

## Appellate Court Decisions - Week of 5/6/13

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

### First Appellate District of Ohio

**State v. Whalen, Appeal No. C-120449, Trial No. 11TRC-40960**

**Constitutional Law: Automobiles: Drugs: Marihuana**

**Full Decision: [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120449\\_05082013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120449_05082013.pdf)**

**R.C. 4511.19(A)(1)(j)(viii)(II), which criminalizes driving with at least 35 nanograms of marihuana metabolite by urine or at least 50 nanograms of marihuana metabolite by blood, is not unconstitutionally vague on its face or unconstitutionally overbroad.**

#### **Summary from the First District:**

R.C. 4511.19(A)(1)(j)(viii)(II), which criminalizes driving with at least 35 nanograms of marihuana metabolite by urine or at least 50 nanograms of marihuana metabolite by blood, is not unconstitutionally vague on its face because a person of ordinary intelligence reading the statute would understand that a metabolite of marihuana is a byproduct of consuming marihuana, an illegal substance in Ohio, and that driving with the proscribed levels of such a metabolite in one's system is prohibited by the statute, and because the statute, by defining the precise metabolite levels at which driving is prohibited, discourages arbitrary and discriminatory enforcement.

R.C. 4511.19(A)(1)(j)(viii)(II) is not unconstitutionally vague as applied to the defendant, who was arrested with over 14 times the legal limit of marihuana metabolite in his system, where he could not identify any constitutionally protected right to operate his vehicle after consuming marihuana, and where a person of ordinary intelligence would not have to guess whether the statute applied to his conduct.

The defendant's challenge to R.C. 4511.19(A)(1)(j)(viii)(II) on the basis that it was fatally overbroad was meritless where he failed to identify any First Amendment right that was inhibited by the statute.

The legislature's decision to include all marihuana metabolites within R.C. 4511.19(A)(1)(j)(viii)(II)'s per se prohibition, even if a particular marihuana metabolite may not cause impairment, was a reasonable exercise of its police power in keeping impaired drivers off Ohio roads, given that the presence of a marihuana metabolite in one's system indicates that one has used marihuana, an illegal drug in Ohio; THC, the active ingredient in marihuana, leaves the body relatively quickly; and unlike alcohol breathalyzer tests, which are commonly administered by police during roadside stops, it

may take some time before police are able to transport and administer a blood or urine test to a suspected drugged driver.

The trial court acted within its discretion in limiting cross-examination of the state's expert witness, a forensic toxicologist, about whether the amount of marijuana metabolite in the defendant's system would have impaired his ability to operate a motor vehicle where the defendant was charged with a violation of R.C. 4511.19(A)(1)(j)(viii)(II), a per se offense, and the only relevant issue was whether he had driven his motor vehicle with the proscribed amount of a marijuana metabolite in his system.

***State v. Hargrove*, Appeal No. C-120321, Trial No. B-0708832**

### **Sentencing**

Full Decision: [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120321\\_05082013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120321_05082013.pdf)

**Where the trial court calculated conflicting jail-time-credit amounts at the original sentencing and at the community-control violation sentencing, the sentence was clearly and convincingly contrary to law, and was remanded for the proper calculation of jail-time credit.**

### **Summary from the First District:**

Where the trial court calculated conflicting jail-time-credit amounts, and the record does not support either jail-time-credit allowance, that part of the defendant's sentence must be vacated, and the cause must be remanded for the proper calculation of the jail-time credit.

***State v. Finch*, Appeal No. C-120553, Trial No. 12CRB-10533**

### **Jurisdiction/Venue: Indictment/Complaint**

Full Decision: [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120553\\_05082013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120553_05082013.pdf)

**The original complaint was issued on April 10, 2012, for a telecommunications harassment that allegedly occurred on or about March 9, 2012. At trial, the state moved, and the trial court granted the state's motion, to amend the complaint so that the date of the offense was April 11, 2012. The effect was to create a complaint, issued on April 10, 2012, for a crime a day later, on April 11. The First District held that "a complaint is invalid when it reflects a date of offense that is subsequent to the date on which the complaint was issued."**

## **Summary from the First District:**

Where the trial court allowed the state to amend the complaint to reflect a date of offense that was subsequent to the date of the filing of the original complaint, the complaint did not comply with Crim.R. 3 and did not invoke the jurisdiction of the municipal court: the complaint on its face indicated that a crime would occur in the future, and a person authorized by law to make a complaint under oath cannot swear that a crime will be committed in the future.

## **Fifth Appellate District of Ohio**

**State v. Norman, Case No. CT2012-0061 (May 5, 2013)**

### **Sentencing: Jail-Time Credit**

**Full Decision:** <http://www.sconet.state.oh.us/rod/docs/pdf/5/2013/2013-ohio-1866.pdf>

**It was error to give Norman jail-time credit for time served on an unrelated offense the sentence for which was completed before the new sentence was imposed.**

Norman was indicted on a third-degree felony theft. He entered a not guilty plea, but was not given a bond because he was already incarcerated for 540 days on unrelated misdemeanor charges. A month and a day later, Norman changed his plea to guilty on the theft charge, which was amended to a fourth-degree felony. The trial court ordered a presentence investigation and a sentencing date for a month and four days after that.

Five days before the sentencing date, Norman's counsel filed a Motion for Full Incarceration Credit, asking the trial court to give Norman credit for time served beginning from the date he was served with the indictment. On the sentencing date, Norman was sentenced to 12 months in prison and was given 103 days of jail time credit. The state appealed, arguing the trial court erred in computing jail time credit.

In this instance, Norman had completed his prison sentence on the misdemeanor cases before he was sentenced for the felony theft. The Fifth District said, furthermore, that time spent serving a jail sentence on another case will not be credited toward another felony case, even if it was pending at the time of the service of the jail sentence. Based on that, the Fifth District reversed the sentence and remanded for further proceedings.

## **Eighth Appellate District of Ohio**

***State v. Kelley, 2013-Ohio-1899 (May 9, 2013)***

**Sentencing: Allied Offenses**

**Full Decision:** <http://www.sconet.state.oh.us/rod/docs/pdf/8/2013/2013-ohio-1899.pdf>

**Aggravated Vehicular Homicide and OVI are allied offenses of similar import. Aggravated Vehicular Assault and OVI are also allied offenses of similar import.**

Kelley was charged with 14 counts of aggravated vehicular homicide, aggravated vehicular assault, and driving under the influence. She pleaded guilty to six counts – two counts of aggravated vehicular homicide, three counts of aggravated vehicular assault, and one count of driving under the influence of alcohol. The remaining counts were nolle. She was sentenced to 10 years on each aggravated vehicular homicide, seven years on one count of aggravated vehicular assault, two years on each of the other aggravated vehicular assaults, and time served for the driving while under the influence of alcohol. The court ordered the terms be served consecutive to one another for a total of 31 years.

Kelley appealed once, but that appeal was dismissed for lack of a final appealable order because the trial court failed to sentence her under the driving under the influence count. The court then resentenced her to six months and six days, and order it be served concurrent to the sentence already imposed.

Kelley appealed, arguing that the driving under the influence should have merged with the aggravated vehicular homicides and the aggravated vehicular assaults as allied offenses of similar import. The Eighth District agreed and held that OVI is an allied offense with aggravated vehicular homicide and aggravated vehicular assault.

## **Supreme Court of Ohio**

*Nothing new.*

## **Sixth Circuit Court of Appeals**

*Nothing new.*

## **Supreme Court of the United States**

*Nothing new.*