Appellate Court Decisions - Week of 4/29/13

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

First Appellate District of Ohio

***State v. Trowbridge*, Appeal No. C-110541, Trial No. B-1101842**

Counsel: Hearsay: Evidence/Witness/Trial: Constitutional Law: ID/Photos: Robbery: Weapons: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-110541_05012013.pdf

Long story short, it's a bad idea to announce to the people you're robbing that you just got out of Marysville prison for robbery – especially when you have distinguishing facial features and don't wear a mask (though curiously lack the ability to leave DNA on the clothes you were).

Summary from the First District:

Where the defendant fails to object to the admission of evidence, the appellate court reviews only for plain error.

Eyewitness testimony relaying the defendant's statement during a robbery that she had "just got[ten] out of Marysville for [doing] the same thing" qualified as a statement by a party opponent under Evid.R. 801(D)(2)(a) and was not hearsay, where the witnesses at trial identified the defendant as the person who made the declaration, and where the statement was offered against the defendant at her criminal trial.

A statement offered only to explain a police officer's conduct while investigating a crime is not hearsay.

The admission of evidence of the defendant's prior criminal history did not violate Evid.R. 404(B) or R.C. 2945.59: the evidence was admissible for the limited purposes of proving the defendant's identity, where the state showed that the defendant was the only woman in the area who had been released from the Marysville reformatory, a claim made by the robber during the robbery, and for proving the robber's intent and use of a threat to commit the aggravated-robbery offense, where the robber used her prior history to bolster her threats during the commission of the robbery.

Evidence of the defendant's prior criminal history was not unfairly prejudicial under Evid.R. 403(A), where the probative value was not substantially outweighed by any danger that the evidence would appeal to the jurors' emotions rather than their intellect.

The defendant failed to demonstrate a violation of her right to a fair trial, based on her appearance before the jury in prison clothing, where she failed to show the requisite "compulsion": the defendant, who was represented by counsel, failed to object to proceeding to trial in jail clothing after the trial court raised the issue, she made no effort to obtain street clothes, and she indicated that she would not make an effort.

The defendant's convictions for aggravated robbery with a three-year firearm specification and having a weapon under a disability were supported by sufficient evidence and were not against the manifest weight of the evidence.

The defendant failed to demonstrate that she was denied the effective assistance of trial counsel where she failed to show that any deficient performance by counsel prejudiced her.

The defendant failed to demonstrate that the trial court's imposition of a 15-year aggregate term of imprisonment was excessive where the individual terms were within the ranges for the offenses and the record does not rebut the presumption that the trial court applied the requisite sentencing statutes.

***State v. Gerth*, Appeal No. C-120392, Trial No. B-1101792**

Homicide: Theft/Receiving Stolen Property

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120392_05012013.pdf

Voluntary intoxication, under R.C. 2901.21(C), "may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense." In this instance, a defendant who killed two people by crashing into their vehicle during a high-speed chase could not overcome the "knowingly" element of felonious assault because he was intoxicated on cocaine, marijuana, and alcohol.

Summary from the First District:

The defendant's convictions for two counts of felony murder, with the underlying felony of felonious assault, were supported by sufficient evidence that the defendant had "knowingly" caused serious physical harm where the record showed, inter alia, that the defendant had, during the course of an extended high-speed police chase, run multiple stop signs and stop lights, crossed the center line, weaved in and out of cars, and crashed into a taxicab, killing the driver and his passenger.

Pursuant to R.C. 2901.21(C), the defendant's voluntary consumption of alcohol, cocaine, and marijuana could not be taken into consideration in determining whether he had acted "knowingly."

The defendant's conviction for receiving stolen property was supported by sufficient evidence that he knew or had reasonable cause to believe that the vehicle he was driving had been stolen where the state presented evidence that the vehicle's owner had reported the vehicle stolen two days earlier; the defendant, when signaled by police to pull over, had initially complied, but then had sped off; the defendant, immediately after crashing the vehicle and being taken into custody, voluntarily told police that his passenger had no knowledge that the vehicle had been stolen; police recovered two blank checkbooks inside the vehicle with the owner's name on them; and the vehicle's owner testified that she had not given the defendant or anyone else permission to use the vehicle.

***In re: T.W.*, Appeal No. C-130080, Trial No. F99-903X**

Children: Standing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130080_05012013.pdf

One does not have standing to assert on appeal that a trial court should grant custody of children to another person.

Summary from the First District:

Where father appealed from the trial court's decision granting permanent custody of his child to a social-services agency, but did not dispute the termination of his own parental rights, father lacked standing to assert that the trial court should have granted the custody petition filed by the child's paternal great-grandmother, who was not a party to the appeal, and that the trial court should have investigated further the child's expressed desire to live with the great-grandmother.

***State v. Wilson*, Appeal No. C-120511, Trial No. B-0208347**

Postconviction: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120511_05032013.pdf

"To the extent that postrelease control is not properly imposed, a sentence is void, and the offending portion of the sentence is subject to review and correction at any time, whether on direct appeal or in a collateral challenge."

Summary from the First District:

R.C. 2953.21 et seq. did not confer upon the common pleas court jurisdiction to entertain defendant's postconviction "Motion to Vacate and Correct a Void Sentence":

the motion was reviewable under R.C. 2953.21 et seq., governing the proceedings on a postconviction petition, because it did not specify the statute or rule under which relief was sought, and because the postconviction statutes provide the exclusive means for collaterally challenging a criminal conviction; but the motion was subject to dismissal for lack of jurisdiction, because it did not satisfy R.C. 2953.21(A)(2)'s time restrictions or R.C. 2953.23's jurisdictional requirements.

The common pleas court erred in failing to correct defendant's sentences to properly impose postrelease control: 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 defendant's postconviction motion brought the matter to the court's attention.

***City of the Village of Indian Hill v. Ledgerwood*, Appeal No. C-120448, Trial No. M-12TRD-25296**

Speedy Trial

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120448_05032013.pdf

The time between a nolle prosequi and the subsequent issuance of a new citation tolls speedy trial time.

Summary from the First District:

Where defendant appealed his mayor's court conviction for speeding to the municipal court, the municipal court erred in granting defendant's motion to dismiss for lack of a speedy trial: the city had been granted a nolle prosequi in mayor's court, and the time between the nolle prosequi and the subsequent issuance of a new citation against defendant was tolled because the charge was not pending during that period.

***State v. Lee*, Appeal No. C-120307, Trial No. B-0410010**

Postconviction: Appellate Review: Sentencing: Allied Offenses

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120307_05032013.pdf

Where the defendant-appellant "satisfied neither the time restrictions of R.C. 2953.21(A)(2) nor the jurisdictional requirements of R.C. 2953.23, the postconviction statutes neither conferred upon the common pleas court jurisdiction to entertain [defendant-appellant's] postconviction motion, nor imposed upon the court an obligation to conduct an evidentiary hearing on the motion.

Defendant-appellant's sentences were void to the extent that he had not be adequately notified concerning postrelease control.

Summary from the First District:

The common pleas court had no jurisdiction to grant defendant the relief sought in his postconviction motion: the motion was reviewable as a postconviction petition under R.C. 2953.21 et seq., because it did not specify the statute or rule under which relief was sought, and because the postconviction statutes provide the exclusive means for collaterally challenging a criminal conviction; but the postconviction statutes did not confer jurisdiction to review the motion, because it did not satisfy R.C. 2953.21(A)(2)'s time restrictions or R.C. 2953.23's jurisdictional requirements; and defendant's allied-offenses claim, even if demonstrated, would not have rendered his sentences void. [*But see* DISSENT: The court had jurisdiction to entertain defendant's allied-offenses claim because a sentence imposed in violation of R.C. 2941.25 is void.]

The court of appeals had no jurisdiction to review alleged sentencing and appeal-right-notification errors: the appeals court had jurisdiction to review only the judgment from which defendant had appealed, and the common pleas court had not ruled upon, because defendant had not asserted in his postconviction motion, the alleged sentencing and appeal-right-notification errors; and neither challenge, even if demonstrated, would have rendered defendant's convictions void.

In his appeal from the overruling of his postconviction motion, 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.

Third Appellate District of Ohio

***State v. Baker*, Case No. 9-12-51, Trial Court No. 12-CR-102**

Motion to Suppress: Statements

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/3/2013/2013-ohio-1737.pdf

It was error not to grant a motion to suppress defendant's statements where a detective continued to question defendant and elicit incriminating responses to questions after defendant had invoked his right to counsel several times, and was not the one to renew the conversation with the detective.

Baker was arrested and charged with robbery. Detective Dutton began questioning Baker, but Baker invoked his right to counsel and the interview was immediately terminated. A week later, Baker was indicted on four counts: Aggravated Robbery, Felonious Assault (x2), and Theft. Baker was unable to make bail and incarcerated pending trial.

Eleven days after the indictment, Dutton went to the jail to interview Baker. Baker invoked his right to counsel seven to nine times. Dutton turned off the tape recorder, but kept talking with Baker while they waited for a guard. During that time, Baker made incriminating statements in response to the conversation. The evidence showed that Baker was not the one to renew the conversation.

The trial court denied Baker's motion to suppress the statements. Baker pleaded no contest and was sentenced to 7 years for each of the first three counts and 17 months for the theft. All were to be served concurrently.

The Third District found the denial of the motion to suppress defendant's statements prejudicial, and the cause was reversed and remanded for further proceedings.

Fifth Appellate District of Ohio

***State v. Hipp*, Case No. 1200390**

Motion to Suppress: OVI: 911 Call

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/5/2013/2013-ohio-1684.pdf

Where a gas station attendant called 911 and told the dispatcher that the driver of a certain make, model and color car, with a certain license plate number, smelled like alcohol and was possibly intoxicated, and where the police officer saw no bad driving on the driver's part before pulling her over, there was not a reasonable and articulable suspicion of criminal activity to justify the stop, so the defendant's motion to suppress should have been granted.

Jack Butler, a Speedway employee, saw Hipp pull into his gas station and nearly hit a cement barrier. Hipp parked at an unusual angle and entered the gas station. Butler also noticed a strong odor of alcohol on Hipp's person, and observed her stumbling when walking.

When Hipp drove away from the gas station, Butler called 911 and gave the dispatcher the make, model, color and license plate number of Hipp's vehicle. Butler only told the dispatcher that he smelled alcohol on Hipp's person and that he believed she was possibly intoxicated. A police officer located Hipp in her vehicle at an ATM and eventually initiated a stop. The officer did not notice any bad driving on Hipp's part, but

he did smell alcohol on her breath when he stopped her. She was charged with an OVI under (A)(1)(a) and (A)(1)(d). Hipp filed a motion to suppress, but it was denied by the trial court. She eventually pleaded no contest to the (A)(1)(a) charge.

The Fifth District held that the gas station attendant did not sufficiently indicate bad driving or inappropriate activity or behavior to indicate Hipp was operating a vehicle while intoxicated prior to her stop. The facts provided by Butler and the officer were insufficient to demonstrate a reasonable and articulable suspicion that Hipp was engaged in unlawful behavior. Therefore, the trial court erred in not granting Hipp's motion to suppress.

Supreme Court of Ohio

***State v. Smith*, 2013-Ohio-1698**

R.C. 2919.27(A)(2): Violation of Protection Order: R.C. 2903.214(F)(1)

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-1698.pdf

To sustain a conviction for violation of a protection order pursuant to R.C. 2919.27(A)(2), the state must establish, beyond a reasonable doubt, that it served the defendant with the order before the alleged violation. (R.C. 2903.214(F)(1), construed).

Pickens and Smith, appellant, began dating in 2009 and did not live together. Pickens terminated the relationship in early 2010, and on April 12, 2010, filed a civil stalking or sexually-oriented-offense protection order ("SSOOPO") against Smith. The court granted the petition *ex parte* on that day and set a mandatory full hearing date. The SSOOPO ordered Smith to stay 500 feet away from Pickens.

On the day the court issued the SSOOPO, the clerk of courts issued an order to serve Smith. Pickens testified that after she received the SSOOPO, she showed Smitha copy and told him he was not allowed around her. At that point, the sheriff had not yet served Smith.

On April 17, 2010, at approximately 11 a.m., Pickens heard a bang in her basement. She investigated and it turned out to be Smith coming up the stairs. Pickens testified that Smith grabbed her around the neck, put her in a headlock, and attempted to choke her. The two began to tussle, but the altercation ended when Pickens' 14-year-old-son and friend came home. Smith did not leave. Pickens called 911, police officers responded, and Smith, despite trying to flee, was arrested. He was charged with aggravated burglary, violating a protection order, domestic violence, and resisting arrest.

The return-of-service portion of the clerk of court's order to serve reflects that Smith was not personally served until the same day of the altercation, but he was

convicted of all but the domestic violence charge, which was dismissed upon Rule 29 motion.

The Supreme Court reversed Smith's conviction for the violation of the protection order, holding that a plain reading of R.C. 2919.27(A)(2) incorporates the requirements of R.C. 2903.214, so, to prove a violation of R.C. 2919.27(A)(2), the state must prove, beyond a reasonable doubt, all requirements of R.C. 2903.214, including the requirement that the order be delivered to the defendant.

***State v. Deanda*, 2013-Ohio-1722**

Lesser Included Offenses: Attempt

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-1722.pdf

Felonious assault through causing serious physical harm is a lesser included offense of attempted murder.

All you need to know is what's in yellow, but if you want a history of lesser-included offenses law, and the court's reasoning in reaching this decision, the full opinion expounds at length about it.

***State v. Noling*, 2013-Ohio-1764**

R.C. 2953.73: Postconviction DNA testing: Appellate jurisdiction: R.C. 2953.73(E)(1): R.C. 2953.72(A)(7): R.C. 2953.71(U): R.C. 2953.74

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-1764.pdf

R.C. 2953.73(E)(1), which grants exclusive jurisdiction to the Supreme Court of Ohio to review rejections of applications for DNA testing in cases in which the death penalty is imposed, is constitutional.

Before dismissing a subsequent application for postconviction DNA testing under R.C. 2953.72(A)(7), a trial court must apply the definition of "definitive DNA test" set forth in R.C. 2953.71(U) and the criteria of R.C. 2953.74.

The Supreme Court held that the General Assembly may limit the court of appeals' jurisdiction in a statute that specifies that the Supreme Court has exclusive jurisdiction to hear appeals of the rejection of DNA testing in cases in which the death penalty has been imposed. Therefore, R.C. 2953.73(E)(1) is constitutional.

In interpreting Article IV, Sections 2(B)(2)(c) and 3(B)(2) of the Ohio Constitution, the Court concluded four things:

1. The Ohio Constitution grants the Supreme Court exclusive appellate jurisdiction for direct review judgments in which the sentence of death is imposed.
2. The constitution specifically excludes the courts of appeals from the direct review of those same judgments.
3. The Court has concurrent appellate jurisdiction with courts of appeals to review postconviction judgments and final orders in cases in which the death penalty has been imposed.
4. Because grants of jurisdiction to the courts of appeals in death-penalty cases are only "as provided by law," the General Assembly may limit the court of appeals' jurisdiction.

In denying Noling's application for DNA testing under 2953.72(A)(7), the trial court failed to consider the definition of "Definitive DNA test" in R.C. 2953.71(U). Since the passing of S.B. 77 on July 6, 2010, it is error not to apply the definition set forth in R.C. 2953.71 (U) before dismissing a second/subsequent application for DNA testing under R.C. 2953.72(A)(7).

***State ex rel. Culgan v. Collier*, 2013-Ohio-1762**

Writ of Procedendo

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-1762.pdf

Where a court has failed to rule on an uncomplicated motion for over a year, a writ of procedendo is appropriate.

Culgan moved the trial court to terminate postrelease control because of a claimed error in his 2009 sentencing entry. When appellee, Judge Collier, did not rule on the motion within 120 days, Culgan filed a complaint for writs of procedendo and mandamus in the 9th District to force the judge to rule.

The 9th District dismissed the complaint, but the Supreme Court reversed the 9th District. The Supreme Court held that Culgan's reliance on Sup.R. 40(A)(3) for his writ of procedendo was incorrect, but that section is indicative of a time frame in which it would appropriate for a court to make a ruling, so here, where the court failed to rule on an uncomplicated motion for over a year, a writ of procedendo was appropriate.

There were a couple of interesting dissents written this week in cases that were dismissed as improvidently granted. They may prove as primers for arguments if you have similar trials/appeals pending. Here they are:

***State v. Davis*, 2013-Ohio-1748 – Voluntary Manslaughter Instruction**

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-1748.pdf

***In re J.S.*, 2013-Ohio-1721 – Serious Youthful Offender Sentences Under R.C. 2152.13 and Void/Voidable Sentences**

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-1721.pdf

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.