

## Appellate Court Decisions - Week of 3/7/16

### First Appellate District of Ohio

#### **State v. Roberts, 2016-Ohio-903**

**OVI: Evidence: Sentencing**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-140331\\_03092016.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-140331_03092016.pdf)

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

“Defendant’s convictions for OVI with the repeat-offender specification, leaving the scene of an accident, and driving while under an OVI suspension were not against the manifest weight of the evidence where the record demonstrates that he was seen shortly after the accident surveying the damage to a vehicle matching the description of the vehicle involved in the accident, and he stated to a witness that he had just been in an accident.

“Questions of witness credibility are properly determined by the trier of fact.

“Defendant was not prejudiced by defense counsel’s alleged ineffectiveness where the record does not demonstrate that had counsel objected to the prosecutor’s improper statement in closing the result of the proceedings would have been different.

“The trial court’s imposition of five years’ incarceration for a third-degree-felony OVI was contrary to law, because the court was only permitted to impose a sentence of nine to 36 months.”

#### **State v. Bowers, 2016-Ohio-904**

**Evidence: Sex Offenses: Sentencing**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-150024\\_03092016.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-150024_03092016.pdf)

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

“The trial court did not commit plain error in allowing defendant’s then ex-wife to testify regarding the contents of jailhouse letters she had received from defendant, because the letters were not privileged spousal communications where the record showed that defendant had been estranged from his wife upon his arrest for the rape of a child, and that some of the letters had been sent after the parties had divorced.

“The trial court did not err in admitting a recorded interview between a child victim and a social worker at Cincinnati Children’s Hospital under Evid.R. 803(4) where the main purpose of the interview was to assess the child’s safety after the child indicated that she had been a victim of sexual abuse, the social worker asked open-ended questions or questions designed to give a choice between two opposing answers, the child indicated to the social worker that she knew the difference between the truth and a lie, the child had no motive to lie about the sexual abuse, and the child’s statements regarding the sexual abuse remained consistent over much of the hour-plus interview.

“The trial court erred in sentencing defendant under R.C. 2971.03(A) for rape of a child where the state did not include a sexually-violent-predator specification in the indictment.”

### **State v. Clark, 2016-Ohio-948**

#### **Constitutional law: Courtroom**

##### **Full Decision:**

<http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-948.pdf>

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

“The trial court’s order, following an episode of witness intimidation, that all spectators must present a valid form of identification before being allowed to enter the courtroom was a narrowly-tailored safety measure implemented to prevent witness intimidation and did not infringe upon the defendant’s constitutional right to a public trial.

“Because the hearing to determine whether there was probable cause to charge another individual with witness intimidation, which the trial court conducted during the defendant’s trial, was unrelated to the criminal charges faced by the defendant, the defendant’s absence from the hearing did not violate his Crim.R. 43(A) right to be present at all stages of the trial.”

#### **Second Appellate District of Ohio**

*Nothing new.*

#### **Third Appellate District of Ohio**

*Nothing new.*

#### **Fourth Appellate District of Ohio**

### **State v. Robinson, 2016-Ohio-905**

## Forfeiture

### Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/4/2016/2016-Ohio-905.pdf>

The trial court erred in ordering appellant's vehicle to be forfeited because the underlying trafficking in heroin offense that was the basis for the vehicle forfeiture specification merged into the possession of heroin offense.

## Fifth Appellate District of Ohio

*Nothing new.*

## Sixth Appellate District of Ohio

*Nothing new.*

## Seventh Appellate District of Ohio

*Nothing new.*

## Eighth Appellate District of Ohio

### ***State v. Dickerson, 2016-Ohio-807***

#### Ineffective Assistance: Preindictment Delay

### Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-807.pdf>

Trial counsel was ineffective for failing to timely file a motion to dismiss for preindictment delay. Appellant was accused of committing a rape 20 years prior. He "had a strong, viable claim of actual prejudice" because one of the witnesses – a potential co-defendant – died several years prior to Appellant's indictment. As the Eighth District put it, "a key witness who was with the victim for a number of hours was unavailable, and the victim herself was unable to account for the time."

### ***State v. Karłowicz, 2016-Ohio-925***

#### Sentencing: Allied Offenses

**Full Decision:**

<http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-925.pdf>

The trial court erred in sentencing appellant to consecutive sentences on two of his convictions for identity fraud – one under R.C. 2913.49(B)(1) and the other under (B)(2). The offenses were allied offenses of similar import and should have merged for sentencing purposes. The two convictions were based on appellant, after being stopped by a police officer, telling the police officer his name was “Shane,” his brother’s name, then using his brother’s ID card as his own. The two actions were committed with the same animus and motivation. They were not committed separately but rather at the same time.

***State v. Green, 2016-Ohio-926***

**Sentencing: Post-Release Control: Mandatory Fine: Ineffective Assistance**

**Full Decision:**

<http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-926.pdf>

Summary from the Eighth District: “The trial court incorrectly imposed a five year mandatory term for postrelease control. Because appellant was convicted of a second-degree felony, postrelease control is for a mandatory three-year period. Counsel was ineffective for failing to file an affidavit of indigency. The trial court was unable to waive the fine as it promised at sentencing without the affidavit being filed. The trial court imposed a sentence in its journal entry that was different than the sentence imposed at the sentencing hearing. The court can correct the error by issuing a nunc pro tunc entry.”

**Ninth Appellate District of Ohio**

***State v. Johnson, 2016-Ohio-872***

**Theft of Firearms: Sufficiency**

**Full Decision:**

<http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2016/2016-Ohio-872.pdf>

Appellant’s conviction for theft of firearms and a firearm specification were based on insufficient evidence where the State did not present any evidence the guns were operable.

### **State v. Lindow, 2016-Ohio-913**

Search: Motion to Suppress

Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2016/2016-Ohio-913.pdf>

The trial court erred in denying appellant's motion to suppress the search of his vehicle. Police did not detect the odor of marijuana until they unlocked the locked tool box in the bed of appellant's truck.

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

*Nothing new.*

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

*Nothing new.*

### **Twelfth Appellate District of Ohio**

### **State v. Velazquez, 2016-Ohio-875**

Plea Withdrawal: Immigration

Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/12/2016/2016-Ohio-875.pdf>

The trial court abused its discretion in denying appellant's R.C. 2943.031(D) motion to withdraw her guilty plea to a domestic violence charge because the original trial court failed to advise her of the immigration consequences of her guilty plea. This was 10 years after the original guilty plea, after appellant had successfully completed a diversion program, and after her domestic violence charges were dismissed because of the completion of the diversion program. Appellant did file the motion to her withdraw guilty plea within weeks of learning her 2005 guilty plea subjected her to deportation.

### **Supreme Court of Ohio**

*Nothing new.*

## Sixth Circuit Court of Appeals

*Nothing new.*

## Supreme Court of the United States

**Wearry v. Cain, 577 U.S. 2016**

Postconviction: Prosecution: Evidence: Failure to Disclose

Full Decision: [http://www.supremecourt.gov/opinions/15pdf/14-10008\\_k537.pdf](http://www.supremecourt.gov/opinions/15pdf/14-10008_k537.pdf)

**“Michael Wearry is on Louisiana’s death row. Urging that the prosecution failed to disclose evidence supporting his innocence and that his counsel provided ineffective assistance at trial, Wearry unsuccessfully sought postconviction relief in state court. Contrary to the state postconviction court, we conclude that the prosecution’s failure to disclose material evidence violated Wearry’s due process rights. We reverse the state postconviction court’s judgment on that account, and therefore do not reach Wearry’s ineffective-assistance-of-counsel claim.”**

**The evidence withheld: Police records showing the State’s star witness’s fellow inmates had made statements casting doubt on his credibility; the state’s other main witness had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry; and the prosecution failed to turn over medical records that discredited another witness’s testimony.**