# Appellate Court Decisions - Week of 12/4/17

*Note: This is not a comprehensive list of every case released this week.*

## First Appellate District of Ohio

### *State v. Williams*, 2017-Ohio-8988

**Rape: Evidence: Confrontation Clause: Hearsay: Ineffective Assistance: Prosecutorial Misconduct: Sentencing**

**Full Decision:**
**http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-8898.pdf**

**Summary from the First District:**

"In a trial for two counts of rape of a child under the age of ten, the admission of statements made by the child-victims at the Mayerson Center did not violate the Confrontation Clause because they were made for the purpose of medical diagnosis and treatment, and therefore, were not testimonial; and while the statements were hearsay, they were properly admitted as statements made for the purpose of medical diagnosis and treatment pursuant to Evid.R. 803(4).

"The trial court erred in allowing mother to testify as to what the children had told her about what defendant had done to them, because the statements were hearsay; but defendant was not prejudiced by the admission of the statements because evidence containing the same information was properly admitted through other sources.

"Defendant's convictions for two counts of rape of a child under ten were based upon sufficient evidence and were not against the manifest weight of the evidence where the testimony of the victims, their interviews at the Mayerson Center, which were admitted into evidence, and the testimony of the Mayerson Center social worker about what the children had said showed that defendant had digitally penetrated the vaginas of both child-victims.

"Counsel was not ineffective for failing to cross-examine the child-victims, because the decision was sound trial strategy and defendant had instructed counsel not to cross-examine the children.

"Counsel was not ineffective for failing to object to an isolated comment made by the prosecutor at the conclusion of the testimony of a child-victim that he was "proud of her" where the comment was innocuous and the decision not to object was a matter of sound trial strategy.

"The prosecutor did not commit misconduct in making a single, encouraging comment to a child-victim at the conclusion of her difficult testimony considering the context of the comment and its isolated character.

"Defendant failed to establish that the outcome of the trial had been adversely affected by cumulative error where he had demonstrated only a single instance of arguable error, which was harmless.

"The trial court did not err in sentencing defendant to consecutive life terms where the court made the required findings pursuant to R.C. 2929.14(C) at the sentencing hearing and recorded those findings in the sentencing entry, and the record supported those findings.

"Defendant's two consecutive life terms did not constitute cruel and unusual punishment: the sentences were within the statutory ranges, and a claim for cruel and unusual punishment cannot be premised on consecutive sentences."

***State v. Gage*, 2017-Ohio-8897**

**Speedy Trial: Misdemeanor**

**Full Decision:**
**http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-8897.pdf**

**Summary from the First District:**

"Because defendant was charged with both a second-degree misdemeanor and a minor misdemeanor, the state had 90 days, the speedy-trial period for a second-degree misdemeanor, to bring him to trial. Where defendant waived a substantial amount of time, and a substantial amount of time was tolled due to his actions, defendant was tried within the statutory speedy-trial period. Though defendant was not tried for over a year after his arrest on misdemeanor charges, his constitutional right to a speedy trial was not violated because much of the delay was attributable to him, he did not assert his speedy-trial right until late in the proceedings, and his defense was not impaired by the delay."

## Second Appellate District of Ohio

***State v. Wertz*, 2017-Ohio-8766**

**Search: Motion to Suppress**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2017/2017-Ohio-8766.pdf**

**The trial court erred in overruling appellant's motion to suppress. From the Second District Opinion:**

"Upon review, we conclude that the trial court erred when it overruled Wertz's motion to suppress. Specifically, we conclude that the encounter between Lingo and Wertz was a not a consensual encounter, and that the trial court erred in concluding that there was 'absolutely no evidence even suggesting that Lingo's earlier encounter with Defendant was anything but consensual.' Based upon the information provided in the dispatch, Lingo approached the residence located at 5225 Rucks Road and walked to the side of the house where he observed Wertz, in his own backyard and not in a public place, trying to push a dirt bike through a gap in the fence into an open field, a place where dirt bikes are often ridden. Lingo commanded Wertz to stop pushing the bike and come over to where Lingo stood and speak to him. Lingo testified that he may have walked into Wertz's backyard 'a couple of steps,' and that he did not observe any criminal activity or indicia of illegality at the time. He testified that he was concerned that the bike might be stolen, and that he was conducting an investigation based upon Wertz's appearance matching the description provided by the anonymous caller, which Lingo termed 'suspicious enough.' Lingo testified that he asked Wertz several questions and checked his identification, and he testified that Wertz was cooperative during the interview. Lingo further recorded the VIN number of the bike in the course of his investigation, after searching the bike 'until I found it.' Lingo testified that he learned the bike had not been reported as stolen. Based upon these facts, we cannot conclude that a reasonable person in Wertz's position would have believed that he was free to go; Wertz, on his own property, was ordered to stop moving a dirt bike, an activity which exhibited at the time no evidence of illegality, and to come to Lingo. Wertz was asked several questions, and the VIN number of the bike was searched for and recorded. Lingo stated that after the interview, he 'let [Wertz] go because I had no further cause to keep him.' Since Lingo's encounter with Wertz was not consensual, Wertz's assigned error is sustained. The judgment of the trial court is reversed, and the matter is remanded for further proceedings consistent with this opinion."

***State v. Weisgarber*, 2017-Ohio-8764**

**Search: Motion to Suppress**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2017/2017-Ohio-8764.pdf**

**The trial court did not err in granting Appellant's motion to suppress. From the opinion:**

"The trial court concluded that Officer West's encounter was not a consensual encounter. The trial court emphasized that West approached Weisgarber in an individual treatment room in the emergency department solely due to a report of Weisgarber's drug overdose, and the officer initiated the contact by asking whether

Weisgarber had 'any drugs or weapons.' The trial court implicitly found that the location of the encounter and the language used by the officer when he approached conveyed to Weisgarber that a response was required.

"Officer West's testimony indicated that he was the only officer that responded to Weisgarber's room, that he did not have his hands near any of the weapons he carries (Tazer, handgun, baton), and that he did not physically restrain Weisgarber. Nevertheless, Officer West approached Weisgarber in a private room in the emergency department, which was likely not generally accessible to the public at large, and immediately asked Weisgarber if he had drugs or weapons. There is no evidence that the officer introduced himself, asked Weisgarber if he was willing to answer questions, or engaged in any conversation prior to asking about whether Weisgarber had drugs or weapons. We defer to the trial court's implicit factual finding that West's use of language and demeanor was a display of authority that indicated to Weisgarber that a response was required. Considering the totality of the circumstances, the trial court did not err in concluding that Weisgarber and Officer West were not engaged in a consensual encounter.

"At the conclusion of the suppression hearing, the trial court orally expressed concern with the hospital's policy that the hospital police respond to every drug overdose patient. We agree with the trial court that the mere fact that a person arrives at an emergency room for medical attention for a drug overdose does not, by itself, create a reasonable, articulable suspicion of criminal activity. Here, Officer West testified that he went to Weisgarber's room solely due to his (Weisgarber's) drug overdose. We understand the hospital's concerns for the safety of its patients and staff, but under these circumstances, West had no reasonable, articulable suspicion of criminal activity to justify his investigatory detention of Weisgarber.

"Even if Officer West and Weisgarber were involved in a consensual encounter, we agree with the trial court that the State did not establish that Weisgarber's consent to the search of his person was voluntary.

* * *

"In this case, the record supports the trial court's conclusion that the State did not meet its burden of proof that Weisgarber voluntarily consented to be searched. Weisgarber had been brought to the hospital due to a drug overdose, and he had received Narcan, to which he responded, at the hospital. West did not know how long prior to the encounter Weisgarber had received Narcan. Weisgarber was lying on the hospital bed when West came into Weisgarber's room in the emergency department.

" trial court determined that 'Officer West observed that Defendant was intoxicated,' but made no finding that Weisgarber was, nevertheless, 'pretty coherent,' as Officer West also testified. Weisgarber's side of the conversation with the officer consisted of two words: 'No' in response to whether he had drugs or weapons, and 'Okay' in response to whether the officer could search him. The record supports the trial court's conclusion that the State did not meet its burden of proof that Weisgarber was in a condition to give

consent. The trial court also expressly found that the officer displayed 'police authority over the situation' and that Weisgarber was not informed of his right to refuse consent. Considering the totality of the circumstances before us, the trial court reasonably found that Weisgarber's response ('okay') to the officer's request to search did not constitute voluntary consent."

***State v. Grigsby*, 2017-Ohio-8760**

**Sex-Offender Registration**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2017/2017-Ohio-8760.pdf**

**Summary from the Second District:**

**"The trial court erred in ordering Appellant to register as a Tier I sex offender for a first-degree-misdemeanor charge of unlawful sexual conduct with a minor when the sexual conduct at issue was consensual and Appellant had no prior convictions for sexually oriented offenses. Under these circumstances, Appellant is excluded from having to register as a sex offender because his offense does not qualify as a 'sexually oriented offense' under R.C. 2950.01(A)(2) or (A)(3), and does not warrant a Tier I or Tier II sex offender classification under R.C. 2950.01(E)(1)(b) and R.C. 2950.01(F)(1)(b). Reversed and remanded."**

## Third Appellate District of Ohio

***Nothing to report.***

## Fourth Appellate District of Ohio

***Nothing to report.***

## Fifth Appellate District of Ohio

***Nothing to report.***

## Sixth Appellate District of Ohio

***Nothing to report.***

## Seventh Appellate District of Ohio

***Nothing to report.***

## Eighth Appellate District of Ohio

***Nothing to report.***

## Ninth Appellate District of Ohio

***Nothing to report.***

## Tenth Appellate District of Ohio

***State v. Pablo*, 2017-Ohio-8834**

**Motion to Suppress: *Miranda*: Juvenile**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2017/2017-Ohio-8834.pdf**

**"Plaintiff-appellant, State of Ohio, appeals a decision of the Franklin County Court of Common Pleas issued on December 21, 2016 which suppressed statements the defendant-appellee, David Pablo, made to the police in an interrogation on September 24, 2014. Because Pablo was not afforded the presence of a parent or responsible adult in determining whether to waive his Miranda1 rights, because he had no prior experience with the police, because English was not his first or primary language, because evidence suggested his level of intelligence was not high, and because he indicated that he signed the rights waiver form because he thought he had to, we agree with the trial court. Under the totality of the circumstances, Pablo's Miranda waiver was not valid and Pablo's statement to the police was correctly suppressed."**

## Eleventh Appellate District of Ohio

***Nothing to report.***

## Twelfth Appellate District of Ohio

***State v. B.J.T.*, 2017-Ohio-8797**

**Sentencing**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/12/2017/2017-Ohio-8797.pdf**

**Summary from the Twelfth District: "Appellant's sexual battery and gross sexual imposition convictions were supported by sufficient evidence and were not against the manifest weight of the evidence where the state demonstrated that appellant engaged in sexual conduct and sexual contact with his adoptive daughter by touching the victim's butt, chest, and digitally penetrated her vagina. The sentencing judge committed reversible error in relying on another judge's personal notes and impressions to familiarize himself with the case, rather than reviewing an official record of the proceedings, before imposing appellant's sentence."**

***State v. Heard*, 2017-Ohio-8796**

**Domestic Violence: Confrontation Clause**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/12/2017/2017-Ohio-8796.pdf**

**Summary from the Twelfth District: "Appellant's right to confront witnesses against him was violated when the trial court admitted hearsay statements from the victim through the testimony of the officer who questioned the victim on the night of the incident. The statements were testimonial in nature because the officer did not ask the victim questions to deal with an ongoing emergency, but rather, to establish what had happened in the past to use in a future prosecution."**

## Supreme Court of Ohio

***Nothing to report.***

## Sixth Circuit Court of Appeals

***Nothing to report.***

## Supreme Court of the United States

***Nothing to report.***