

## Appellate Court Decisions - Week of 3/3/14

### First Appellate District of Ohio

#### ***State v. Davis, 2014-Ohio-794***

**Appellate Review: Procedure: App.R. 9(C): Crim.R. 22: Recording Sidebars**

**Full Decision: [http://www.hamilton-co.org/appealscourt/docs/decisions/C-130198\\_03052014.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-130198_03052014.pdf)**

#### **Summary from the First District:**

“Where the trial court failed to record sidebar conferences as required by Crim.R. 22 in a serious-offense case, the defendant had the burden of reconstructing what had transpired off the record pursuant to App.R. 9(C).

“The trial court erred in failing to record sidebar conferences in a serious-offense case as required by Crim.R. 22, but the defendant, who failed to object and who accepted the trial court’s summary of the sidebar conferences as accurate, was not prejudiced.”

### Second Appellate District of Ohio

#### ***State v. Bizzell, 2014-Ohio-726***

**Sex Offender Classification: Impossibility**

**Full Decision:**

**<http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2014/2014-ohio-726.pdf>**

**Appellant, a sexually oriented offender, was charged and pled no contest to one count of Failure to Notify, in violation of R.C. 2950.04. The trial court found him guilty. On appeal, he argued that he had established the affirmative defense of impossibility because he was homeless. The Second District held that homelessness alone does not establish impossibility for complying with registration requirements.**

## Third Appellate District of Ohio

**State v. Lyle, 2014-Ohio-751**

**CASE OF FIRST IMPRESSION, APPARENTLY ANYWHERE IN OHIO**

Sentencing

Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/3/2014/2014-ohio-751.pdf>

**“[B]ecause community control sanctions are not imprisonment, the presumption against consecutive sentences does not apply, nor is there a requirement to make specific findings on the record under R.C. 2929.19(C)(4) for consecutive community control sanctions to be valid.”**

**“R.C. 2929.15 governs the imposition of community control sanctions. Our review of the chapter reveals that it does not contain any prohibition against imposing consecutive community control sanctions. The only limitation is that “[t]he duration of all community control sanctions imposed upon an offender under this division shall not exceed five years.”**

**Where a defendant has had consecutive community control sanctions imposed on him, and, for instance, the first is two years and the second is three years, and fewer than two years have passed since the first was imposed, the defendant cannot also violate the second community control sanction because it has not yet started. The two sanctions do not become one whole once imposed – they literally run consecutively.**

## Fourth Appellate District of Ohio

*Nothing new.*

## Fifth Appellate District of Ohio

*Nothing new.*

## Sixth Appellate District of Ohio

*Nothing new.*

## Seventh Appellate District of Ohio

**State v. Adams, 2014-Ohio-724**

**Sentencing: Plea Agreement**

**Full Decision:** <http://www.sconet.state.oh.us/rod/docs/pdf/7/2014/2014-ohio-724.pdf>

**It was plain error for the prosecution to breach the plea agreement it reached with Appellant by asking for a maximum sentence where it had agreed in writing and on the record to stand silent and make no sentencing recommendation. The case is remanded for resentencing.**

## Eighth Appellate District of Ohio

**State v. Shepherd, 2014-Ohio-827**

**Verdict: Aggravated Robbery: Robbery: Lesser Included Offense**

**Full Decision:**  
<http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2014/2014-ohio-827.pdf>

**Shepherd was charged with kidnapping and aggravated robbery. The rest simply requires quoting the opinion. You should read it:**

“A two-step analysis is conducted to determine when a factfinder is permitted to consider a lesser included offense: ‘(1) is the offense a lesser included offense of the charged offense, and (2) could the trier of fact reasonably find the defendant not guilty of the charged offense, but convict the defendant of the lesser included offense.’ *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶6.

“Shepherd contends that this charge of robbery was not available as a less offense of aggravated robbery as indicted. Shepherd concedes on appeal that robbery in violation of R.C. 2911.02(A)(1) is a lesser included offense of aggravated robbery as defined in R.C. 2911.01(A)(1) as provided under the law; however, the facts do not support a lesser-included finding; thus, not satisfying the second tier of the *Deanda* analysis.

“In order to convict Shepherd of the lesser included, the court had to believe that Shepherd had the gun in his possession or under his control, but did not display, brandish, indicate possession, or use it. The only testimony presented about the actual robbery was that of the victim. [The victim] testified that when he stepped off the elevator, a gun was immediately placed to the right side of his head behind his ear. He further testified: ‘[h]e hit me on the back of my head, like a tap with the gun.’ [The victim] responded to these actions by immediately lying down on the ground face down.

He testified that he ‘glanced’ and all he saw was ‘the gun.’ Although [the co-defendant] testified that Shepherd denied hitting [the victim], the evidence was that Shepherd displayed, brandished, and used the gun during the commission of the offense.

“The testimony, if believed is sufficient to support the indicted charged [sic] of aggravated robbery and the verdict that Shepherd was guilty of robbery. But a lesser offense may not be considered merely because the defendant could be found guilty of the offense. It may only be considered when the evidence is such that the defendant could reasonably have been found not guilty of the great offense but guilty of the lesser offense. The evidence in this case does not make that possible.

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“[T]he trial court in this case could not reasonably find Shepherd not guilty of aggravated robbery and guilty of robbery, since robbery would have nonetheless been based on the display and brandishing of the gun as a deadly weapon. Accordingly, the court erred in finding Shepherd guilty of a robbery in violation of R.C. 2911.02(A)(1) as a lesser included offense of aggravated robbery in violation of R.C. 2911.01(A)(1) because the evidence did not reasonably support both acquittal of the greater offense and conviction of the lesser offense. Therefore, the guilty verdict of robbery was improper.

“Because the conviction of the lesser offense serves as an implied acquittal on the great offense, Shepherd’s conviction for robbery is overturned and the case is dismissed.”

### **Ninth Appellate District of Ohio**

*Nothing new.*

### **Tenth Appellate District of Ohio**

*Nothing new.*

### **Eleventh Appellate District of Ohio**

*Nothing new.*

## Twelfth Appellate District of Ohio

*Nothing new.*

## Supreme Court of Ohio

### **Mansaray v. State, 2014-Ohio-750**

Wrongful Imprisonment: R.C. 2743.48(A)(5)

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2014/2014-ohio-750.pdf>

**Syllabus of the Court: “When a defendant seeks a declaration that he is a wrongfully imprisoned individual and seeks to satisfy R.C. 2743.48(A)(5) by proving that an error in procedure resulted in his release, the error in procedure must have occurred subsequent to sentencing and during or subsequent to imprisonment.”**

### **State v. Johnson, 2014-Ohio-770**

Appellate: Presentence-Investigation Reports: R.C. 2951.03: R.C. 2953.08

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2014/2014-ohio-770.pdf>

**Pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant’s presentence investigation report.**

### **State v. Romage, 2014-Ohio-783 \*\*MUST READ\*\***

R.C. 2905.05(A): Child Enticement

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2014/2014-ohio-783.pdf>

**Syllabus of the Court: “Ohio’s child-enticement statute, R.C. 2905.05(A), is unconstitutionally overbroad because it sweeps within its prohibitions a significant amount of constitutionally protected activity.”**

**State v. Manocchio, 2014-Ohio-785**

**Driver's License: Lifetime Suspension: R.C. 4510.021(A): Fifteen-Year  
Waiting Period: Former R.C. 4510.54(A)**

**Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2014/2014-ohio-785.pdf>**

**“We hold that when a trial court grants limited driving privileges and issues an entry in compliance with R.C. 4510.021(A), that grant is not a modification of a lifetime suspension within the meaning of former R.C. 4510.54(A).”**

**Sixth Circuit Court of Appeals**

*Nothing new.*

**Supreme Court of the United States**

*Nothing new.*