Appellate Court Decisions - Week of 5/23/16

First Appellate District of Ohio

***In re T.W.*, 2016-Ohio-3131**

Juvenile: Confinement Credit: R.C. 2152.18(B)

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-150327_05252016.pdf

Summary from the First District:

"The trial court properly ordered the time the juvenile spent at Hillcrest School, a residential facility, credited to the juvenile's Department of Youth Services commitment because, under the test articulated by this court in *In re D.P.*, 1st Dist. Hamilton No. C-140158, 2014-Ohio-5414, it constituted 'confinement' as contemplated by R.C. 2152.18(B). [*But see* DISSENT: In *In re D.P.*, this court did not articulate an appropriate test for when a juvenile is 'confined' for purposes of R.C. 2152.18(B); but even if the *In re D.P.* test is applied, the juvenile's time at Hillcrest School did not constitute 'confinement' as contemplated by R.C. 2152.18(B).]"

***State v. Marshall*, 2016-Ohio-3184**

Juvenile: Bindover

Full Decision: http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-3184.pdf

Summary from the First District:

"In a case involving an issue of first impression, when the juvenile court relinquished jurisdiction over a 15-year-old juvenile in a discretionary-bindover proceeding, and the juvenile and the state entered into a plea agreement and jointly recommended a sentence that the trial court then imposed, the juvenile did not waive his ability to challenge the bindover proceedings on appeal under R.C. 2953.08(D)(1), because defects in the bindover proceedings relate to the common pleas court's subject-matter jurisdiction to try the juvenile as an adult, and if the trial court lacked subject-matter jurisdiction over a criminal case, then its sentence was not 'authorized by law' within the context of R.C. 2953.08(D)(1).

"The juvenile court did not abuse its discretion in concluding that the 15-year-old juvenile was not amenable to rehabilitation in the juvenile-justice system for his participation in two separate aggravated robberies, because the juvenile court, in making an amenability determination, was not bound by the opinions of two experts

who had concluded that the juvenile was amenable to treatment within the juvenile-justice system, but could take into account the severity of the offenses, and the power to weigh the factors against or in favor of transfer to adult court for criminal prosecution under R.C. 2152.12(D) and (E) rests with the juvenile court."

Second Appellate District of Ohio

Nothing new.

Third Appellate District of Ohio

Nothing new.

Fourth Appellate District of Ohio

***Turner v. Hooks*, 2016-Ohio-3083**

Juvenile: Bindover: *Habeas Corpus*

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/4/2016/2016-Ohio-3083.pdf

Appellant's "petition of *habeas corpus* states a valid claim under R.C. 2725.06. The juvenile court failed to provide notice to [Appellant's] 'parents, guardian, or other custodian pursuant to R.C. 2152.12(G). As a result, the bindover proceeding was improper and the general division of the common pleas court patently and unambiguously lacked jurisdiction. The court's judgment of conviction is void ab initio."

Regarding who needed to be notified of the bindover proceedings: "[W]e conclude that the legislature did not intend the term 'parents' to include a biological mother who has lost all but residual parenting rights and has been implicitly declared an unsuitable parent through a neglect or dependency adjudication."

"The court only provided notice to [Appellant's] biological mother, who had been implicitly found to be an unsuitable parent in a prior dependency proceeding. The court did not provide notice to [Appellant's] legal custodian. There is no evidence in the record that his [grandmother/legal guardian] had actual notice as she was not in attendance during any part of the hearing. [Appellant] was prejudiced by the juvenile court's failure to give notice because he did not have [his grandmother] at the hearing to offer him assistance, guidance or support."

Fifth Appellate District of Ohio

Nothing new.

Sixth Appellate District of Ohio

***State v. Baker*, 2016-Ohio-3094**

Jury Instructions: Lesser Included

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/6/2016/2016-Ohio-3094.pdf

The trial court committed plain error in failing to instruct the jury on the meaning of the lesser-included complicity to burglary offense. The trial court did not explain that the jury should only move to the lesser offense if it found that the state had not proven all the elements of the greater charge or could not agree on that issue. That error was significant because of the lack of evidence for the aggravating element for the greater complicity charge.

Seventh Appellate District of Ohio

Nothing new.

Eighth Appellate District of Ohio

***Cleveland v. Krivich*, 2016-Ohio-3072**

OVI: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-3072.pdf

The trial court did not err in granting Appellee's motion to suppress where the State failed to show the officer substantially complied with the NHTSA manual. The trial court also considered all the other indications of intoxication when it ruled there was not probable cause to arrest, and therefore did not err in its determination.

***State v. Sanchez*, 2016-Ohio-3167**

Ineffective Assistance: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-3167.pdf

Trial counsel was ineffective for failing to file a motion to suppress that would have had a reasonable probability of success. Appellant was convicted of possession of cocaine. He and another man allegedly went into the restroom of a bar. Appellant allegedly had a bag of a white substance in his hand. The owner of the bar followed them into the bar and told them to leave. They had an exchange of words, then the men left. The bar owner followed Appellant outside. He said he saw Appellant go to the passenger door of a vehicle, lean in, shut the door, and walk away. The bar owner called a police officer and informed the officer Appellant "looks like he has a big bag of dope on him possibly cocaine." The officer searched Appellant and found nothing. The officer then searched the car and found a bag of pills, marijuana, and the suspected cocaine on the passenger side of the vehicle.

The Eighth District said the motion to suppress had a reasonable chance of success because, even though the bar owner was an identified citizen informant, his credibility was lessened when the search of Appellant's person yielded nothing, and the bar owner had a possible revenge motivation because of his exchange of words with Appellant earlier. The search of the car likely would have been suppressed, the Eighth District held.

***State v. Nitsche*, 2016-Ohio-3170**

Restitution

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-3170.pdf

After Appellant's aggravated murder conviction (among other convictions), the trial court erred in ordering him to pay restitution to the victim's family for the costs of the victim's funeral because the trial court did not consider Appellant's present and future ability to pay the restitution.

***State v. Freeman*, 2016-Ohio-3178**

Sentencing

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2016/2016-Ohio-3178.pdf

The trial court erred when it sentenced Appellant to 12 months in prison for her fourth-degree felony burglary/trespass in habitation conviction rather than community control sanctions. The trial court improperly treated Appellant's offense as an offense of violence. Appellant had no prior criminal history and the burglary was the only count at the time of sentencing. The trial court did not make a request to the department of rehabilitation and correction regarding the availability of community-control sanctions. Also, the trial court did not explicitly make any of the R.C. 2929.13(B)(1)(b)(i)-(xi) findings to overcome the presumption of community control sanctions on the record. Finally, the record does not support a finding that Appellant cause a victim harm during the commission of her burglary/trespass in a habitation offense. Without those findings, the maximum sentence available was community control sanctions.

Ninth Appellate District of Ohio

Nothing new.

Tenth Appellate District of Ohio

***Columbus v. Wood*, 2016-Ohio-3081**

Restitution

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2016/2016-Ohio-3081.pdf

Before imposing restitution, the trial court erred in failing to determine the proximate cause of the economic loss caused by Appellant's operation of his vehicle before, during, or after his violation of Columbus Traffic Code 2135.12(b)(1) (hit-skip). It also erred in ordering more than $5,000 in restitution, when restitution is limited to $5000 by the statute. The case is reversed and remanded for a new hearing to determine whether the "accident or collision" * * * "Was the *direct and proximate result* of [Appellant's] operation of the vehicle before, during, or after committing the [hit-skip] offense," and to require the trial court to limit the restitution to no more than $5000.

Eleventh Appellate District of Ohio

***State v. Weimer*, 2016-Ohio-3116**

Evidence: Hearsay

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/11/2016/2016-Ohio-3116.pdf

The trial court erred in allowing into evidence statements from Appellant's alleged co-conspirator because the statements were not made in furtherance of the conspiracy. The error was not harmless.

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

***Foster v. Chatman*, Slip Opinion No. 14-8349**

Batson: Habeas Corpus

Full Decision: http://www.supremecourt.gov/opinions/15pdf/14-8349_6k47.pdf

Syllabus:

Petitioner Timothy Foster was convicted of capital murder and sentenced to death in a Georgia court. During jury selection at his trial, the State used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury. Foster argued that the State's use of those strikes was racially motivated, in violation of *Batson v. Kentucky*, 476 U. S. 79. The trial court rejected that claim, and the Georgia Supreme Court affirmed. Foster then renewed his *Batson* claim in a state habeas proceeding. While that proceeding was pending, Foster, through the Georgia Open Records Act, obtained from the State copies of the file used by the prosecution during his trial. Among other documents, the file contained (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in bright green, with a legend indicating that the highlighting "represents Blacks"; (2) a draft affidavit from an investigator comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) notes identifying black prospective jurors as "B#1," "B#2," and "B#3"; (4) notes with "N" (for "no") appearing next to the names of all black prospective jurors; (5) a list titled "[D]efinite

NO's" containing six names, including the names of all of the qualified black prospective jurors; (6) a document with notes on the Church of Christ that was annotated "NO. No Black Church"; and (7) the questionnaires filled out by five prospective black jurors, on which each juror's response indicating his or her race had been circled.

The state habeas court denied relief. It noted that Foster's *Batson* claim had been adjudicated on direct appeal. Because Foster's renewed *Batson* claim "fail[ed] to demonstrate purposeful discrimination," the court concluded that he had failed to show "any change in the facts sufficient to overcome" the state law doctrine of res judicata.

The Georgia Supreme Court denied Foster the Certificate of Probable Cause necessary to file an appeal.

Held:

1. This Court has jurisdiction to review the judgment of the Georgia Supreme Court denying Foster a Certificate of Probable Cause on his *Batson* claim. Although this Court cannot ascertain the grounds for that unelaborated judgment, there is no indication that it rested on a state law ground that is both "independent of the merits" of Foster's *Batson* claim and an "adequate basis" for that decision, so as to preclude jurisdiction. *Harris v. Reed*, 489 U. S. 255, 260. The state habeas court held that the state law doctrine of res judicata barred Foster's claim only by examining the entire record and determining that Foster had not alleged a change in facts sufficient to overcome the bar. Based on this lengthy "*Batson* analysis," the state habeas court concluded that Foster's renewed *Batson* claim was "without merit." Because the state court's application of res judicata thus "depend[ed] on a federal constitutional ruling, [that] prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U. S. 68, 75; see also *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, P. C., 467 U. S. 138, 152. Pp. 6–9.

2. The decision that Foster failed to show purposeful discrimination was clearly erroneous. Pp. 9–25.

(a) *Batson* provides a three-step process for adjudicating claims such as Foster's. "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder v. Louisiana*, 552 U. S. 472, 477 (internal quotation marks and brackets omitted). Only *Batson*'s third step is at issue here. That step turns on factual findings made by the lower courts, and this Court will defer to those findings unless they are clearly erroneous. See ibid. Pp. 9–10.

(b) Foster established purposeful discrimination in the State's strikes of two black prospective jurors: Marilyn Garrett and Eddie Hood. Though the trial court accepted the prosecution's justifications for both strikes, the record belies much of the prosecution's reasoning. Pp. 10–22.

(i) The prosecution explained to the trial court that it made a last-minute decision to strike Garrett only after another juror, Shirley Powell, was excused for cause on the morning that the strikes were exercised. That explanation is flatly contradicted by evidence showing that Garrett's name appeared on the prosecution's list of "[D]efinite NO's"—the six prospective jurors whom the prosecution was intent on striking from the outset. The record also refutes several of the reasons the prosecution gave for striking Garrett instead of Arlene Blackmon, a white prospective juror. For example, while the State told the trial court that it struck Garrett because the defense did not ask her for her thoughts about such pertinent trial issues as insanity, alcohol, or pre-trial publicity, the record reveals that the defense asked Garrett multiple questions on each topic. And though the State gave other facially reasonable justifications for striking Garrett, those are difficult to credit because of the State's willingness to accept white jurors with the same characteristics. For example, the prosecution claims that it struck Garrett because she was divorced and, at age 34, too young, but three out of four divorced white prospective jurors and eight white prospective jurors under age 36 were allowed to serve. Pp. 11–17.

(ii) With regard to prospective juror Hood, the record similarly undermines the justifications proffered by the State to the trial court for the strike. For example, the prosecution alleged in response to Foster's pretrial *Batson* challenge that its only concern with Hood was the fact that his son was the same age as the defendant. But then, at a subsequent hearing, the State told the court that its chief concern was with Hood's membership in the Church of Christ. In the end, neither of those reasons for striking Hood withstands scrutiny. As to the age of Hood's son, the prosecution allowed white prospective jurors with sons of similar age to serve, including one who, in contrast to Hood, equivocated when asked whether Foster's age would be a factor at sentencing. And as to Hood's religion, the prosecution erroneously claimed that three white Church of Christ members were excused for cause because of their opposition to the death penalty, when in fact the record shows that those jurors were excused for reasons unrelated to their views on the death penalty. Moreover, a document acquired from the State's file contains a handwritten note stating, "NO. NO Black Church," while asserting that the Church of Christ does not take a stand on the death penalty. Other justifications for striking Hood fail to withstand scrutiny because no concerns were expressed with regard to similar white prospective jurors. Pp. 17–23.

(c) Evidence that a prosecutor's reasons for striking a black prospective juror apply equally to an otherwise similar nonblack prospective juror who is allowed to serve tends to suggest purposeful discrimination. *Miller-El v. Dretke*, 545 U. S. 231, 241. Such evidence is compelling with respect to Garrett and Hood and, along with the prosecution's shifting explanations, misrepresentations of the record, and persistent focus on race, leads to the conclusion that the striking of those prospective jurors was "motivated in substantial part by discriminatory intent." *Snyder*, 552 U. S., at 485. P. 23.

(d) Because *Batson* was decided only months before Foster's trial, the State asserts that the focus on black prospective jurors in the prosecution's file was an effort to develop

and maintain a detailed account should the prosecution need a defense against any suggestion that its reasons were pretextual. That argument, having never before been raised in the 30 years since Foster's trial, "reeks of afterthought." *Miller-El*, 545 U. S., at 246. And the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury. Pp. 23–25.

Reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion.