Appellate Court Decisions - Week of 2/26/18

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

First Appellate District of Ohio

Phipps v. State, 2018-Ohio-720

Sex Offenses: Out-Of-State Offender: Proof of Conviction: Duty to Register

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2018/2018-Ohio-720.pdf

Summary from the First District:

"The trial court did not err in finding that the state was not required to prove defendant's New York conviction for a sexually-oriented offense with a document that complied with R.C. 2945.75(B) and Crim.R. 32(C): the procedures under former R.C. Chapter 2950 were civil in nature, and former R.C. 2950.07(F) did not require the state to prove the out-of-state sex offense in the same way it would have had to prove a prior conviction beyond a reasonable doubt in a criminal case where the prior conviction was an element of a new criminal offense or was required to elevate the level of a crime or enhance a sentence.

"The trial court erred in holding that defendant's New York conviction for sexual misconduct required him to register as a sex offender in Ohio, because the New York sexual-misconduct statute is not substantially equivalent to Ohio's unlawful-sexual-conduct-with-a-minor statute, R.C. 2907.04(A): the Ohio statute applies to persons over 18, while the New York statute does not set an age limit for the perpetrator; Ohio's law prohibits sexual conduct with a victim between the ages of 13 and 15, while the New York prohibition extends to a victim under the age of 17; Ohio requires that the perpetrator knew the age of the victim or was reckless in that regard, while New York does not require a mens rea; and the Ohio offense is a felony, while the New York offense is a misdemeanor. [*But see* DISSENT: The two statutes are substantially equivalent because they both criminalize sex with a teenager regardless of consent. Further, the New York statute is substantially equivalent to Ohio's sexual-imposition offense, R.C. 2907.06(A)(4).]"

State v. Bedell, 2018-Ohio-721

Sex Offenses: Gross Sexual Imposition: Evidence: Ineffective Assistance: Prosecutorial Misconduct: Plain Error: Sentencing

Full Decision:

http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2018/2018-Ohio-721.pdf

Summary from the First District:

"The defendant's convictions on two counts of gross sexual imposition involving a victim under the age of 13 were supported by sufficient evidence and were not against the manifest weight of the evidence where the victim unequivocally testified at a bench trial that the defendant had rubbed her vagina on more than one occasion when she was under the age of 13.

"The defendant failed to demonstrate that the prosecutor's asking of leading questions was prosecutorial misconduct that rose to the level of plain error where he failed to identify specific questions he contended were improperly leading or explain how they prejudiced him.

"The defendant could not establish an ineffective-assistance- of-trial-counsel claim where he failed to show any prejudice resulting from trial counsel's allegedly deficient performance.

"Where the record clearly demonstrates that the trial court used an incorrect and higher sentencing range when determining the defendant's sentences, and then sentenced the defendant to the minimum term within that higher range, the error rose to the level of plain error that should be corrected, even though the defendant failed to object below. [*But see* DISSENT: The defendant failed to demonstrate clear error because the judge's comments at the sentencing hearing could reasonably be interpreted to refer to something other than a misunderstanding of the applicable sentencing range.]"

***State v. Brogden*, 2018-Ohio-722**

Theft: Evidence: Sentencing: Allocution

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2018/2018-Ohio-722.pdf

Summary from the First District:

"Defendant's conviction for theft was supported by sufficient evidence where the victim testified that the car belonged to her and the defendant refused to return the keys.

"Defendant's sentence must be reversed and the cause remanded for resentencing where the trial court denied defendant her right of allocution and the error was not invited or harmless."

***State v. Ingels*, 2018-Ohio-724**

Sentencing: Jurisdiction: Appellate Review

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2018/2018-Ohio-724.pdf

Summary from the First District:

"Defendant's kidnapping sentences were void and thus subject to correction, because the trial court had no statutory authority to enhance those sentences pursuant to sexually-violent-predator specifications charged under former R.C. Chapter 2971, when the specifications were not, as former R.C. 2971.01(H)(1) had required, based on a sexually-violent-offense conviction that had existed prior to the indictment charging the specifications: the common pleas court did not err in overruling, because the doctrine of the law of the case precluded the court from granting, defendant's postconviction motion for resentencing on that ground; but following the appeals court's decision overruling its prior decisions holding that the sentences were not void, the sentences are properly remanded to the common pleas court for resentencing under the jurisdiction to correct a void judgment. [But see DISSENT: Defendant's kidnapping sentences were not subject to correction, because the claimed error did not render those sentences void.]"

***State v. Brogden*, 2018-Ohio-735**

Evidence: Sufficiency: Civil Protection Order

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2018/2018-Ohio-735.pdf

Summary from the First District:

"Defendant's conviction for violating a temporary civil protection order was not supported by sufficient evidence where the state failed to prove that the temporary protection order was in effect on the date of the alleged violation."

Second Appellate District of Ohio

***State v. McComb*, 2018-Ohio-674**

Sentencing: Aggravated Robbery: *State v. Hand*

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2018/2018-Ohio-674.pdf

Summary from the Second District:

"Defendant was granted a delayed appeal from his October 2015 conviction for aggravated robbery and felonious assault, for which he received a mandatory three-year sentence and a two-year sentence, respectively. Defendant challenges his sentence under *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448. *Hand* applies to defendant's three-year sentence for aggravated robbery, which was made mandatory due to a prior juvenile adjudication. Having granted defendant's motion for a delayed appeal, pursuant to App.R. 5, defendant's conviction is pending on direct appeal, and his conviction was not final for purposes of applying *Hand*. Defendant has completely served his two-year sentence for felonious assault, and thus his appeal of that sentence is moot. Regardless, the trial court did not impose a mandatory sentence for the felonious assault. Judgment affirmed in part, modified in part, and remanded for the court to issue a revised judgment entry that eliminates the mandatory nature of defendant's sentence for aggravated robbery."

***State v. Jacobs*, 2018-Ohio-671**

Restitution

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2018/2018-Ohio-671.pdf

Summary from the Second District:

"Trial court erred in ordering the payment of restitution in the full amount of the victim's medical expenses. Based on the testimony at the restitution hearing, it was clear that the victim had health insurance, and it was likely that some or all of the medical expenses would be covered by insurance. Double recovery is not permitted, and the court's failure to determine the amount of restitution to a reasonable degree of certainty was error. Judgment affirmed in part, reversed in part, and remanded for further consideration of restitution order."

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

***State v. Harper*, 2018-Ohio-690**

OVI: Motion to Suppress

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-690.pdf

Summary from the Eighth District:

"The state's expert witness failed to demonstrate that the results of appellee's blood test were valid, accurate, or reliable to a reasonable degree of scientific certainty. Therefore, the trial court did not abuse its discretion in granting appellee's motion to suppress the results of the blood test."

Ninth Appellate District of Ohio

***State v. Cutlip*, 2018-Ohio-726**

Sufficiency: Failure to Stop After an Accident

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/9/2018/2018-Ohio-726.pdf

Appellant's conviction for failure to stop after an accident was based on insufficient evidence where his accident/collision did not occur on a public roadway, even though he failed to control his vehicle on the roadway. The failure to control his vehicle on the roadway did not constitute an accident, and the accident occurred solely on private property.

Tenth Appellate District of Ohio

***State v. Thomas*, 2018-Ohio-758**

Motion to Suppress: Search

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2018/2018-Ohio-758.pdf

The trial court did not err in granting Appellee's motion to suppress where the officers lacked reasonable and articulable suspicion to detain Appellee. The fact that he had a gun and ammunition on his person was not in and of itself evidence of criminal activity.

Eleventh Appellate District of Ohio

Nothing to report.

Twelfth Appellate District of Ohio

***State v. Vineyard*, 2018-Ohio-705**

Good Samaritan

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/12/2018/2018-Ohio-705.pdf

Summary from the Twelfth District:

"The trial court correctly dismissed the charges against appellee and determined that Ohio's Good Samaritan Statute applied to appellee where he had not been convicted or punished for his drug crimes and otherwise met the qualifications of the statute, even though appellee's drug overdose occurred before the Good Samaritan Statute became effective."

Supreme Court of Ohio

Nothing to report.

Sixth Circuit Court of Appeals

Nothing to report.

Supreme Court of the United States

***Jennings v. Rodriguez*, 583 U.S. _____ (2018)**

Immigration

Full Decision:
https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf

Syllabus:

Immigration officials are authorized to detain certain aliens in the course of immigration proceedings while they determine whether those aliens may be lawfully present in the country. For example, §1225(b) of Title 8 of the U. S. Code authorizes the detention of certain aliens seeking to enter the country. Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation, and to certain other aliens designated by the Attorney General in his discretion. Section 1225(b)(2) is a catchall provision that applies to most other applicants for admission not covered by §1225(b)(1). Under §1225(b)(1), aliens are normally ordered removed "without further hearing or review," §1225(b)(1)(A)(i), but an alien indicating either an intention to apply for asylum or a credible fear of persecution, §1225(b)(1)(A)(ii), "shall be detained" while that alien's asylum application is pending, §1225(b)(1)(B)(ii). Aliens covered by §1225(b)(2) in turn "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled" to admission. §1225(b)(2)(A).

The Government is also authorized to detain certain aliens already in the country. Section 1226(a)'s default rule permits the Attorney General to issue warrants for the arrest and detention of these aliens pending the outcome of their removal proceedings. The Attorney General "may release" these aliens on bond, "[e]xcept as provided in subsection (c) of this section." Section 1226(c) in turn states that theAttorney General "shall take into custody any alien" who falls into one of the enumerated categories involving criminal offenses and terrorist activities, §1226(c)(1), and specifies that the Attorney General "may release" one of those aliens "only if the Attorney General decides" both that doing so is necessary for witness-protection purposes and that the alien will not pose a danger or flight risk, §1226(c)(2).

After a 2004 conviction, respondent Alejandro Rodriguez, a Mexican citizen and a lawful permanent resident of the United States, was detained pursuant to §1226 while the Government sought to remove him. In May 2007, while still litigating his removal, Rodriguez filed a habeas petition, claiming that he was entitled to a bond hearing to determine whether his continued detention was justified. As relevant here, he and the class of aliens he represents allege that §§1225(b), 1226(a), and 1226(c) do not authorize "prolonged" detention in the absence of an individualized bond hearing at which the Government proves by clear and convincing evidence that detention remains justified. The District Court entered a permanent injunction, and the Ninth Circuit affirmed. Relying on the canon of constitutional avoidance, the Ninth Circuit construed §§1225(b) and 1226(c) as imposing an implicit 6-month time limit on an alien's detention under those sections. After that point, the court held, the Government may continue to detain the alien only under the authority of §1226(a). The court then construed §1226(a) to mean that an alien must be given a bond hearing every six months and that detention

beyond the initial 6-month period is permitted only if the Government proves by clear and convincing evidence that further detention is justified.

Held: The judgment is reversed, and the case is remanded.
804 F. 3d 1060, reversed and remanded.

JUSTICE ALITOdelivered the opinion of the Court, except as to Part II, concluding that §§1225(b), 1226(a), and 1226(c) do not give detained aliens the right to periodic bond hearings during the course of their detention. The Ninth Circuit misapplied the canon of constitutional avoidance in holding otherwise. Pp. 12–31.

(a) The canon of constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one [plausible] construction." *Clark v. Martinez*, 543 U. S. 371, 385. The Ninth Circuit's interpretations of the provisions at issue, however, are implausible. Pp. 12–13.

(b) Read most naturally, §§1225(b)(1) and (b)(2) mandate detention of applicants for admission until certain proceedings have concluded. Until that point, nothing in the statutory text imposes a limit on the length of detention, and neither provision says anything about bond hearings. Pp. 13–19.

(1) Nothing in the text of §1225(b)(1) or §1225(b)(2) hints that those provisions have an implicit 6-month time limit on the length of detention. Respondents must show that this is a plausible reading in order to prevail under the canon of constitutional avoidance, but they simply invoke the canon without making any attempt to defend their reading.

The Ninth Circuit also all but ignored the statutory text, relying instead on *Zadvydas v. Davis*, 533 U. S. 678, as authority for grafting a time limit onto §1225(b)'s text. There, this Court invoked the constitutional-avoidance canon, construing §1231(a)(6)—which provides than an alien subject to a removal order "may be detained" beyond the section's 90-day removal period—to mean that the alien may not be detained beyond "a period reasonably necessary to secure removal," id., at 699, presumptively six months, id., at 701. The Court detected ambiguity in the statutory phrase "may be detained" and noted the absence of any explicit statutory limit on the length of permissible detention following the entry of an order of removal.

Several material differences distinguish the provisions at issue in this case from *Zadvydas*'s interpretation of §1231(a)(6). To start, the provisions here, unlike §1231(a)(6), mandate detention for a specified period of time: until immigration officers have finished "consider[ing]" the asylum application, §1225(b)(1)(B)(ii), or until removal proceedings have concluded, §1225(b)(2)(A). Section 1231(a)(6) also uses the ambiguous "may," while §§1225(b)(1) and (b)(2) use the unequivocal mandate "shall be detained." There is also a specific provision authorizing temporary parole from §1225(b) detention "for urgent humanitarian reasons or significant public benefit," §1182(d)(5)(A), but no similar release provision applies to §1231(a)(6). That express exception implies that there are no other circumstances under which aliens detained under §1225(b) may be released. Pp. 14–17.

(2) Respondents also claim that the term "for" in §§1225(b)(1) and (b)(2) mandates detention only until the start of applicable proceedings. That is inconsistent with the meanings of "for"—"[d]uring [or] throughout," 6 Oxford English Dictionary 26, and "with the object or purpose of," id., at 23—that make sense in the context of the statutory scheme as a whole. Nor does respondents' reading align with the historical use of "for" in §1225. Pp. 17–19.

(c) Section 1226(c)'s language is even clearer. By allowing aliens to be released "only if " the Attorney General decides that certain conditions are met, that provision reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute. Together with §1226(a), §1226(c) makes clear that detention of aliens within its scope must continue "pending a decision" on removal. Section 1226(c) is thus not silent as to the length of detention. *See Demore v. Kim*, 538 U. S. 510, 529. The provision, by expressly stating that covered aliens may be released "only if " certain conditions are met, also unequivocally imposes an affirmative prohibition on releasing them under any other conditions. Finally, because §1226(c) and the PATRIOT Act apply to different categories of aliens in different ways, adopting §1226(c)'s plain meaning will not make any part of the PATRIOT Act, see §1226a(a)(3), superfluous. Pp. 19–22.

(d) Nothing in §1226(a), which authorizes the Attorney General to arrest and detain an alien "pending a decision" on removal and which permits the Attorney General to release the alien on bond, supports the imposition of periodic bond hearings every six months in which the Attorney General must prove by clear and convincing evidence that continued detention is necessary. Nor does it hint that the length of detention prior to the bond hearing must be considered in determining whether an alien should be released. Pp. 22–23.

(e) The Ninth Circuit should consider the merits of respondents' constitutional arguments in the first instance. But before doing so, it should also reexamine whether respondents can continue litigating their claims as a class. Pp. 29–31.

ALITO, J., delivered the opinion of the Court, except as to Part II. ROBERTS, C. J., and KENNEDY, J., joined that opinion in full; THOMAS and GORSUCH, JJ., joined as to all but Part II; and SOTOMAYOR, J., joined as to Part III–C. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined except for footnote 6. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined. KAGAN, J., took no part in the decision of the case.