Appellate Court Decisions - Week of 3/25/13

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

First Appellate District of Ohio

***In Re: M/S Children* (J.S. Only), Appeal No. C-120498, Trial No. F10-435**

Final Appealable Order

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120498_03272013.pdf

A final appealable order is an "order that affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2905.02(B)(1).

"J.S.'s father filed a custody action in Florida four months after J.S. and his mother moved to Ohio. Father later presented to the trial court a valid 'pick up' order issued by the Circuit Court of Pinellas County, Florida. The order directed the trial court to relinquish jurisdiction and return J.S. to Florida to be placed in Father's care. At a hearing to enforce the order, the trial court determined that Florida was the home of J.S. and the Florida has jurisdiction to determine custody matters under the [Uniform Child Custody Jurisdiction Enforcement Act]. The court therefore afforded full faith credit to the Florida order, relinquished jurisdiction, terminated [Hamilton County Department of Job and Family Services'] interim custody of J.S., and returned J.S. to Florida for a custody determination."

J.S's guardian ad litem contended on appeal that the court's judgment was not a final appealable order.

"A final appealable order is an 'order that affects a substantial right in an action that in effect determines the action and prevents a judgment.' R.C. 2505.02(B)(1). Here, the trial court's judgment affected a 'substantial right' because it determined that no child custody action would be brought in Ohio. *See* R.C. 2505.02(A)(1); *Natl. City Commercial Capital Corp v. AAAA At Your Service, Inc,* 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶ 7-12. And by so ruling, the trial court in effect determined the Ohio custody action and prevented judgment in favor of [Hamilton County Department of Job and Family Services. Accordingly, the trial court's order is final and appealable."

***State v. Ysreal*, Appeal Nos. C-100622, C-120263; Trial No. B-0905094**

Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120263_03272013.pdf

Summary from the First District: A trial court errs when it fails to inform a defendant, pursuant to R.C. 2947.23(A)(1), that he can perform community service in lieu of paying court costs.

***State v. Eichelbrenner*, Appeal No. C-110431, Trial No. B-1102105**

Assault: Evidence/Eyewitness/Trial: Jury Instructions

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-110431_03292013.pdf

It is invited error for defense counsel to tell a witness to continue testifying before the court can rule on an objection. Also, a defendant need not testify for the jury to be instructed on self-defense, but there must be evidence in the record to support the self-defense argument in order to get the instruction.

Summary from the First District:

The invited-error doctrine applied where defense counsel instructed the witness to continue with her testimony, which referred to prior bad acts by the defendant, instead of waiting for the trial court to rule on his objection.

The trial court erred in refusing to instruct the jury on the affirmative defense of self-defense solely on the ground that the defendant did not testify, but the error was harmless because the record was devoid of evidence that reasonably would have supported a finding that the defendant was not at fault in creating the affray.

The defendant's conviction for felonious assault was supported by sufficient evidence and was not against the manifest weight of the evidence where the defendant kicked his victim with enough force to break her collarbone.

***State v. Hodges*, Appeal No. C-110630, Trial No. B-1006698**

R.C. 2941.25: Sentencing: Appellate Review/Criminal

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-110630_03292013.pdf

"In this case, although Hodges was aware that his conduct would probably result in physical harm to [the victim] and shots fired at or into two separate apartments, the record does not reflect that Hodges intended to 'shoot up' the dwellings. Indeed, his immediate motive was clearly to injure [the victim] after their verbal altercation had escalated. We, therefore, cannot say that Hodges committed his attempt offenses with a separate animus to each offense. Having also determined that the offenses were committed with the same conduct and not separately, we hold that they should have been merged under R.C. 2941.25.

Summary from the First District:

The trial court erred under R.C. 2941.25 by imposing separate sentences for one count of attempt to commit felonious assault and two counts of attempt to commit improper discharge of a firearm at or into a habitation because the record reflected that the defendant had shot several bullets in rapid succession towards the victim and two apartments at the same time with the immediate motive to injure the victim. [*But see* DISSENT: Given the severity of the defendant's conduct, a separate animus was demonstrated for each attempt offense.]

An affidavit signed by the defendant and attached to his postsentence motion to withdraw his guilty pleas was outside the record on appeal where the defendant only appealed from the trial court's judgment of conviction.

The defendant failed to point to anything in the record to show that his guilty pleas were not knowing, voluntary, and intelligent, or that his counsel's performance was deficient or that he was prejudiced by any deficiency.

***State v. Shears*, Appeal No. C-120212, Trial No. B-1102971**

Sentencing: R.C. 2941.25: Witnesses: Homicide

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120212_03292013.pdf

- **An eight-hour interrogation was not unduly coercive where defendant was allowed breaks to nap, given water when thirsty, the police officers never raised their voices, and there were never more than two police officers in the interrogation room at a time.**
- **There is no need to repeat *Miranda* rights to the defendant when the defendant never leaves custody, the period of time between interrogations is not lengthy, and no new evidence was disclosed.**
- **In a bench trial, it was not error for the court to call defendant's girlfriend as its witness because the traumatic nature of the case made it difficult for her to remember events.**
- **Aggravated robbery and aggravated burglary are allied offenses.**
- **Gross abuse of a corpse and tampering with evidence are allied offenses.**

Summary from the First District:

The trial court properly denied defendant's motion to suppress statements made during his interrogation where he was properly informed of his *Miranda* rights and the interrogation was not unduly coercive, even though the interrogation lasted eight hours.

Notification of *Miranda* rights need not be repeated before a subsequent interrogation where the time period between interrogations is not lengthy, defendant remained in custody the entire time, and no significant new evidence was disclosed.

The trial court did not abuse its discretion in calling the defendant's girlfriend as a court's witness in a bench trial where she was having difficulty remembering events because it had "been traumatic."

Aggravated robbery and aggravated burglary were allied offenses that must be merged for sentencing where the same conduct constituted the aggravating factors for both crimes.

Gross abuse of a corpse and tampering with evidence were allied offenses subject to merger for sentencing where both arose from the disposal of the same body.

Aggravated murder did not merge with other related offenses for sentencing where the force used to kill far exceeded the force necessary to commit the related offenses.

Kidnapping did not merge with other related offenses for sentencing where the restraint and transportation of the victim was more than what was necessary to commit the related offenses.

The trial court erred in sentencing defendant to consecutive terms of imprisonment without making the required findings pursuant to R.C. 2929.14(C)(4).

***State v. Green*, Appeal No. C-120283, Trial No. 11CRB-31331A**

Constitutional Law: Criminal

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120283_03292013.pdf

There is no fundamental right to engage in sexual activity for hire and there is a legitimate government interest in regulating such conduct, so Ohio's solicitation statute is constitutional because it is rationally related to that interest.

R.C. 2907.24(A), Ohio's solicitation statute, is constitutional: there is no fundamental right to engage in sexual activity for hire or to solicit another for sexual activity, and the statute is rationally related to the legitimate government interest in protecting public health, safety, morals and general welfare.

Sixth Appellate District of Ohio

***City of Toledo v. Nova*, Court of Appeals No. L-12-1229, Trial Court No. CRB-11-16136**

Probation Violation: New Charges

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/6/2013/2013-ohio-1094.pdf

New criminal charges alone are not enough to show a violation of probation.

Nova was sentenced to 6-months in jail – 6 months suspended, and probation on a domestic violence conviction. One of the probation terms was to "Obey all city, state, and federal laws. Contact your Officer immediately if ticketed or arrested or placed on supervision (probation) with any other Court."

Five months later, Nova was charged with misdemeanor cruelty to animals. At a preliminary hearing on an allegation of probation violation, the trial court found Nova in violation of his probation and ordered that the six-month suspended jail sentence be enforced. The Sixth District held that the trial court abused its discretion in finding that Nova had violated his probation merely by being charged with another crime.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

***Florida v. Jardines*, No. 11-564 (Decided March 26, 2013)**

Fourth Amendment: Search and Seizure: Dog Sniff of a Home

Full Decision: http://www.supremecourt.gov/opinions/12pdf/11-564_5426.pdf

Using a drug-sniffing dog on a homeowner's porch to investigate what's inside the home is a "search" within the meaning of the Fourth Amendment.

Syllabus of the Supreme Court of the United States:

Police took a drug-sniffing dog to Jardines' front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants; Jardines was charged with trafficking in cannabis. The Supreme Court of Florida approved the trial court's decision to suppress the evidence, holding that the officers had engaged in a Fourth Amendment search unsupported by probable cause.

Held: The investigation of Jardines' home was a "search" within the meaning of the Fourth Amendment.

(a) When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones*, 565 U.S. ___, ___, n. 3.

(b) At the Fourth Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511. The area "immediately surrounding and associated with the home" – the curtilage – is "part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180. The officers entered the curtilage here: The front porch is the classic exemplar of an area "to which the activity of home life extends." *Id.*, at 182, n. 12.

(c) The officers' entry was not explicitly or implicitly invited. Officers need not "shield their eyes" when passing by a home "on public thoroughfares," *California*

v. Colorado, 476 U.S. 207, 213, but "no man can set his foot upon his neighbour's close without his leave," *Entick v. Carrington*, 2 Wils. K. B. 275, 291, 95 Eng. Rep. 807, 817. A police officer not armed with a warrant may approach a home in hopes of speaking to its occupants, because there is "no more than any private citizen might do." *Kentucky v. King*, 563 U.S. ___, ___. But the scope of a license is limited not only to a particular area but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search.

(d) It is unnecessary to decide whether the officers violated Jardines' expectation of privacy under *Katz v. United States*, 389 U.S. 347.