ineffective, and Toca's questionable conduct was irrelevant to the narrow issue before the Sixth Circuit. Pp. 6-11.

680 F. 3d 577, reversed."