Appellate Court Decisions - Week of 3/4/13

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

First Appellate District of Ohio

***State v. Washington*, Appeal No. C-120583, Trial No. B-1202341**

Sex Offenses: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120583_03082013.pdf

"[A]n offender who was classified under Megan's Law, and who violates the reporting requirements of former R.C. 2950.05 after Megan's Law was replaced under Senate Bill 10 by the Adam Walsh Act, can only be subject to the penalty as expressed in the version of R.C. 2950.99 in place just before the effective date of the Adam Walsh Act—meaning the version of R.C. 2950.99 as amended by Senate Bill 5."

Where the defendant was originally convicted of rape and classified as a sexually-oriented offender under Megan's Law, pursuant to *State v. Howard*, __Ohio St.3d__, 2012-Ohio-5738, __N.E.2d__, the conviction for and penalty imposed on the defendant's failure-to-notify offense, which occurred after Senate Bill 10's effective date, must be that in place just before the effective date of Senate Bill 10, and the defendant must be convicted of and sentenced for a third-degree felony in accordance with the version of R.C. 2950.99 amended by Senate Bill 5.

Third Appellate District of Ohio

***State v. Zhovner*, Case No. 2-12-13, Trial Court No. 2012 TRD 01541**

Evidence: Judicial Notice: Ultralyte laser speed detector

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/3/2013/2013-ohio-749.pdf

Trial court erred in taking judicial notice of scientific reliability of Ultralyte Laser Speed Detector where trial court heard no expert testimony, the municipal courts in that area had never found the Ultralyte to be scientifically reliable, and the Third District and Ohio Supreme Court had also never found the Ultralyte or any other such laser device that uses the same scientific principles to be reliable.

The police officer in this case observed Zhovner's vehicle traveling at a speed he believed to be above the posted speed limit of 65 mph. He took two measurements of the

vehicle's speed with the Ultralyte laser speed detector. The first reading measured Zhovner's speed at 80 mph, the second at 79 mph. The officer stopped Zhovner and cited him for speeding in violation of R.C. 4511.21(D)(2).

During his bench trial, Zhovner argued pursuant to *State v. Miko*, 9th Dist. No. 07CA0018-M, 2008-Ohio-1991, that the trial court could not take judicial notice of the scientific reliability of the Ultralyte laser. The trial court disagreed and took judicial notice. The officer testified that he was trained and currently certified to operate the Ultralyte laser. There was no expert testimony on the scientific reliability of the Ultralyte laser. The court found Zhovner guilty of speeding.

On appeal, Zhovner contended that the trial court erred when it found the Ultralyte laser to be an accurate and reliable device without hearing expert testimony on the accuracy and reliability of the device. The Third District by stating that to "convict an individual of speeding based on a laser device, 'there must be evidence introduced at trial that the device is scientifically reliable.' *State v. Starks*, 196 Ohio App.3d 589, 2011-Ohio-2344 ¶21 (12th Dist.), citing *State v. Palmer*, 1st Dist. No. C-050750, 2006-Ohio-5456, ¶10; *see also State v. Helke*, 3d Dist. No. 8-07-04, 2007-Ohio-5483, ¶7 (to convict an individual for speeding based on a radar device, the state must prove, among other things, that the device was accurate and reliable), citing *State v. Kirkland*, 3d Dist. No. 8-97-22 (Mar. 2, 1998)." Also, it stated that "[t]he scientific reliability of a particular speed-measuring device can be established via expert testimony or judicial notice. *State v. Everett*, 3d Dist. No. 16-09-10, 2009-Ohio-6714, ¶6, citing *State v. Yuan*, 3d Dist. No. 8-07-22, 2008-Ohio-1902, ¶12."

The Third District said there are three ways to establish the reliability of a particular speed-measuring device: "(1) a reported municipal court decision, (2) a reported or unreported case from the appellate court, or (3) the previous consideration of expert testimony about a specific device where the trial court notes it on the record." *Yuan* at ¶12, citing *City of Cincinnati v. Levine*, 158 Ohio App.3d 657, 2004-Ohio-5992, ¶10 (1st Dist.). 'However, the fact that a court in one jurisdiction has taken judicial notice of a device's accuracy cannot serve as the basis for a court in another jurisdiction to take judicial notice.' *Columbus v. Bell*, 10th Dist. No. 09AP-1012, 2010-Ohio-2908, ¶14, citing *Columbus v. Dawson,* 10th Dist. No. 99AP-589 (Mar. 14, 2000); *Levine* at ¶8, citing *State v. Doles,* 70 Ohio App.2d 35 (10th Dist. 1980); *see also State v. Colby*, 14 Ohio App.3d 291, 291 (3d Dist. 1984)."

The Court held in this case that the trial court erred in taking judicial notice of the scientific reliability of the Ultralyte laser because there are no reported decisions from the municipal court where the trial took place finding that the Ultralyte laser or any other laser speed device that operates via the same scientific principles is scientifically reliable. Also, neither the Third District nor the Ohio Supreme Court have ever found the Ultralyte or any other such laser device that uses the same scientific principles to be reliable. Finally, there is no evidence that the trial court had previously heard expert testimony on the Ultralyte laser's scientific reliability.

Twelfth Appellate District of Ohio

***State v. Marlow*, Case No. CA2012-07-051**

Voyeurism: Use of a Minor in Nudity-Oriented Material: Merger: Allied Offenses of Similar Import

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/12/2013/2013-ohio-778.pdf

Voyeurism and illegal use of a minor in nudity-oriented material are allied offenses of similar import if committed with the same conduct.

Marlow pleaded guilty to one count of voyeurism and one count of illegal use of a minor in nudity-oriented material, both felonies of the fifth degree. He used a pen camera to film his minor sister-in-law in the bathroom. At the sentencing hearing, the trial court classified Marlow as a Tier I sex offender and sentenced him to three years of community control. The trial court did not do any allied offenses of similar import analysis and Marlow's trial counsel did not object.

The Twelfth District found on appeal that the two acts could be committed with the same conduct, and that in this instance, they actually were committed in a single act. Therefore, it held that voyeurism and illegal use of a minor in nudity-oriented material were allied offenses of similar import and should merge for sentencing.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.