Appellate Court Decisions - Week of 4/15/13

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

First Appellate District of Ohio

***State v. Green,* Appeal Nos. C-120269, C-120270; Trial Nos. B-1000217, B-1003635**

Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120269_04172013.pdf

The trial court erred by imposing consecutive prison terms without making the requisite statutory findings, and erred in sentencing defendant to terms of imprisonment of greater than 10 years for a first-degree felony committed before H.B. 86.

Summary from the First District:

Because the defendant was sentenced after the effective date of 2011 Am.Sub.H.B. 86, the trial court was required to make findings before it imposed consecutive sentences, and where the court did not make the required findings, the challenged sentences were contrary to law, and the case must be remanded for resentencing.

Since a trial court has no power to impose a sentence that is greater than that provided by law, where the defendant had committed a first-degree felony offense before the 2011 Am.Sub.H.B. 86 effective date, the trial court was authorized to impose no more than a 10-year sentence for that offense—the maximum penalty in effect prior to H.B. 86.

***State v. Campbell,* Appeal No. C-110627, Trial No. B-1101716**

Sex Offenses: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-110627_04192013.pdf

The 20-day notice prior to an address change in Senate Bill 10 also existed in Megan's Law, but under Megan's Law the offense should have been a felony of the third degree, not a second-degree felony (or first).

Summary from the First District:

Where the defendant was originally convicted of rape and classified as a sexually oriented offender under Megan's Law, and where the indictment alleged that the

defendant had failed to provide written notice at least 20 days prior to an address change, the trial court did not err in denying the defendant's motion to dismiss the indictment on the basis that Senate Bill 10 could not constitutionally be applied to the defendant because the defendant had an ongoing duty under Megan's Law to provide written notice 20 days prior to an address change, and his failure-to-notify offense was based upon that duty, which was the same under both Megan's Law and Senate Bill 10. *See State v. Brunning*, 134 Ohio St.3d 438, 2012-Ohio-5752, 983 N.E.2d 316.

Where the defendant was originally convicted of rape and classified as a sexually oriented offender under Megan's Law, the trial court erred in convicting the defendant of and sentencing him for a second-degree felony for failing to provide notice of an address change because, pursuant to *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341, he should have been convicted of and sentenced for a third-degree felony under the statutory scheme that was in place just prior to the January 1, 2008, effective date of Senate Bill 10.

***State v. Tye*, Appeal No. C-120562, Trial No. B-1201674**

Sex Offenses: Sentencing

Defendant convicted of rape and classified under Megan's Law should have been convicted and sentenced for a third-degree felony for failure to provide notice of an address change, not a first-degree felony.

Summary from the First District:

Where the defendant was originally convicted of rape and classified as a sexual predator under Megan's Law, the trial court erred in convicting the defendant of and sentencing him for a first-degree felony for failing to provide notice of an address change because, pursuant to *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341, he should have been convicted of and sentenced for a third-degree felony under the statutory scheme that was in place just prior to the January 1, 2008 effective date of the Adam Walsh Act.

Ninth Appellate District of Ohio

***State v. Ross*, C.A. No. 12CA0008, Case No. TRC-11-05-03983**

Marked Lanes Violation: R.C. 4511.33

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/9/2013/2013-ohio-1488.pdf

The state must present evidence that the driver of a vehicle moving either between lanes of traffic or completely out of a lane of traffic failed to ascertain the safety of such a move prior to making the move in order to convict the driver of a marked-lanes violation under R.C. 4511.33(A).

Ross was convicted of a marked-lanes violation and a seatbelt violation. He appealed the marked-lanes violation, and the Ninth District reversed. It concluded that "there was insufficient evidence to establish that, in moving between lanes of traffic or completely out of a lane of traffic, Mr. Ross failed to ascertain the safety of such movement prior to making the movement. *See* R.C. 4511.33(A)(1)." In other words, in order to convict someone of a marked-lanes violation under R.C. 4511.33(A), the state needs to present evidence that the driver of a vehicle moving either between lanes of traffic or completely out of a lane of traffic failed to ascertain the safety of such a move prior to making the move.

Supreme Court of Ohio

***In re M.M.*, 2013-Ohio-1495 (April 17, 2013)**

Appellate Procedure: R.C. 2945.67(A): Juvenile Cases: State's Appeals

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-1495.pdf

In juvenile cases, the state is not authorized to pursue a discretionary appeal when it fails to take an appeal as of right in accordance with the applicable rules of procedure.

Seven complaints were filed against M.M., a juvenile, alleging that he was delinquent for engaging in conduct that, had he been an adult, would have constituted rape and gross sexual imposition. M.M was 12 at the time and the alleged victims were siblings aged 8, 6, 4, and 2.

At trial, most of the victims' out-of-court statements were not allowed into evidence, and the two-year-old was found not to be competent to testify. The state also failed to elicit any coherent testimony from the victims. The defense therefore moved for dismissal pursuant to Juv.R. 29, and the court granted the motion.

The state sought leave to file a discretionary appeal under R.C. 2945.67(A). It argued that appellate review of the trial court's exclusion of evidence was permissible under *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644. Leave to appeal was initially granted, but after briefing and oral argument, the court of appeals determined that doing so was inadvertent, so it dismissed the appeal.

The question presented to the Ohio Supreme Court was as follows:

> The right to file an appeal pursuant to *State v. Bistricky*, 51 Ohio St.3d 157, 555 N.E.2d 644 (1990), is not waived if the state does not pursue an interlocutory remedy under Crim.R. 12(K) and Juv.R. 22(F). The existence of interlocutory remedies does not preclude the state from appealing

substantive legal issues involving the suppression or exclusion of evidence pursuant to *Bistricky*.

The Ohio Supreme Court said that it rejects the state's proposition because it lacks statutory support and ignores a governing rule of procedure. First, the Court said, the state's *Bistricky* argument is a red herring because only a statute, not a prior court decision, can give the state the substantive right to appeal. Second, the Court rejected the state's position, which it said would result in the state "having an option to seek leave to appeal pursuant to R.C. 2945.67(A) regarding a suppression ruling either immediately upon the ruling or later after the delinquency adjudication."

Finally, the Court held that in order to exercise its substantive right to appeal, the state must comply with the relevant rules of procedure – in this case, Juv.R. 22(F). It went on to say, "Juv.R. 22(F) plainly requires the state to file an interlocutory appeal if it wishes to seek review of an adverse decision that suppresses evidence. And it must do so, if at all, within seven days of the adverse decision. It further requires the prosecutor to certify that the appeal is not taken for purposes of delay and that the exclusion of the evidence seriously jeopardizes the state's case."

Sixth Circuit Court of Appeals

***United States v. Rose*, No. 11-4313**

Motion to Suppress: Probable Cause: Search and Seizure

Full Decision: http://www.ca6.uscourts.gov/opinions.pdf/13a0108p-06.pdf

Failure to provide an address in a search warrant is akin to a clerical error.

Rose pleaded guilty to three counts of production of child pornography in violation of 18 U.S.C. § 2251. Rose appealed the district court's denial of three motions: (1) a motion to suppress evidence; (2) a motion for a *Franks* hearing; and (3) a motion to dismiss the superseding indictment.

In November 2008, Cincinnati Police began investigating allegations that Rose had abused three minors. After interviewing the minors, the police sought to obtain a search warrant for 709 Elberon Ave., Cincinnati, OH. The front page of the search warrant identified "Kenneth Rose" as the subject of the search, and immediately below Rose's name, it identified the location to be searched as "709 Elberon Av. [sic], Cincinnati, Hamilton County, Ohio 45205." The warrant described the physical attributes of the address, including that the name "Rose" appeared over the doorbell of apartment number one. Attached to the warrant was a photograph of the property taken from the Hamilton County Auditor's website. The supporting affidavit summarized the testimony of the three victims, including testimony that Rose had shown two of the victims pornographic images on a computer "located in his room" or "located on his bedroom." The third victim testified that he engaged in nonconsensual sexual activity

with Rose beginning in July 2008. The affidavit explained that the police sought to obtain computers and related documentation.

However, the police officer did not provide Rose's address in the affidavit. Regardless, the magistrate granted the request for the search warrant, which was executed on November 12, 2008.

Rose was indicted by the grand jury for the Southern District of Ohio on April 15, 2009, with one count of possession of child pornography and five counts of production of child pornography. A superseding indictment was filed on November 3, 2012, charging 17 additional counts of production of child pornography. Rose moved for the evidence from the search to be suppressed, but that motion was denied. He also moved to dismiss the superseding indictment, then filed an omnibus motion requesting reconsideration of his motion to suppress and a *Franks* hearing. Those motions were denied as well.

Rose argued on appeal that the district court erred in denying his motion to suppress because the affidavit did not establish probable cause. Specifically, Rose argued that the affidavit failed to establish the required nexus between the place to be searched and the evidence sought.

The Sixth Circuit said, "[t]here is no way to read the affidavit and to conclude that the magistrate judge had a substantial basis for thinking that there was a fair probability that the evidence of the crimes described in the affidavit would be found at 709 Elberon Ave. As a result, the affidavit did not provide probable cause to believe that the items sought in the warrant were located at 709 Elberon Ave." Therefore, there was no probable cause to search 709 Elberon Ave.

Nevertheless, the Sixth Circuit said that the failure to provide an address is akin to a cleric error. Therefore, the question became whether the affidavit's failure to provide a connection between the evidence sought and 709 Elberon Ave. made the affidavit so bare bones that the search could not have been conducted in good faith. The Court held that in searching Rose's home, the officer exercised good faith and acted in objectively reasonable reliance on the warrant's legality.

The remaining issues are federal issues, so I will not address them.

Supreme Court of the United States

***Missouri v. McNeely*, No. 11-1425 (April 17, 2013)**

OVI: Fourth Amendment: Blood Test: Refusal: Warrant

Full Decision: http://www.supremecourt.gov/opinions/12pdf/11-1425_cb8e.pdf

"In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."

This is a split decision of the Court, but ultimately I believe this decision stands for a simple premise: The fact that a person's blood alcohol content (BAC) dissipates over time is not enough on its own to justify a warrantless blood draw and test for BAC. In other words, there need to be additional exigent circumstances, besides the fact that BAC dissipates over time and the fact that getting a warrant can be time consuming, to justify a warrantless blood test. The inquiry into exigent circumstances is a fact-specific, totality-of-the-circumstances test to be decided on a case-by-case basis. There is no *per se* rule. If the police officer obtains a legitimate warrant, then this argument becomes moot.

The obvious question, then, is what effect will this have in Ohio, and in particular on R.C. 4511.191(A)?

Based upon my reading of the decision, I don't believe there will be any effect on R.C. 4511.191(A)(1-4). I do believe, however, that there is a strong argument to be made that R.C. 4511.191(A)(5) is unconstitutional based upon this decision. That section is written as follows:

> (5)
>
> (a) If a law enforcement officer arrests a person for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance and if the person if convicted would be required to be sentenced under division (G)(1)(c), (d), or (e) of section 4511.19 of the Revised Code, the law enforcement officer shall request the person to submit, and the person shall submit, to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine for the purpose of determining the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine. A law enforcement officer who makes a request pursuant to this division that a person submit to a chemical test or tests is not required to advise the person of the consequences of submitting to, or refusing to submit to, the test or tests and is not required to give the person the form described in division (B) of section 4511.192 of the Revised Code, but the officer shall advise the person at the time of the arrest that if the person refuses to take a chemical test the officer may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. The officer shall also advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. Divisions (A)(3) and (4) of this section apply to the administration of a chemical test or tests pursuant to this division.

> (b) If a person refuses to submit to a chemical test upon a request made pursuant to division (A)(5)(a) of this section, the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma. A law enforcement officer who acts pursuant to this division to ensure that a person submits to a chemical test of the person's whole blood or blood serum or plasma is immune from criminal and civil liability based upon a claim for assault and battery or any other claim for the acts, unless the officer so acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

My initial reaction to this case is that any statute that makes a blood test mandatory could be unconstitutional, and I believe that's what R.C. 4511.191(A)(5) does. However, although the defendant in this case actually had two prior DUIs, there is no discussion in this case about a Missouri statute that escalates the penalty based upon having prior DUIs, or one that makes blood tests mandatory in such situations. Perhaps because of that, the Supreme Court refers to this DUI stop as a routine stop without any exigent circumstances. Therefore, I can only speculate on the effect this decision will have in R.C. 4511.191(A)(5) situations.

My advice, then, is simple. If you have a case where your client refused blood testing, the police did not get a warrant, and the police went ahead and had the blood drawn for testing anyway, then by all means refer to this case as a reason to suppress the test, even in an R.C. 4511.191(A)(5) situation. Obviously, there is no case law on this issue in Ohio, so it's worth giving it a shot. The threshold on exigent circumstances seems pretty low, as the basic issue in the *Schmerber v. California*, 384 U.S. 757, case cited by the Court was that the officer thought there was an emergency and extra time was needed to investigate the traffic accident, and that was enough for a warrantless blood draw. But, as I said above, this is a brand new case, so fire away.

For your reading pleasure, I've also included the syllabus of the U.S. Supreme Court.

Syllabus of the U.S. Supreme Court:

Respondent McNeely was stopped by a Missouri police officer for speeding and crossing the centerline. After declining to take a breath test to measure his blood alcohol concentration (BAC), he was arrested and taken to a nearby hospital for blood testing. The officer never attempted to secure a search warrant. McNeely refused to consent to the blood test, but the officer directed a lab technician to take a sample. McNeely's BAC tested well above the legal limit, and he was charged with driving while intoxicated (DWI). He moved to suppress the blood test result, arguing that taking his blood without a warrant violated his Fourth Amendment rights. The trial court agreed, concluding that the exigency exception to the warrant requirement did not apply because, apart from the fact that McNeely's blood alcohol was dissipating, no circumstances suggested that the officer faced an emergency. The State Supreme Court affirmed, relying on *Schmerber* v. *California*, 384 U. S. 757, in which this Court upheld

a DWI suspect's warrantless blood test where the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,'" *id.,* at 770. This case, the state court found, involved a routine DWI investigation where no factors other than the natural dissipation of blood alcohol suggested that there was an emergency, and, thus, the nonconsensual warrantless test violated McNeely's right to be free from unreasonable searches of his person.

Held: The judgment is affirmed.

358 S. W. 3d 65, affirmed.

JUSTICE SOTOMAYOR delivered the opinion of the Court with respect to Parts I, II-A, II-B, and IV, concluding that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. Pp. 4-13, 20-23.

(a) The principle that a warrantless search of the person is reasonable only if it falls within a recognized exception, see, *e.g., United States* v. *Robinson*, 414 U. S. 218, 224, applies here, where the search involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a blood sample to use as evidence in a criminal investigation. One recognized exception "applies when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.'"*Kentucky* v. *King*, 563 U. S. ____, ____. This Court looks to the totality of circumstances in determining whether an exigency exits. See*Brigham City* v. *Stuart*, 547 U. S. 398, 406. Applying this approach in *Schmerber,* the Court found a warrantless blood test reasonable after considering all of the facts and circumstances of that case and carefully basing its holding on those specific facts, including that alcohol levels decline after drinking stops and that testing was delayed while officers transported the injured suspect to the hospital and investigated the accident scene. Pp. 4-8.

(b) The State nonetheless seeks a *per se* rule, contending that exigent circumstances necessarily exist when an officer has probable cause to believe a person has been driving under the influence of alcohol because BAC evidence is inherently evanescent. Though a person's blood alcohol level declines until the alcohol is eliminated, it does not follow that the Court should depart from careful case-by-case assessment of exigency. When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See*McDonald* v. *United States*, 335 U. S. 451, 456. Circumstances may make obtaining a warrant impractical such that the alcohol's dissipation will support an exigency, but that is a reason to decide each case on its facts, as in *Schmerber*, not to accept the "considerable overgeneralization" that a *per se* rule would reflect, *Richards* v. *Wisconsin*, 520 U. S. 385, 393. Blood testing is different in critical respects from other destruction-of-evidence cases. Unlike a situation where, *e.g.,* a suspect has control over easily disposable evidence, see *Cupp* v. *Murphy*, 412 U. S. 291, 296, BAC evidence naturally

dissipates in a gradual and relatively predictable manner. Moreover, because an officer must typically take a DWI suspect to a medical facility and obtain a trained medical professional's assistance before having a blood test conducted, some delay between the time of the arrest or accident and time of the test is inevitable regardless of whether a warrant is obtained. The State's rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence supporting probable cause is simple. The natural dissipation of alcohol in the blood may support an exigency finding in a specific case, as it did in *Schmerber*, but it does not do so categorically. Pp. 8-13.

(c) Because the State sought a *per se* rule here, it did not argue that there were exigent circumstances in this particular case. The arguments and the record thus do not provide the Court with an adequate framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. Pp. 20-23.

JUSTICE SOTOMAYOR, joined by JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE KAGAN, concluded in Part III that other arguments advanced by the State and *amici* in support of a *per se* rule are unpersuasive. Their concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers may make the desire for a bright-line rule understandable, but the Fourth Amendment will not tolerate adoption of an overly broad categorical approach in this context. A fact-intensive, totality of the circumstances, approach is hardly unique within this Court's Fourth Amendment jurisprudence. See, *e.g., Illinois* v. *Wardlow*, 528 U. S. 119, 123-125. They also contend that the privacy interest implicated here is minimal. But motorists' diminished expectation of privacy does not diminish their privacy interest in preventing a government agent from piercing their skin. And though a blood test conducted in a medical setting by trained personnel is less intrusive than other bodily invasions, this Court has never retreated from its recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests. Finally, the government's general interest in combating drunk driving does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. Pp. 15-20.

JUDGES: SOTOMAYOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, II-B, and IV, in which SCALIA, KENNEDY, GINSBURG, and KAGAN, JJ., joined, and an opinion with respect to Parts II-C and III, in which SCALIA, GINSBURG, and KAGAN, JJ., joined. KENNEDY, J., filed an opinion concurring in part. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which BREYER and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion.