Appellate Court Decisions - Week of 4/22/13

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

First Appellate District of Ohio

***State v. Pulley*, Appeal No. C-120444, Trial No. B-110552**

Counsel: Drugs: Evidence/Witness/Trial: Postrelease Control: Procedure/Rules: Prosecutor: Search and Seizure

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120444_04242013.pdf

The trial court did not need to inform defendant of the possibility of postrelease control when it did not impose a prison term.

The trial court did not err in denying defendant's request for new counsel where, although trial counsel filed a motion to suppress late, the motion was still heard and the trial counsel was otherwise prepared.

The trial court did not err in not sanctioning the state's police witnesses for violating the court's separation order where it made a detailed inquiry into what the officers talked about between the motion to suppress and the trial. The remedy for such violations is in the court's discretion.

There was no prosecutorial misconduct for violations of Crim. R. 16 where there were two bundles of marijuana found on defendant, but only one bundle was tested by a lab, and that lab report was turned over.

The trial court did not impermissibly allow an officer to testify about defendant's exercise of her right to remain silent where defendant's statements were voluntary and made without prompting.

The trial court did not err in not granting defendant's motion to suppress the marijuana found on her where there was a strong odor of marijuana emanating from defendant.

Defendant's conviction for trafficking in marijuana was based on sufficient evidence and was not against the manifest weight of the evidence where defendant had 92 grams of marijuana on her person, hidden in her groin region, and $4500 hidden on her chest.

Summary from the First District:

The trial court was not required to inform the defendant about the potential of postrelease-control supervision where the court did not impose a prison term, but instead imposed community control.

The trial court did not err in denying the defendant's request for new counsel where the defendant did not explain why she believed her counsel was unprepared and where the defendant did not demonstrate that there had been a complete breakdown in communication between her and her counsel.

The trial court did not abuse its discretion in refusing to exclude police witnesses or otherwise sanction the state even though the police officers had discussed the case in violation of the court's separation order where there was no demonstration that the state had any knowledge of the officers' violation of the court's order and where the court determined, after hearing from the officers, that the discussion would not impact their testimony.

There was no prosecutorial misconduct under Crim.R. 16 where the state disclosed prior to trial the entire laboratory report that had been prepared by the crime lab, which had analyzed one of two bundles found on the defendant and had determined that it contained marijuana: the police officer who testified that he had weighed the two bundles at the police station did not prepare a report and so there was no report to disclose, and the defendant had had ample opportunity to weight the bundles.

The trial court did not err in allowing a police officer to testify that the defendant did not initially answer when asked about money found on her person where the defendant did not unequivocally assert her right to remain silent and where the defendant volunteered an account of where the money had come from.

The trial court did not err in refusing to suppress evidence seized from the defendant because the police officers had probable cause to search the defendant based on the strong odor of marijuana emanating from her.

The trial court did not err in refusing to suppress statements made by the defendant to police where the defendant had made the statements voluntarily, and not in response to any questions by police.

The defendant's conviction for trafficking in marijuana was not based on insufficient evidence or against the weight of the evidence where the state's evidence, including the amount of marijuana and the way the defendant had hidden it, and the large amount of money the defendant was carrying, belied her contention that the marijuana was for her personal use.

***State v. Bowling*, Appeal No. C-100323, Trial No. B-0903357**

Constitutional Law/Criminal: Sex Offenses: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-100323_04242013.pdf

Defendant's plea was made knowingly, intelligently, and voluntarily despite the fact that he was on prescription opiates for pain because the trial court conducted a meaningful dialogue with defendant to ensure his plea was made knowingly, voluntarily, and intelligently.

Trial counsel was not ineffective where the record did not indicate, and defendant failed to show, that trial counsel promised defendant would receive probation in exchange for pleading guilty.

Defendant was originally classified as a sexual predator under Megan's Law, then reclassified as Tier III under the Adam Walsh Act. It was not error to convict defendant of failure-to-notify offense because the 20-day prior to change of address rule had not changed, but it was error to convict him of a second-degree felony when it would have been a third-degree felony under Megan's Law.

Summary from the First District:

The trial court did not err in accepting the defendant's guilty plea because the record showed that it was made knowingly, intelligently, and voluntarily where the trial court conducted a thorough Crim.R. 11(C) colloquy with the defendant, the defendant indicated that his prescription medication did not affect his ability to understand the proceedings, the trial court noted on the record that the defendant did not appear to be affected by medication, and there is no indication in the record that the defendant was confused or that he did not understand the nature of the proceedings or the consequences of his plea.

Where the defendant was originally convicted of rape and classified as a sexual predator 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 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 sexual predator 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. Dye*, Appeal No. C-120483, Trial No. B-0100606**

Postsentence Motion to Withdraw Guilty Plea: Postrelease Control

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120483_04242013.pdf

The trial court did not abuse its discretion by overruling defendant's postsentence Crim.R. 32.1 motion to withdraw his guilty pleas, or in declining to conduct an evidentiary hearing on the motion, when defendant failed to sustain his burden of demonstrating that the withdrawal of the pleas was necessary to correct a manifest injustice.

Defendant's sentences were void and were subject to correction where he was not adequately notified concerning postrelease control.

Summary from the First District:

The common pleas court did not abuse its discretion in overruling defendant's postsentence Crim.R. 32.1 motion to withdraw his guilty pleas, or in declining to conduct an evidentiary hearing on the motion, when defendant failed to sustain his burden of demonstrating that withdrawal of the pleas was necessary to correct a manifest injustice: the court properly discounted the credibility of the supporting affidavits to the extent that they conflicted with matters disclosed in the transcript of the plea and sentencing hearing; and defendant failed to otherwise demonstrate that his guilty pleas had been unknowing or unintelligent.

In his appeal from the overruling of his motion to withdraw his guilty pleas, defendant's sentences were subject to remand for correction of postrelease-control notification: the sentences were void to the extent that he had not been adequately notified concerning postrelease control; and the sentences were subject to review and correction, when his appellate brief brought the matter to the appeals court's attention.

***State v. Thomas*, Appeal No. C-120557, Trial No. B-1201049**

Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120557_04242013.pdf

It was error for the trial court to sentence defendant to concurrent five-year sentences for offenses that carried maximum sentences of 36 months.

Defendant was convicted of trafficking in cocaine and possessing a weapon under disability, both felonies of the third degree. Defendant and the state agreed to an

aggregate term of five years in prison. At sentencing, the trial court stated it would impose 36 months for the trafficking offense, and 24 months consecutive for the weapon charge. However, in the sentencing entry, the trial court imposed two concurrent five-year terms.

The First District held that, because a defendant may appeal an agreed sentence if it is not authorized by law, and the maximum term of incarceration for the offenses in this case was 36 months, the sentences must be vacated and the cause remanded for resentencing.

***State v. Allen*, Appeal Nos. C-120358, C-120359; Trial Nos. 12CRB-3182(A-B)**

Jurisdiction

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120358_04262013.pdf

The trial court lacked subject-matter jurisdiction because the complaint did not meet the requirements of Crim. R. 3 where the police officer in a prostitution sting signed and dated the complaint before the crime occurred, then, after defendant's arrest, another officer filled in the facts and details of the crime.

Summary from the First District:

Where a police officer signed and dated the criminal complaint before the crime occurred and then, after the crime had been committed, another officer filled in the facts and details of the crime under the first officer's signature, the complaint did not meet the requirements of Crim.R. 3 because it was not made under oath and, therefore, the trial court lacked subject-matter jurisdiction to hear the case.

Second Appellate District of Ohio

***Ohio v. Smith*, Appellate Case No. 24402, Trial Court Case No. 07-CR-4895**

Voir Dire: Challenges for Cause

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/2/2013/2013-ohio-1586.pdf

The trial court erred in sustaining the State's challenge of one prospective juror for cause because, although the juror has been in America since 1969, she is an immigrant and has some problem with some words, and did not originally understand the word "preponderance," she did understand it when explained to her.

From the opinion, ¶19:

"We find no basis in the record for the trial court's finding that prospective juror no. 11's knowledge of English was insufficient to permit her to understand the facts and law in the case. After 23 transcript pages of preliminary instructions and voir dire conducted by the trial court, prospective juror no. 11 told the trial judge that the only word she had not understood was the word "preponderance," not used in the phrase "preponderance of the evidence," but used by itself as one of two possible standards of proof in a civil trial. When the trial court then explained the concept of "preponderance of the evidence," prospective juror no. 11 said that she understood it, with no hesitation or apparent uncertainty. There is no other indication in this record that this prospective juror's knowledge of English was insufficient to permit her to understand the facts and the law of the case."

***State v. Brown*, Appellate Case No. 25285, Trial Court Case No. 2011-CR-4307**

Trial Court Interrogation

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/2/2013/2013-ohio-1579.pdf

There's honestly no way I can think of to summarize this opinion. The Second District said that the trial court, in its questioning, crossed the line from neutral interrogation to partisan cross-examination of Brown on the issue of his ability to pay support. The Second District quotes the trial transcript extensively, so reading the opinion is the only way to understand how it reached that conclusion.

Eighth Appellate District of Ohio

***State v. Coleman*, Nos. 98557 and 98558**

Sentencing

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/8/2013/2013-ohio-1658.pdf

R.C. 2929.13(B)(1)(a), which creates a presumption in favor of community control sanctions for crimes meeting certain criteria, in the version that existed before the passage of Am.Sub.S.B. 160, has a two-year time limitation that applies to both misdemeanor offenses of violence and felonies, not just misdemeanor offenses of violence.

Eleventh Appellate District of Ohio

***State v. Adams*, Case No. 2012-A-0025**

Possession of Heroin: Constructive Possession

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/11/2013/2013-ohio-1603.pdf

Where defendant had no heroin in his home, but evidence of a heroin business, including a Mason jar with heroin inside, was located on property adjoining defendant's, and that evidence matched the evidence inside the home, that was constructive possession and defendant was guilty of possession of heroin.

Adams was convicted of three counts of Trafficking in Heroin and one count of Possession of Heroin. At trial, a member of the Trumbull Ashtabula Group (TAG) Task Force, James Byler, testified that he participated in a heroin buy from Adams. He and Adams discussed Adams placing the heroin in a bucket in the back of Byler's truck at a later time, as he did not have heroin at that time. Byler later returned to Adams' home, but he still did not receive any heroin. However, Byler did see a brown substance he believed to be heroin in Adams' kitchen. Byler again did not pay for heroin, but agreed to pay later. About a week later, Byler found heroin in a toolbox in his truck after Adams told him to look there.

Damian Schultz also testified regarding two heroin purchases he made from Adams while working with the TAG Task Force. When Schultz requested heroin from Adams on the first buy, Adams removed the heroin from a bag within a clear Mason jar.

Following the drug buys, a search warrant was obtained for Adams' residence. Detective Brian Cumberledge, with the Ashtabula County Sherriff's Office, assisted in executing the search warrant. While searching the land, Cumberledge found a weapon and ammunition in a field approximately 100 feet from Adams' home. He also saw many Mason jars and other items scattered about the perimeter for the property. There was no trail in the ground from Adams' home to the location of the items found in the field, and the property did not belong to Adams.

Detective Tony Villanueva, a member of the TAG Task Force, also took part in the search. He searched a fire pit in the field area and found a Mason jar spray painted green that contained marijuana. He also found another Mason jar spray painted green that contained heroin. Again, the fire pit was not on Adams property, but there were no other houses nearby on that side of the street.

Deputy Anthony Mino of the Ashtabula County Sherriff's Department testified that he found a "press" wrapped in plastic outside, just past Adams' property line, and that the heroin found on the property looked like it had been pressed. He also testified that there was a path in the grass that led to some of the weapons and items found inside.

Melanie Gambill, a member of the TAG Task Force, searched inside Adams' home and found a scale weight, digital scale, a Mason jar with dirt on the lid, another lid with dirt on it in the freezer, plastic baggies, and lottery tickets.

Detective Richard Tackett of the TAG Task Force testified that several empty Mason jars spray painted green were found outside home and in the yard, including a green jar containing marijuana. The jar of heroin was found 101 feet outside Adams' home. He said there was $2,960 found inside, but no heroin.

Detective Greg Leonhard of the TAG Task Force testified that he found several Mason jars in a box in the same room as a green can of spray paint, which seemed "pretty new" and fully, but a BCI test showed that the green spray paint can found in the house did not match the spray paint on the Mason jars.

Adams challenged the sufficiency and weight of the evidence as it relates to his conviction for Possession of Heroin. He argued that the only evidence of drug possession was the Mason Jar with heroin in it 101 feet from his residence on adjoining property, and that there was no physical evidence submitted tying him to the jar of heroin.

The Eleventh District held that there was sufficient evidence to support a finding that Adams was in constructive possession of the heroin and his conviction was not against the manifest weight of the evidence. It said the Mason jar used to store the heroin was consistent with those found inside the home. Schultz testified that the heroin he bought from Adams was taken from a glass jar. Green spray paint was found in the home next to Mason jars. Several of the jars inside Adams' home had dirt on them. All of the foregoing, along with a lack of evidence that others had access to the adjoining property, led to the conclusion that there was sufficient evidence for constructive possession of heroin.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

***Moncrieffe v. Holder*, No. 11-702, Decided April 23, 2013**

Immigration: Felonies: Deportation

Full Decision: http://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf

If you have a client who could face deportation for their offense, please consider this opinion.

From the ABA: The Court reversed and remanded the decision of the United States Court of Appeals for the Fifth Circuit, holding that if a non-citizen's state felony conviction for marijuana distribution does not involve either remuneration or a significant amount of marijuana then the conviction is not an aggravated felony for the purposes of the Immigration and Nationality Act.

Syllabus of the Supreme Court of the United States:

Under the Immigration and Nationality Act (INA), a noncitizen convicted of an "aggravated felony" is not only deportable, 8 U. S. C. §1227(a)(2)(A)(iii), but also ineligible for discretionary relief. The INA lists as an "aggravated felony" "illicit trafficking in a controlled substance," §1101(a)(43)(B), which, as relevant here, includes the conviction of an offense that the Controlled Substances Act (CSA) makes punishable as a felony, *i.e.,* by more than one year's imprisonment, see 18 U. S. C. §§924(c)(2), 3559(a)(5). A conviction under state law "constitutes a 'felony punishable under the [CSA]' only if it proscribes conduct punishable as a felony under that federal law." *Lopez* v. *Gonzales*, 549 U. S. 47, 60, 127 S. Ct. 625, 166 L. Ed. 2d 462.

Petitioner Moncrieffe, a Jamaican citizen here legally, was found by police to have 1.3 grams of marijuana in his car. He pleaded guilty under Georgia law to possession of marijuana with intent to distribute. The Federal Government sought to deport him, reasoning that his conviction was an aggravated felony because possession of marijuana with intent to distribute is a CSA offense, 21 U. S. C. §841(a), punishable by up to five years' imprisonment, §841(b)(1)(D). An Immigration Judge ordered Moncrieffe removed, and the Board of Immigration Appeals affirmed. The Fifth Circuit denied Moncrieffe's petition for review, rejecting his reliance on §841(b)(4), which makes marijuana distribution punishable as a misdemeanor if the offense involves a small amount for no remuneration, and holding that the felony provision, §841(b)(1)(D), provides the default punishment for his offense.

Held: If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony under the INA. Pp. 4-22.

(a) Under the categorical approach generally employed to determine whether a state offense is comparable to an offense listed in the INA, see, *e.g.*,*Nijhawan* v. *Holder*, 557 U. S. 29, 33-38, 129 S. Ct. 2294, 174 L. Ed. 2d 22, the noncitizen's actual conduct is irrelevant. Instead "the state statute defining the crime of conviction" is examined to see whether it fits within the "generic" federal definition of a corresponding aggravated felony.*Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 186, 127 S. Ct. 815, 166 L. Ed. 2d 683. The state offense is a categorical match only if a conviction of that offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Shepard* v. *United States*, 544 U. S. 13, 24, 125 S. Ct. 1254, 161 L. Ed. 2d 205.

Because this Court examines what the state conviction necessarily involved and not the facts underlying the case, it presumes that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, before determining whether even those acts are encompassed by the generic federal offense. *Johnson* v. *United States*, 559 U. S. 133, 137, 130 S. Ct. 1265, 176 L. Ed. 2d 1. Pp. 4-6.

(b) The categorical approach applies here because "illicit trafficking in a controlled substance" is a "generic crim[e]." *Nijhawan*, 557 U. S., at 37, 129 S. Ct. 2294, 174 L. Ed. 2d 22. Thus, a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct. Possession of marijuana with intent to distribute is clearly a federal crime. The question is whether Georgia law necessarily proscribes conduct punishable as a felony under the CSA. Title 21 U. S. C. §841(b)(1)(D) provides that, with certain exceptions, a violation of the marijuana distribution statute is punishable by "a term of imprisonment of not more than 5 years." However, one of those exceptions, §841(b)(4), provides that "any person who violates [the statute] by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, *i.e.*, as a misdemeanant. These dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, the other not. The fact of a conviction under Georgia's statute, standing alone, does not reveal whether either remuneration or more than a small amount was involved, so Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Thus, the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Pp. 6-9.

(c) The Government's contrary arguments are unpersuasive. The Government contends that §841(b)(4) is irrelevant because it is merely a mitigating sentencing factor, not an element of the offense. But that understanding is inconsistent with *Carachuri-Rosendo* v. *Holder*, 560 U. S. ___, 130 S. Ct. 2577, 177 L. Ed. 2d 68, which recognized that when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too. The Government also asserts that any marijuana distribution conviction is presumptively a felony, but the CSA makes neither the felony nor the misdemeanor provision the default. The Government's approach would lead to the absurd result that a conviction under a statute that punishes misdemeanor conduct only, such as §841(b)(4) itself, would nevertheless be a categorical aggravated felony.

The Government's proposed remedy for this anomaly—that noncitizens be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration—is inconsistent with both the INA's text and the categorical approach. The Government's procedure would require the Nation's overburdened immigration courts to conduct precisely the sort of *post hoc* investigation into the facts of predicate offenses long deemed undesirable, and would require uncounseled noncitizens to locate witnesses years after the fact.

Finally, the Government's concerns about the consequences of this decision are exaggerated. Escaping aggravated felony treatment does not mean escaping deportation, because any marijuana distribution offense will still render a noncitizen deportable as a controlled substances offender. Having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, but the Attorney General may, in his discretion, deny relief if he finds that the noncitizen is actually a more serious drug trafficker. Pp. 9-21.

662 F. 3d 387, reversed and remanded.