Appellate Court Decisions - Week of 4/18/16

First Appellate District of Ohio

***State v. Beasley*, 2016-Ohio-1603**

Appellate Review: Crim.R. 11: Pleas

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-1603.pdf

Summary from the First District:

"A trial court's blanket policy of refusing to accept no-contest pleas is error; but the alleged error was not preserved and defendant forfeited her right to raise that issue on appeal where defendant's counsel stated that defendant would have entered a no-contest plea but for the trial court's policy against accepting such pleas, but the court's statement of its policy had occurred in chambers and no other mention of the policy appeared on the record, and defendant never attempted to plead no contest on the record. [*But see* DISSENT: The trial court abused its discretion in refusing to accept defendant's no-contest plea based upon its blanket policy: if defense counsel's statement as to the trial court's policy had been incorrect neither the trial court nor the lawyers, pursuant to their ethical duty of candor, would have agreed to the statement on the record, and no reason existed for defendant to enter a no-contest plea on the record when doing so would have been futile.]"

Second Appellate District of Ohio

***State v. C.W.*, 2016-Ohio-1558**

Evidence: Hearsay

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2016/2016-Ohio-1558.pdf

The State appealed the juvenile court's judgment denying its motion to admit a minor's out-of-court statement pursuant to Evid.R. 807. The minor was determined to be incompetent to be testify by the juvenile court. The Second District held that the juvenile court did not err because the State failed to provide a prima facie showing of independent proof of the act of physical violence necessary to admit the hearsay under Evid.R. 807. Here, although the State provided a video allegedly showing the incident, the video was of very poor quality and did not show the alleged slap that was the basis of the charge.

***State v. Dillon*, 2016-Ohio-1561**

Evidence: Hearsay

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2016/2016-Ohio-1561.pdf

Appellant was convicted of aggravated murder (prior calculation and design) for killing his mother, along with purposeful murder and felony murder. He was also found guilty of receiving stolen property and evidence tampering.

The trial court erred in admitting into evidence a letter Appellant's mother had written to the trial court in connection with a 2009 criminal case involving Appellant. The letter accused Appellant of being a bully who threatens his parents daily, including threating to kill them or burn their house down, among other things. The State relied on the letter to prove Appellant's motive and to prove prior calculation and design. The Second District found the letter was hearsay and was offered to prove the truth of the matter asserted. It was not admissible under any exception argued by the State. The trial court abused its discretion in allowing the letter to be admitted. With regard to the aggravated-murder conviction, the error was not harmless beyond a reasonable doubt. It was harmless, however, with regard to the purposeful murder and felony murder convictions.

The trial court also abused its discretion in allowing the State to use against him evidence that he had viewed pornography on the internet and had several white-supremacist screen names – but it did not amount to plain error.

Third Appellate District of Ohio

***State v. Sutherly*, 2016-Ohio-1574**

Jurisdiction: Dismissal

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/3/2016/2016-Ohio-1574.pdf

In 2014, a criminal complaint against Appellant was filed charging him with one count of public indecency. A couple of weeks later, an amended complaint was filed charging him with the same crime, but this time it omitted reference to the degree of misdemeanor being charged. A month later, the case was dismissed without prejudice because the State failed to

serve Appellant with the summons. Six days later the dismissal was vacated, allegedly because of a clerical error. Ten days after that, Appellant pleaded not guilty. Eight months after that, the matter proceeded to a jury trial at the conclusion of which Appellant was found guilty.

The Third District elected to determine whether the dismissal actually contained a clerical error because if it did not, the trial court did not have jurisdiction to vacate the dismissal. The State argued that the clerical error was when the police officer returned the summons as being expired but it was not. The Third District rejected that argument. There was nothing in the record to suggest the officer inadvertently returned the summons for failure to serve Appellant when the officer had, in fact, served Appellant. Instead, the summons clearly showed Appellant was not served when the summons was returned. It did not matter that the officer was wrong in concluding that the time for service had expired. The Third District held that the dismissal remained a final judgment. The trial court then lacked jurisdiction to reopen the case, sua sponte, which was previously dismissed. Appellant's conviction and sentence were void and were reversed.

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

Nothing new.

Eighth Appellate District of Ohio

***State v. Garner*, 2016-Ohio-2623**

Sentencing: GSI

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-2623.pdf

"[T]he trial court plainly erred by sentencing [Appellant] to 25 years on each GSI charge. As mandated by R.C. 2971.03(A)(3)(a), the court was

required to impose an indefinite term of imprisonment, consisting of a minimum term fixed by the court among the range of terms available as a definite term for GSI offenses, but not less than two years, and a maximum term of life."

***State v. Webster*, 2016-Ohio-2624**

Obstruction of Justice

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-2624.pdf

Appellant's conviction for obstruction of justice under R.C. 2929.32(A)(3) for warning a person that he was named on the indictment for a robbery was based on insufficient evidence. There was no direct evidence Appellant's instructions to warn the person were actually carried out. However, there was sufficient evidence that Appellant attempted to warn the person, so the Eighth District reduced his judgment of conviction from obstruction of justice in violation of R.C. 2921.32(A)(3) to attempted obstruction of justice pursuant to R.C. 2923.02 and R.C. 2921.32(A)(3).

Ninth Appellate District of Ohio

Nothing new.

Tenth Appellate District of Ohio

***State v. Lytle*, 2016-Ohio-1552**

Kidnapping: Sufficiency

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2016/2016-Ohio-1552.pdf

One of Appellant's convictions was for conspiracy to commit kidnapping. It was based on his contacting a person and asking that person if he would be willing to find someone for him that would be willing to cut up his wife's face. That conviction was based on insufficient evidence because, while there may have been sufficient evidence to support that Appellant reached an agreement with the first person to cut up his wife's face, and that he engaged in an overt act, there was not sufficient evidence to support that the conduct Appellant proposed constituted kidnapping.

***State v. Almedom*, 2016-Ohio-1553**

Ineffective Assistance

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2016/2016-Ohio-1553.pdf

Trial counsel was ineffective for failing to object to the trial court consistently referring to the alleged victims as "victims," "which, in essence, was telling the members of the jury that the [alleged victims] were truthful when they claimed that sexual abuse occurred, as opposed to telling the jury [Appellant] was truthful in his denial, or refusing to comment on the credibility of any potential witness." The prosecuting attorney also referred to the alleged victims as "victims" without objection from trial counsel.

At the close of the State's case, one of the three alleged victims was not called as a witness and the charge involving her was dismissed upon the State's motion, but trial counsel did not move for a mistrial or ask for a limiting jury instruction. Trial counsel, despite the fact that this case could have put Appellant in prison for the rest of his life, filed no pre-trial motions other than a motion for a bill of particulars. Trial counsel did not file a motion to determine the competency of the alleged victims despite the fact that the youngest of the three was only six years old as of the trial date. Trial counsel also did not object to huge portions of the State's evidence, including extrajudicial interviews of the alleged victims.

The Tenth District said, "We are not saying that the [alleged victims] were not being truthful. We are not saying [Appellant] was being truthful. We are saying the conduct of the trial judge when linked with the deficient conduct of defense counsel denied [Appellant] of the opportunity for a fair trial – a trial in which his defense could be fairly considered."

***State v. Hill*, 2016-Ohio-1551**

Sealing Record: Attempted Burglary

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2016/2016-Ohio-1551.pdf

The trial court did not err when it granted Appellee's application to seal the record of her attempted burglary conviction. (Which, of course, is all over this opinion now, so the State won even when it lost by appealing.) The State argued that under R.C. 2953.36(F), because the victim of Appellee's attempted burglary conviction was 13-years-old, Appellee's conviction could

not be sealed. The complaint indicated that Appellee entered a house by kicking in the rear door, and that her purpose upon entering the house was to cause harm to the 13-year-old. There was nothing in the record to indicate Appellee succeeded in that purpose, and there was nothing in the record indicating the 13-year-old was actually present in the house Appellee entered. The version of burglary that Appellee ultimately pled guilty to did not require that she enter the house with the purpose to commit a criminal offense therein. Because the victim of the attempted burglary was the homeowner, not the 13-year-old, and the homeowner could not have been a minor. For those reasons, the trial court did not abuse its discretion in granting Appellee's application.

Eleventh Appellate District of Ohio

Nothing new.

Twelfth Appellate District of Ohio

Nothing new.

Supreme Court of Ohio

***State v. Arnold*, 2016-Ohio-1595**

Constitutional Law: Fifth Amendment: Sixth Amendment: Confrontation

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-1595.pdf

"In this appeal, we address the manner in which trial courts should analyze a witness's assertion of the constitutional right against self-incrimination. We further consider the manner in which appellate courts should evaluate a defendant's assertion, for the first time on appeal, that the trial court violated his right to confront witnesses. Because we hold that any error in the trial court's handling of the claim of privilege during the trial in this cause was harmless beyond a reasonable doubt and that there was no Confrontation Clause violation, we affirm the judgment of the court of appeals * * *."

Feel free to read this one. It's a mess. There are three dissents and one concurrence. Long story short, the alleged victim of Appellant's domestic violence raised his Fifth Amendment privilege and would not testify at trial. Nobody ever explained why he might incriminate himself. When the prosecutor and the court had him read his prior statement to police, the defense objected based on the fact that the alleged victim had raised his Fifth Amendment privilege. The Supreme Court held he lacked standing to

do so, and was not deprived of a fair trial or the right to confront the witnesses against him. Also, even if the making the alleged victim read his prior statement was error, the Court said it was harmless error because the other properly admitted evidence supported the conviction beyond a reasonable doubt.

***State v. Obermiller*, 2016-Ohio-1594**

Aggravated Murder: Death Penalty

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-1594.pdf

The Supreme Court affirmed Appellant's convictions and death sentence. Justices Pfiefer and O'Neill dissented from the affirmance of the imposition of the death penalty because of "the unacceptable absence of mitigation evidence."

***State v. Belton*, 2016-Ohio-1581**

Aggravated Murder: Death Penalty: Sentencing

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-1581.pdf

The Supreme Court affirmed Appellant's convictions and death sentence. It also said that a capital defendant does not have a right to a jury during the sentencing phase of trial when he has waived the right to have a jury determine whether he was guilty.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

***Welch v. United States*, No. 15-6418**

Constitution: Rules of Criminal Procedure

Full Decision: http://www.supremecourt.gov/opinions/15pdf/15-6418_2q24.pdf

Syllabus of the Court:

"Federal law makes the possession of a firearm by a felon a crime punishable by a prison term of up to 10 years, 18 U. S. C. §§922(g), 924(a)(2), but the Armed Career Criminal Act of 1984 increases that sentence to a mandatory 15 years to life if the offender has three or more prior convictions for a 'serious drug offense' or a 'violent felony,' §924(e)(1). The definition of "violent felony" includes the so-called residual clause, covering any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B)(ii). In *Johnson v. United States*, 576 U. S. ___, this Court held that clause unconstitutional under the void-for-vagueness doctrine.

"Petitioner Welch was sentenced under the Armed Career Criminal Act before Johnson was decided. On direct review, the Eleventh Circuit affirmed his sentence, holding that Welch's prior Florida conviction for robbery qualified as a 'violent felony' under the residual clause. After his conviction became final, Welch sought collateral relief under 28 U.S.C. §2255, which the District Court denied. The Eleventh Circuit then denied Welch a certificate of appealability. Three weeks later, this Court decided *Johnson*. Welch now seeks the retroactive application of *Johnson* to his case.

"*Held*: *Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review."

* * *

"New constitutional rules of criminal procedure generally do not apply retroactively to cases on collateral review, but new substantive rules do apply retroactively. *Teague v. Lane*, 489 U. S. 288, 310; *Schriro v. Summerlin*, 542 U. S. 348, 351. Substantive rules alter "the range of conduct or the class of persons that the law punishes," id., at 353. Procedural rules, by contrast, 'regulate only the manner of determining the defendant's culpability.' Ibid. Under this framework, *Johnson* is substantive. Before *Johnson*, the residual clause could cause an offender to face a prison sentence of at least 15 years instead of at most 10. Since *Johnson* made the clause invalid, it can no longer mandate or authorize any sentence. By the same logic, *Johnson* is not procedural, since it had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Act, see *Schriro*, *supra*, at 353."