Appellate Court Decisions - Week of 5/28/13

First Appellate District of Ohio

***State v. Kottner*, Appeal No. C-120350, Trial No. B-1003804**

***Miranda*: Burglary/B&E/Trespass: R.C. 2941.25: Theft/Receiving Stolen Property**

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120350_05292013.pdf

There were several holdings in this decision, but this is the most interesting: **"The defendant's passing references to counsel, including, 'I haven't talked to any lawyer yet,' did not constitute an unequivocal invocation of his right to counsel so as to require police to cease questioning."**

Summary from the First District:

The trial court properly denied the defendant's motion to suppress statements made to police where the totality of the circumstances demonstrated that the defendant had voluntarily waived his right to remain silent.

Police officers were not required to re-administer *Miranda* warnings to the defendant where only seven hours had elapsed since the defendant had executed a written waiver of his rights, the defendant had been in continual police custody, the subsequent interview was part of a series of discussions that the defendant had had with police about burglaries in the area, and the defendant was mentally alert, attentive, and lucid during the subsequent interview.

The defendant's passing references to counsel, including, "I haven't talked to any lawyer yet," did not constitute an unequivocal invocation of his right to counsel so as to require police to cease questioning.

A police officer's indication of a willingness to attest to a defendant's cooperation did not constitute improper inducement so as to affect the voluntariness of the defendant's statements to police.

A conviction for burglary under R.C. 2911.12(A)(3) was based upon sufficient evidence that a person occupied the structure where a police officer was dispatched to a 911 call about a break-in at an apartment, the officer observed that the apartment door was splintered and its lock mechanism was broken apart, the officer observed a footprint on the door where it appeared that the door had been kicked open, and the officer saw evidence that a person resided in the apartment, including furnishings, numerous personal belongings, and mail.

A conviction for burglary under R.C. 2911.12(A)(3) was based upon sufficient evidence, where, even if the trial court's admission of hearsay by the property owner was erroneous, a residence was broken into, the defendant admitted to police that he had stolen golf clubs from the residence during the break-in and that he had sold them the following day to a business, and an employee of the business testified that the business had purchased the clubs from the defendant.

A conviction for burglary under R.C. 2911.12(A)(2) was based upon sufficient evidence that a person was likely to be present where a homeowner testified that she had locked her door when she left home for work in the morning, that upon returning home from work the same evening she had discovered that her home had been broken into, that her job enabled her to return home during a typical workday, that she had taken vacation days to stay at home, and that she had stayed home from work when she was sick.

A conviction for an attempted burglary was based upon sufficient evidence where the defendant had taken substantial steps in a course of conduct that the defendant admitted would have culminated in the commission of a burglary: the defendant admitted that he had specifically targeted the home during the daytime and had feigned interest in a nearby home when he was surprised by the arrival of the homeowner, and the homeowner testified that she had arrived home during the daytime to find the defendant at her front door and his cohort looking over her backyard fence, and that the men had acted suspiciously when she confronted them.

A defendant was properly convicted of two receiving-stolen-property offenses in addition to two burglary offenses involving different property owners where the state presented evidence that the defendant had retained and had pawned stolen property that was separate from the property associated with the burglary offenses.

***State v. Huge*, Appeal No. C-120388, Trial No. B-1007369**

Evidence: Homicide: Prosecutor: R.C. 2941.25

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120388_05292013.pdf

The trial court did not err in allowing a Children's Services investigator testify that the father (and defendant) of the murder victim (and daughter) did not want the victim/daughter to be placed with him because she was an infant and he did not believe she was his, because it was important background information and showed motive/intent.

The trial court did not err in allowing in testimony that the father/defendant lacked affection for the daughter/victim and that others had previously found signs of injury on the daughter/victim.

There was no prosecutorial misconduct where defendant argued daughter/victim's death had possibly been accidentally caused by defendant's other daughter and the prosecutor said during closing argument, "what kind of person would throw his two-year-old, three-month daughter under the bus to save his soul? That man right there."

The trial court did not err in allowing a state's witness to read from text messages that were not authenticated by a phone company representative.

The defendant's convictions for murder and child endangering were not allied offenses subject to merger because the offenses occurred on separate dates.

Summary from the First District:

The trial court properly admitted other-acts evidence regarding the defendant's interaction with the victim, his 15-month-old-daughter, and prior injuries suffered by the victim where the evidence was relevant to show the defendant's motive and intent, and that the injuries to the victim had not been accidental.

The defendant's allegations of prosecutorial misconduct were not supported by the record where the prosecutor's comments during closing argument were fair commentary based on the evidence that had been presented at trial.

The trial court properly admitted and allowed a witness to read text messages that had been sent between the witness and the defendant where the witness satisfied the authentication requirement of Evid.R. 901 by testifying that texting had been her normal means of communication with the defendant, that the text message had been sent from the defendant, and that she had saved the message to her phone.

The defendant's convictions for murder and child endangering were not allied offenses subject to merger because the offenses occurred on separate dates.

***City of Cincinnati v. Ilg*, Appeal No. C-120667, Trial No. 11TRC-53698**

Discovery: Evidence: OVI: Intoxilyzer 8000

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120667_05312013.pdf

Summary from the First District:

The trial court did not abuse its discretion in overruling the city's motion to quash subpoenas duces tecum with respect to archived breath-test data in the possession of the Ohio Department of Health: although the city presented evidence that the data would be difficult to reproduce, the

defendant demonstrated that the material was relevant to the reliability of his test and that it could not be obtained by other means.

The trial court did not err in excluding the defendant's breath test from evidence: even though the discovery violation was attributable to the state of Ohio, the state and the city of Cincinnati are deemed to be the same sovereign, and, in any event, the exclusion of the evidence was proper to protect the defendant's fundamental right to a fair trial.

This case was before Judge Shanahan and the attorneys were Steven Adams and Margie Slagle. Ilg was charged with driving with a prohibited breath-alcohol concentration and driving while impaired. In discovery, Ilg asked for Ohio Department of Health (ODH) documents relating to the performance of the Intoxilyzer 8000. The relevant item here that Ilg asked for was the ODH's computerized online breath archives, or "COBRA" data.

Ilg did not receive the materials he requested, so he served the ODH with two subpoenas duces tecum. Those also did not result in the production of the materials, so Ilg filed a motion to compel the production of the documents and a motion for sanctions. The city responded by filing a motion to strike the subpoenas. At the hearing on the motions, ODH representative Mary Martin testified that the Intoxilyzer 8000 saves data for each test that is performed, and that the data – the COBRA data – is compiled by the ODH in a spreadsheet. Martin then testified that the COBRA database was stored in a read-only format that the ODH did not have the resources to copy it for dissemination. Nevertheless, Judge Shanahan granted the motion to compel and ordered ODH to produce the COBRA data as well as the other material in the subpoena duces tecum.

A second hearing was held about a month later on the discovery issues. Some of the documents had been produced, but the COBRA data from the ODH had not been provided. Mary Martin testified again that the ODH lacked the personnel or technology required to provide the requested material. Judge Shanahan then ordered the exclusion of the breath test evidence, leaving the case to proceed on the impairment charge alone. The state appealed from the exclusion.

The city first argued that the trial court erred in ordering the production of the documents listed in Ilg's subpoenas duces tecum. The First District limited its opinion to the failure to produce the COBRA data, and held that there was no abuse of discretion. It said that Ilg demonstrated that the COBRA data was relevant to the reliability of the breath test by showing that the COBRA database was a comprehensive repository of information relative to the functioning of the Intoxilyzer 8000 used in his case. The evidence also showed that Ilg could not get the data without ODH's help, that Ilg needed the information to prepare for trial, and that he asked for the data in good faith. The city tried to lean on *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), but the First District was not persuaded by that argument.

The city's last argument was that the trial court erred in excluding the breath test because the discovery violation was attributable to ODH. The First District also rejected that argument, holding that city and the state are essentially the same sovereign, and therefore the city cannot avoid the consequences of the ODH's failure to comply with the court's order.

Thoughts: This decision has the potential to be extremely important, and if the city chooses to go forward, it seems likely that it will end up in front of the Ohio Supreme Court. From here on out, we should be requesting the COBRA data for Intoxilyzer 8000 machines in every driving with a prohibited breath-alcohol concentration case. If and when the ODH fails to produce the COBRA data, we have to convince the other judges to go along with Judge Shanahan and suppress the breath test. If we can get the other judges to along, we're either going to start getting the COBRA data, or we're going to start killing driving with a prohibited breath-alcohol concentration cases in which an Intoxilyzer 8000 was used.

***State v. Smith*, C-110727, B-1102515**

Search and Seizure

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-110727_05312013.pdf

The trial court erred in granting Smith's motion to suppress the revolver found in her purse inside of her car where the police officer had authority to stop the vehicle and Smith made furtive movements after being stopped.

Summary from the First District:

The trial court erred when it granted defendant's motion to suppress a loaded revolver seized from her purse located in the center rear seat of her vehicle: the defendant's furtive movements during the traffic stop gave police officers the necessary reasonable suspicion to conduct a limited search of the car for their own safety, and this remained so even after the defendant had been removed from the car.

Second Appellate District of Ohio

***State v. Howard*, Appellate Case No. 25276, Trial Court Case No. 2011-CR-3318**

Fourth Amendment: Search and Seizure: *Terry* Search: Motion to Suppress

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/2/2013/2013-ohio-2123.pdf

Police officers cannot open containers found on defendants during a frisk merely under the pretense that those containers might contain razor blades.

Dayton Police received word in September 2011 that the Renegades motorcycle club, a club considered by police and the FBI to be an "outlaw motorcycle club," was having a party at the Renegades Clubhouse. The police had received nuisance calls regarding shots fired and a loud party at the Clubhouse.

About 15 officers responded to the Clubhouse, in which were about 45 Renegades. The officers developed a plan based on the Renegade's reputation for being hostile toward police officers and because it appeared they had been drinking heavily that night. The officers planned to pat down Renegade members in the gated portion of the Clubhouse's front yard, then direct members to the backyard to speak with a detective and his supervisor. While executing the pat downs, the members were free to leave at any point and were not required to stay.

During the pat downs, knives and guns were recovered from Renegade members. At no point, however, did any Renegade members resist. The officers made two or three arrests that night. Regarding the defendant in question, he walked toward one of the police officers, who started the pat down without asking for permission or getting any verbal consent from the defendant because he was acting in a manner consistent with the other members who had consented to pat downs. The officer described the defendant as being very cooperative and friendly during the pat down.

During the pat down, the officer used a closed fist on the outside of the defendant's clothing. The officer found a handgun and three knives on the defendant's person, as well as a container in the defendant's pocket. The defendant had a concealed carry license for the gun and the pocket knives were all of legal size. The container was white, opaque, approximately 2 in. by 2 in. in size, and it had a screw-on lid. The officer unscrewed the container under the pretense that he had seen razor blades concealed in similar containers in the past. Inside the container, the officer found a white, powdery substance which tested positive for cocaine. At no point during the pat down did the officer interview the defendant, obtain a warrant, or recite the *Miranda* warnings.

This appeal is based on the defendant's motion to suppress the cocaine found in the container. The Second District held that the officer had no legal authority to open the small container found on the defendant. The officer did not seek the defendant's permission to open the container, and he did not have a warrant to open it. The officer simply opened the container right away and tipped it over, under the alleged justification that it might contain razor blades (despite the fact that the defendant was open and honest about the gun and knives). The Second District was not persuaded by the officer's testimony that he knew gang members sometimes hide razor blades in "any small, little areas." In other words, police officers cannot open any container during a frisk merely under the pretense that it might container razor blades.

Supreme Court of Ohio

***State v. Graham et al.*, Slip Opinion No. 2013-Ohio-2114**

Motion to Suppress: Statements: Employer Investigation

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-2114.pdf

Statements made by employees of state agency during an investigation conducted by the Ohio inspector general were coerced and are therefore inadmissible in subsequent criminal proceedings – *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) applied.

Appellants were five upper-level employees of the Ohio Department of Natural Resources' (ODNR) Division of Wildlife (DOW): Division Chief David Graham, Assistant Chief Randy Miller, Human Resource Manager Michele Ward-Tackett, Law Enforcement Executive Administrator James Lehman, and District Manager Todd Haines.

In 2009, a confidential informant contacted the Ohio Inspector General (OIG) to allege that Brown County DOW wildlife officer Allan Wright had engaged in misconduct that DOW officials had not investigated properly. The allegation was that Wright let a friend from South Carolina obtain an Ohio-resident hunting license by allowing the friend to use his address as his own. That allowed the friend to pay the resident fee of $19 instead of the $125 nonresident fee.

It was determined that the ODNR's handling of the matter was not sufficient and that crimes had been committed, so each of the appellants was indicted by a Brown County grand jury on one count of obstructing justice and one count of complicity in obstructing justice, each a fifth-degree felony. Each appellant filed a motion to suppress or, alternatively, dismiss, on the ground that their statements during the investigation into their handling of the matter were coerced by the threat of job loss and were therefore inadmissible under *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). The investigator testified that he never threatened the appellants, but the ODNR Labor Relations Administrator testified that the appellants knew that they could be disciplined for refusing to cooperate with the investigation. There was also evidence that the appellants had received a written warning that they'd be disciplined for not cooperating in the investigation. The trial court suppressed the statements, declaring them to be compelled statements and therefore inadmissible under *Garrity*. The court of appeals reversed.

The Supreme Court of Ohio reversed the appellate court and reinstated the holding of the trial court that the statements should be suppressed. The Supreme Court said that "for a statement to be suppressed under *Garrity*, the employee claiming coercion must have believed that his or her statement was compelled on threat of job loss and this belief must have been objectively reasonable. In examining whether an employee's belief was objectively reasonable under the circumstances, evidence of an express threat of termination or a statute, rule, or policy demanding termination will almost always be sufficient to show coercion." Finally, the Supreme Court held that the appellants "answered questions after receiving a warning that they could be fired for doing so. Statements extracted under these circumstances cannot be considered voluntary within the meaning of *Garity*."

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.