Appellate Court Decisions - Week of 4/7/14

Appellate Musings:

A recent burglary prosecution raised a red flag. Burglary requires a trespass and the commission of a criminal offense during that trespass. *State v. Murray*, 11th Dist. Lake No. 2003-L-045, 2005-Ohio-1693.

The case involved defendants who were invited into a residence to clean and while they were inside, they secretly stole jewelry. The prosecutor argued that they committed a burglary, because they became trespassers by virtue of committing the crime in the house. In support they cited *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987).

The First District previously rejected this argument. *State v. Greer*, 1st Dist. No. C-930313, 1994 WL 114304 (Apr. 6, 1994). The state cannot use the criminal offense to prove the trespass. In *Steffen* there was an initial, violent assault against the victim. This allowed the court to find that the victim withdrew her consent and by remaining in the residence the offender was trespassing. *State v. Young*, 4th Dist. Scioto No. 07CA3195, 2008-Ohio-4752, ¶25. After the assault (during the trespass) Steffen killed the victim, and the homicide was the predicate offense for the burglary.

First Appellate District of Ohio

***State v. Curless*, 2014-Ohio-1493**

Ineffective Assistance of Counsel: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130204_04092014.pdf

Summary from the First District:

"Defendant's claim that his counsel was ineffective for failing to advise him to plead no contest instead of pleading guilty to two counts of third-degree-felony robbery so that he could preserve his challenge on appeal to the denial of his motion to suppress was meritless where the trial court had informed the defendant during his guilty-plea colloquy that by pleading guilty he would be giving up his right to challenge on appeal the trial court's ruling on the motion to suppress, the trial court gave him an opportunity to consult with his counsel before entering his guilty plea, and the defendant had still pleaded guilty in the face of such advice.

"Defendant's 24-month sentence was not clearly and convincingly contrary to law where the trial court considered the existence of grounds to mitigate the defendant's conduct under R.C. 2929.12(C)(4), the trial court's decision to impose a prison term upon defendant, while imposing a sentence of community control upon his codefendants, was supported by his greater involvement in the offenses, his criminal

record, and his lack of genuine remorse, and the trial court had no duty under recently amended R.C. 2929.14 and 2929.19 to inform the defendant that he would be eligible to earn credit towards his sentence while incarcerated."

***State v. Williams*, 2014-Ohio-1526**

Procedure: Evidence: Crim.R. 16(D): Counsel: ID: Juries: Prosecutor

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130277_04112014.pdf

Summary from the First District:

"The trial court did not abuse its discretion in failing to order the state to disclose its witness list even though the state's written certification of nondisclosure under Crim.R. 16(D) did not contain specific, articulable facts to show that the disclosure would jeopardize the witnesses' safety where, at a hearing held under Crim.R. 16(F), a police officer testified that the witnesses had expressed fear of being harmed by the defendant and his family, who had reputations for violence.

"The defendant's claim that the state's failure to disclose its witness list until the day of trial prevented him from discovering evidence favorable to him, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), fails because the defendant received some of the records he had sought in time for trial, the records were not material, the defendant was granted a three-day continuance to investigate, and his counsel thoroughly cross-examined the state's witnesses.

"The defendant was not denied the effective assistance of counsel, despite his claims that his counsel was unable to adequately investigate the case because the state did not disclose its witness list until the first day of trial, where the defendant failed to show that his counsel's representation fell below an objective standard of reasonableness or that, but for counsel's lack of investigation or preparation, the result of the proceeding would have been otherwise.

"The trial court did not err in overruling the defendant's motion to suppress identification evidence because even if the identification procedures were unduly suggestive, the identifications were reliable because the witnesses had a good opportunity to see the defendant during the commission of the offenses and the witnesses knew the defendant from previous incidents, even if they did not know his name.

"Once a prosecutor has offered a race-neutral reason for exercising a peremptory challenge against an African-American juror and the court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing of discrimination becomes moot.

"The trial court's acceptance of the prosecutor's race-neutral reasons for the use of peremptory challenges was not clearly erroneous, and, therefore, the defendant did not meet his burden to show discriminatory intent."

***State v. Lecky*, 2014-Ohio-1527**

Procedure: Crim.R. 12(K)

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130445_04112014.pdf

Summary from the First District:

"Where the defendant was indicted for two sets of crimes based on evidence recovered during searches of his house and his automobile, the trial court did not err in denying the defendant's motion to dismiss the counts related to the automobile search: the trial court only suppressed evidence from the house search, and therefore Crim.R. 12(K) did not bar prosecution of the counts related to the automobile search because they were not the 'same offenses' at issue in the state's attempted appeal from the suppression order."

Second Appellate District of Ohio

Nothing new.

Third Appellate District of Ohio

Nothing new.

Fourth Appellate District of Ohio

***State v. Stump*, 2014-Ohio-1487**

Sentencing: Restitution

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/4/2014/2014-ohio-1487.pdf

A bank inadvertently sent another customer's banking information to Appellant. Appellant was convicted of theft for transferring funds from that other customer's account into her own. The trial court erred in imposing restitution to the bank, because the bank, as a third-party and not the victim of the crime, cannot be awarded restitution.

Fifth Appellate District of Ohio

Nothing new.

Sixth Appellate District of Ohio

Nothing new.

Seventh Appellate District of Ohio

***State v. Fasline*, 2014-Ohio-1470**

Search: Consent: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/7/2014/2014-ohio-1470.pdf

The trial court did not err in granting Appellant's motion to suppress where the trial court's conclusion that the police officers coerced Appellant into consenting to the search of his home was not unreasonable. On November 19, 2010, a homemade firework exploded near a fraternity house. Police eventually received information that Appellant was responsible. On December 1, 2010, they went to the fraternity house to talk to Appellant, but he got in his car and drove away before they got to the house. The officers followed him and initiated a proper traffic stop because of his erratic driving and speeding. The officers asked Appellant to search his car, and he consented, telling the officers that he had a legal firework in his car, which was true. The officers then asked to search his home. He said they could, but not for about an hour while he went to cash a check. The officers insisted that the search happen then, because they didn't want to miss lunch. They all then went to the home, but before Appellant could execute a consent-to-search form, he said he knew went the officers wanted and went inside to retrieve fireworks-making materials. The Seventh District held that the trial court did not err in finding the officers' actions coercive and in violation of Appellant's Fourth Amendment rights. It also said the officers lacked sufficient indicia of illegal activity to search the home.

Eighth Appellate District of Ohio

***State v. Sneed*, 2014-Ohio-1438**

Sentencing: Driver's License: Suspension

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2014/2014-ohio-1438.pdf

The trial court erred in imposing a lifetime license suspension on Appellant via a nunc pro tunc entry without a pronouncement or order at the time of sentencing. As Appellant has completed his prison sentence, the trial court no longer has jurisdiction to impose the mandatory lifetime driver's license suspension.

Ninth Appellate District of Ohio

***State v. Mack*, 2014-Ohio-1387**

Jury Instruction

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2014/2014-ohio-1387.pdf

In Appellant's trial for the illegal manufacture for methamphetamine, the trial court committed plain error in failing to give the jury the required cautionary instruction regarding the testimony of an alleged accomplice under R.C. 2923.03(D). Unlike Appellant's charge and conviction for illegal assembly or possession of chemicals for the manufacture of drugs and aggravated possession of drugs, the illegal manufacture charge could not be proven without the testimony of the alleged accomplice.

Tenth Appellate District of Ohio

***State v. Kosla*, 2014-Ohio-1381**

Search: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2014/2014-ohio-1381.pdf

The trial court did not err in granting Appellant's motion to suppress the search of his home. If you'd like to read the flimsiest set of facts, possibly ever, used to obtain a search warrant, then read this case. In essence, police saw Appellant go into a garden store twice a year prior to the warrant and discovered that his power bill was higher than his neighbors'. They threw in that he had been charged with some crimes 8 years earlier – that had nothing to do with cultivating marijuana – that there was some speculation he might have transported marijuana several years ago, and one time he may have had a large sum of cash on him.

Eleventh Appellate District of Ohio

Nothing new.

Twelfth Appellate District of Ohio

Nothing new.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.