Appellate Court Decisions - Week of 12/9/13

First Appellate District of Ohio

***State v. Thomas*, 2013-Ohio-5386**

Juries: Jury Instructions: Procedure/Rules: Evidence/Witness/Trial: Indictment/Complaint: Sentencing: Postrelease Control

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120561_12112013.pdf

Summary from the First District:

"The trial court's acceptance of the state's race-neutral reason for exercising a preemptory challenge against an African-American juror, that the juror's children went to the same school as the children of defense counsel, was not clearly erroneous.

The trial court's admission of other-acts evidence was not plain error where testimony by an accomplice that he was a 'robbery boy' who hired himself out to commit robberies and that he knew the defendant because he had committed robberies and other crimes for the defendant put the relationship between the accomplice and the defendant in context and also showed the defendant's motive and intent.

The trial court did not err in allowing the state to impeach its own witness when the witness testified to a different version of events than the state expected him to testify to, even though the witness had told that version of events at some point before trial, where the witness had admitted earlier that the version of events he testified to at trial was not true and where, after conversations with police detectives and the witness's attorney, the state had expected the witness to testify consistent with the version of events that he had originally told police.

The trial court did not commit plain error in admitting the defendant's voice-mail and text messages into evidence because the defendant had not filed a motion to suppress setting forth the basis of his challenge to the evidence and referring to facts which, if proved, would have required relief.

The trial court did not err in instructing the jury using the full name of the victim even though the indictment had only referred to the victim by his initials where the identity of the victim was not an essential element of the crime, the identity of the victim was not at issue, and nothing in the record showed that the defendant was unaware of the victim's identity or that the jury was confused in any way by the instructions.

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

The trial court erred in failing to inform the defendant that court costs may be paid through community service as required by R.C. 2947.23(A).

The trial court erred in notifying the defendant that he was subject to five years of postrelease control where the offenses of which he had been convicted were second- and third-degree felonies, which carry a mandatory term of three years of postrelease control."

***State v. Furguson*, 2013-Ohio-5388**

OVI: Boat: Failure to Comply: Ineffective Assistance of Counsel

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130173_12112013.pdf

Summary from the First District:

"The defendant's conviction for operating a watercraft while under the influence of alcohol was based on sufficient evidence and was not against the manifest weight of the evidence: the arresting officer testified that defendant had admitted operating the boat, had a moderate to strong smell of alcohol about his person, had glassy and bloodshot eyes, and was belligerent and physically combative.

The defendant's convictions for failing to comply with the order of an officer and for failing to have an audible sound device on a watercraft were in accordance with the evidence: the state demonstrated that the officer had the authority to inspect watercraft for safety equipment, that the defendant had refused to cooperate with the officer's inspection and had refused to show the officer the required sound device.

The defendant was not denied the effective assistance of trial counsel as a result of counsel's failure to more aggressively pursue the argument that the defendant's actions had been the result of a psychiatric condition and not of intoxication: the trial court was presented with evidence that the defendant had been prescribed medication for a psychiatric condition and that he had not taken the medication on the date of the alleged offenses; the court's refusal to accept that explanation did not establish that counsel's representation had been deficient."

***State v. Cook*, 2013-Ohio-5449**

Sentencing: ID/Photos: Search and Seizure: Postrelease Control

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130242_12132013.pdf

Summary from the First District:

"The trial court properly denied the defendant's motion to suppress the evidence stemming from the warrantless entry and search of an apartment the defendant shared with his girlfriend, where a police detective testified that the defendant's girlfriend had voluntarily consented to the search of the apartment, and the defendant, who had been present when the police entered the apartment, did not expressly object to their presence.

The trial court properly denied the defendant's motion to suppress the burglary victim's eyewitness identification of the defendant on the basis that the police detective who had administered the photographic array was not a blind administrator where the detective testified that she had known that the defendant had been a suspect in the burglary, and that his photo had been included in the array, but that she had not known what he looked like.

The trial court did not err in denying the defendant's motion to suppress his statements to police on the basis that he was too intoxicated to have knowingly, intelligently and voluntarily waived his rights to counsel and to remain silent: although a police detective testified that the defendant appeared to be "dope sick" during a police interview, at no time during the interview did the defendant assert his right to counsel or to remain silent, but instead chose to verbally spar with investigators and try to persuade them of his innocence.

Where the trial court failed at the sentencing hearing to inform the defendant that he would be subject to a mandatory three-year period of postrelease control and that the parole board could impose a prison term of up to one-half of the prison term originally imposed if he violated supervision or a condition of his postrelease control, the cause must be remanded pursuant to R.C. 2929.191 for the court to properly notify the defendant.

At the plea hearing, the trial court substantially complied with its obligation to inform the defendant of the maximum penalty for his offenses: even though the court initially misstated that the defendant could be subject to three years of discretionary postrelease control, the assistant prosecuting attorney promptly corrected the trial court, stating that the postrelease-control term was mandatory, the defendant's plea form contained the correct postrelease-control term, and the defendant did not demonstrate any prejudice from the initial misstatement.

The trial court did not violate Crim.R. 11(C)(2) by failing to inform the defendant, who pleaded no contest to three counts of burglary, that the court had the option under R.C. 2929.14 to run the sentences consecutively rather than concurrently. (*State v. Johnson*, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988), syllabus, followed.)"

Second Appellate District of Ohio

***State v. Mogle*, 2013-Ohio-5341**

Sentencing: Community Control

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/2/2013/2013-ohio-5341.pdf

Where the defendant's community control was revoked and he was sentenced to prison, and the new convictions that were the basis for the revocation of community control were reversed on appeal, the revocation of community control and the resulting sentence must be vacated.

Sixth Appellate District of Ohio

***State v. Brown*, 2013-Ohio-5351**

Search: Extraterritorial Stop: Drug Possession

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/6/2013/2013-ohio-5351.pdf

A township officer violated R.C. 4513.39 by making an extraterritorial stop on an interstate highway for a marked lane violation, and there were no extenuating circumstances for doing so. Therefore, because the stop was unreasonable under Article I, Section 14, of the Ohio Constitution, the drug evidence seized as a result of the stop should have been excluded from evidence.

Eighth Appellate District of Ohio

***City of Cleveland v. White*, 2013-Ohio-5423**

Ineffective Assistance of Counsel: Speedy Trial

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/8/2013/2013-ohio-5423.pdf

Appellant was denied the effective assistance of counsel where counsel failed to file a motion to dismiss on grounds that his right to a speedy trial

had been infringed. Four years had elapsed between when the charges were filed and the trial, and the motion would have succeeded.

Ninth Appellate District of Ohio

***State v. Spurlock*, 2013-Ohio-5369**

OVI: Motion to Suppress: NHTSA Standards

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/9/2013/2013-ohio-5369.pdf

In an OVI case, the field sobriety tests should have been suppressed where the State Trooper who performed them did not testify whether he had performed them in compliance with NHTSA standards, or any other standards and the state did not submit a NHTSA manual or other standardized testing manual into evidence.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

***Kansas v. Cheever*, Slip Opinion No. 12-609**

Evidence: Mental Health Evaluation

Full Decision: http://www.supremecourt.gov/opinions/13pdf/12-609_g314.pdf

"The question here is whether the Fifth Amendment prohibits the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut that defendant's presentation of expert testimony in support of a defense of voluntary intoxication. We hold that it does not."

Syllabus of the Court:

"Shortly after respondent Cheever was charged with capital murder, the Kansas Supreme Court found the State's death penalty scheme unconstitutional. State prosecutors then dismissed their charges to allow federal authorities to prosecute him. When Cheever filed notice that he intended to introduce expert evidence that

methamphetamine intoxication negated his ability to form specific intent, the Federal District Court ordered Cheever to submit to a psychiatric evaluation. The federal case was eventually dismissed without prejudice. Meanwhile, this Court held the State's death penalty scheme constitutional, see *Kansas v. Marsh*, 548 U. S. 163. The State then brought a second prosecution. At trial, Cheever raised a voluntary intoxication defense, offering expert testimony regarding his methamphetamine use. In rebuttal, the State sought to present testimony from the expert who had examined Cheever by the Federal District Court order. Defense counsel objected, arguing that since Cheever had not agreed to the examination, introduction of the testimony would violate the Fifth Amendment proscription against compelling an accused to testify against himself. The trial court allowed the testimony, and the jury found Cheever guilty and voted to impose a death sentence. The Kansas Supreme Court vacated the conviction and sentence, relying on *Estelle v. Smith*, 451 U. S. 454, in which this Court held that a court-ordered psychiatric examination violated a defendant's Fifth Amendment rights when the defendant neither initiated the examination nor put his mental capacity in dispute. The court distinguished the holding of *Buchanan v. Kentucky*, 483 U. S. 402, that a State may introduce the results of such an examination for the limited purpose of rebutting a mental-status defense, on the basis that voluntary intoxication is not a mental disease or defect under Kansas law.

Held: The rule of *Buchanan*, reaffirmed here, applies in this case to permit the prosecution to offer the rebuttal evidence at issue. Pp. 4– 10.

(a) In *Buchanan*,the prosecution presented evidence from a courtordered evaluation to rebut the defendant's affirmative defense of extreme emotional disturbance. This Court concluded that this rebuttal testimony did not offend the Fifth Amendment, holding that when a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. *Buchanan*'s reasoning was not limited to the circumstance that the evaluation was requested jointly by the defense and the government. Nor did the case turn on whether state law referred to extreme emotional disturbance as an affirmative defense. Pp. 4–6.

(b) The admission of rebuttal testimony under the rule of *Buchanan* harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination. See *Fitzpatrick v. United States*, 178 U. S. 304, 315. Here, the prosecution elicited testimony from its expert only after Cheever offered expert testimony about his inability to form the requisite *mens rea*. Excluding this testimony would have undermined *Buchanan* and the core truth-seeking function of trial. Pp. 6–7.

(c) This Court is not persuaded by the Kansas Supreme Court's reasoning that Cheever did not waive his Fifth Amendment privilege because voluntary intoxication is not a mental disease or defect as a matter of state law. "Mental disease or defect" is not the salient phrase under this Court's precedents, which use the much broader phrase "mental status," *Buchanan*,483 U. S., at 423. Mental-status defenses include those based on psychological expert evidence as to a defendant's *mens rea*, mental capacity to commit the crime, or ability to premeditate. To the extent that the Kansas Supreme Court declined to apply *Buchanan* because Cheever's intoxication was "temporary," this Court's precedents are again not so narrowly circumscribed, as evidenced by the fact

that the courts where *Buchanan* was tried treated his extreme emotional disturbance as a "temporary" condition. Pp. 7–8.

(d) This Court declines to address in the first instance Cheever's contention that the prosecution's use of the court-ordered psychiatric examination exceeded the rebuttal-purpose limit established by *Buchanan*, see 483 U. S., at 424. Pp. 9–10. 295 Kan. 229, 284 P. 3d 1007, vacated and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court."