Appellate Court Decisions - Week of 2/4/13

Note: Anything that has "OVERVIEW" in front of it is the Lexis summary of a case.

First Appellate District of Ohio

State v. Harris, **Appeal No. C-110472, Trial No. B-1006801-A**

Aggravated Murder: Aggravated Robbery: Evidence: Psychologist: Procedure/Rules

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-110472_02062013.pdf

It was prejudicial error for the trial court in an aggravated murder/aggravated robbery case to allow the psychologist who evaluated the defendant for competency and NGRI to testify that he was a malingerer (feigning psychiatric problems for NGRI purposes).

Summary from the First District Court of Appeals:

In a trial for aggravated murder and aggravated robbery, the trial court committed prejudicial error in allowing a psychologist, who had been appointed to evaluate the defendant's competency to stand trial and whether he met the criteria for a not-guilty-by-reason-of-insanity plea, to testify that the defendant "was malingering both cognitive and psychiatric difficulties" where the testimony went to the credibility of the defendant who testified that he had not intended to rob the victim.

The trial court's error in excluding defense counsel from the hearing on the prosecutor's Crim.R. 16(D) nondisclosure of witnesses certification did not require reversal where the defendant failed to show that he was prejudiced by the error.

***State v. Duncan*, Appeal No. C-120324, Trial No. B-0101407**

Postconviction: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120324_02082013.pdf

A sentence is void to the extent that the convicted is not notified of postrelease of control. (If this is not corrected while the convicted is still in prison, then postrelease control cannot be imposed. So, we wouldn't want to appeal the lack of notification.)

Summary from the First District:

R.C. 2953.21 et seq. did not confer upon the common pleas court jurisdiction to entertain defendant's postconviction "Motion to Vacate Postrelease Control": the motion was reviewable as a postconviction petition under R.C. 2953.21 et seq., because it did not specify the statute or rule under which relief was sought, and because the postconviction statutes provide the exclusive means for collaterally challenging a criminal conviction; but the motion was subject to dismissal for lack of jurisdiction, because it did not satisfy R.C. 2953.21(A)(2)'s time restrictions or R.C. 2953.23's jurisdictional requirements.

The Ohio Supreme Court in *State ex rel. Pruitt v. Cuyahoga Cty. Court of Common Pleas*, 125 Ohio St.3d 402, 2010-Ohio-1808, 928 N.E.2d 722, did not establish either a rule of substantial compliance with the statutory mandates concerning postrelease-control notification when some reference is made to postrelease control at sentencing and in the judgment of conviction, or a rule of waiver or forfeiture when postrelease-control notification is not challenged on direct appeal; nor did the court in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, establish habeas corpus as the only means for challenging the imposition of postrelease control after the offender's release from prison.

The common pleas court erred in failing to afford defendant the relief sought in his "Motion to Vacate Postrelease Control": defendant's 2003 sentence was void to the extent that he had not been adequately notified concerning postrelease control; and because defendant had been released from his 2003 prison sentence, postrelease control could not be imposed, and defendant was entitled to be discharged from the prison sentence imposed for his postrelease-control violation. [*But see* PARTIAL DISSENT: Defendant's 2003 prison sentence was not void because the postrelease-control language in the sentencing entry adequately notified defendant about postrelease control.]

***State v. Wagner*, Appeal no. C-120402, Trial No. B-1101992**

Constitutional Law: Criminal: Miranda

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120402_02082013.pdf

The following facts are not an unambiguous invocation of the right to remain silent: 1. Defendant tells officer he wants to talk about case. 2. Officer tells defendant to wait to talk to investigator. 3. Defendant only wants to talk to officer. 4. Officer reads defendant his *Miranda* rights and asks defendant if he wants to answer questions. 5. Defendant responds in the negative. 6. Defendant proceeds to tell officer his version of the case.

Summary from the First District:

The trial court did not err in failing to suppress statements made by the defendant to a police officer where the defendant had initiated the conversation by stating that he wanted to tell the officer what had happened but that he would not answer any questions even though the officer encouraged the defendant to wait and speak to another officer from a separate jurisdiction: the defendant's statement that he would tell the officer what had happened but he did not want to answer any questions was not an unambiguous or unequivocal assertion of the right to remain silent, but rather was an attempt by the defendant to control the conversation that he had initiated.

The break-in-custody rule established in *Maryland v. Shatzer*, 559 U.S. 98, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010), was inapplicable because the defendant had never invoked his fifth amendment right to remain silent, but rather had voluntarily waived that right in order to speak with law enforcement.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

***United States v. Stout*, No. 10-6163 (Decided and Filed: February 5, 2013)**

Crime of Violence: Escape: State Law: Application to Federal Law

Full Decision: http://www.ca6.uscourts.gov/opinions.pdf/13a0029p-06.pdf

Escape from a secured facility is a crime of violence under 18 U.S.C. § 16(b). (So, if you have a client convicted of escape, they probably need to be apprised of how this affects his/her ability to own guns, body armor, etc.)

Four pieces of body armor were discovered in Stout's vehicle when he was stopped by police in 2009. The body armor was sold in interstate commerce, so federal courts had jurisdiction. Stout was indicted and charged with one count of being a felon-in-possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and one count of knowingly possessing body armor after having been previously convicted of a crime of violence in violation of 18 U.S.C. § 931(a)(2).

Stouts prior conviction was for second-degree escape in violation of section 520.030 of the Kentucky Revised Statutes. The conviction in that case was for scaling the wall of a jail and escaping through a hole in its fence. The district court held, and the Sixth Circuit affirmed that the conviction for escape constituted a "crime of violence" for purposes of 18 U.S.C. §16.

A "crime of violence" is defined as follows under 18 U.S.C. §16:

a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The reasoning that the Sixth Circuit used in holding that escape is a "crime of violence," despite the fact that Stout's escape involved no violence, was essentially that any escape involves the substantial risk that physical force against the person or property of another may be used in the course of committing the offense. Therefore, escape is a "crime of violence" under 18 U.S.C. § 16(b).

Supreme Court of the United States

Nothing new.