Appellate Court Decisions - Week of 6/1/15

First Appellate District of Ohio

***State v. Long*, 2015-Ohio-2114**

Juvenile: Homicide: Sentencing

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2015/2015-Ohio-2114.pdf

Summary from the First District:

"In sentencing the juvenile defendant on two counts of aggravated murder, the trial court did not fail to consider the defendant's youth as a mitigating factor as required by *Miller v. Arizona*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, but instead found that the aggravating factors outweighed the mitigating factors, including the defendant's youth.

"The evidence at trial supported the finding that the defendant had an intent to kill, and therefore, the trial court did not err in sentencing him to two terms of life without the possibility of parole on two counts of aggravated murder.

"The trial court did not deny the defendant the opportunity to present mitigating evidence, but instead found that the mitigating factors the defendant had presented did not outweigh the aggravating factors."

***State v. Jackson*, 2015-Ohio-2171**

Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-140384_06052015.pdf

Summary from the First District:

"In sentencing the defendant for violating the conditions of his community control, the trial court's failure to address the defendant personally and ask whether he wished to exercise his right of allocution as required by R.C. 2929.19(A)(1) and Crim.R. 32(A)(1) was not harmless error where the defendant had twice requested, but was not granted, an opportunity to address the court and make his case in mitigation before the court pronounced sentence, defense counsel was not afforded an opportunity to address the court on behalf of the defendant, and the trial court sentenced the defendant to the maximum prison term. [*But see* DISSENT: This court should overrule its decision in

State v. McAfee, 1st Dist. Hamilton No. C-130567, 2014-Ohio-1639, and hold that the defendant had no right to allocution at the community-control-revocation hearing where the trial court was merely reinstating the sentence imposed when the defendant was placed on community control.]"

Second Appellate District of Ohio

***State v. Younker*, 2015-Ohio-2066**

Sentencing: Third-Degree Felony Sex Offenses: Mandatory Imprisonment

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2015/2015-Ohio-2066.pdf

Appellant was convicted of three counts of gross sexual imposition involving a child under the age of 13. The trial court sentenced Appellant to a mandatory term based on the mistaken belief that third-degree felony sex offenses are subject to mandatory sentences as a matter of law. R.C. 2907.05(C)(2) merely calls for a presumption of prison, not a mandatory term.

Third Appellate District of Ohio

Nothing new.

Fourth Appellate District of Ohio

Nothing new.

Fifth Appellate District of Ohio

Nothing new.

Sixth Appellate District of Ohio

Nothing new.

Seventh Appellate District of Ohio

Nothing new.

Eighth Appellate District of Ohio

Nothing new.

Ninth Appellate District of Ohio

***State v. Gorden*, 2015-Ohio-2133**

Search: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2015/2015-Ohio-2133.pdf

The trial court did not err in granting Appellee's motion to suppress the search of his home. Police responded to his home because of a noise complaint. The officers could hear the music coming from Appellee's apartment from some distance away. They knocked on his door, he answered, gave his name, said the music was coming from a TV, and he would turn it down. He then closed the door, but did not turn down the music. The police waited three minutes, then knocked on the door again. Appellee answered again, and the police told him they were going to issue a noise ordinance citation and they needed his ID. Appellee would not comply with the request for ID. He repeated that he would turn the music down and tried to close the door. One officer, however, stopped him by putting his foot in the doorway. The officer demanded ID again, then a struggle ensued, eventually ending in Appellee's arrest and the search of his home. The trial court suppressed the warrantless search because none of the exceptions to the warrant requirement existed at the time the officer put his foot in the door.

Tenth Appellate District of Ohio

Nothing new.

Eleventh Appellate District of Ohio

Nothing new.

Twelfth Appellate District of Ohio

Nothing new.

Supreme Court of Ohio

***State v. Anderson*, 2015-Ohio-2089**

Sentencing: Community Control: Prison: Stay-Away Order

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2015/2015-Ohio-2089.pdf

A trial court cannot impose a prison term and a no-contact order for the same felony offense.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

***Mellouli v. Lynch*, No. 13-1034, 575 U.S. _____ (2015)**

Immigration

Full Decision: http://www.supremecourt.gov/opinions/14pdf/13-1034_3dq4.pdf

Syllabus of the Court:

Petitioner Moones Mellouli, a lawful permanent resident, pleaded guilty to a misdemeanor offense under Kansas law, the possession of drug paraphernalia "to . . . store [or] conceal . . . a controlled substance." Kan. Stat. Ann. §21–5709(b)(2). The sole "paraphernalia" Mellouli was charged with possessing was a sock in which he had placed four unidentified orange tablets. Citing Mellouli's misdemeanor conviction, an Immigration Judge ordered him deported under 8 U.S.C. §1227(a)(2)(B)(i), which authorizes the deportation(removal) of an alien "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." Section 802, in turn, limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. 21 U.S.C. §802(6). Kansas defines "controlled substance" as any drug included on its own schedules, without reference to §802. Kan. Stat. Ann. §21–5701(a). At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not on the federal lists. The Board of Immigration Appeals (BIA) affirmed Mellouli's deportation order, and the Eighth Circuit denied his petition for review.

***Held*:** Mellouli's Kansas conviction for concealing unnamed pills in his sock did not trigger removal under §1227(a)(2)(B)(i). Pp. 5–14.

(a) The categorical approach historically taken in determining whether a state conviction renders an alien removable looks to the statutory definition of the offense of conviction, not to the particulars of the alien's conduct. The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable

offenses defined by federal law. The BIA has long applied the categorical approach to assess whether a state drug conviction triggers removal under successive versions of what is now §1227(a)(2)(B)(i). *Matter of Paulus*, 11 I. & N. Dec. 274, is illustrative. At the time the BIA decided *Paulus*, California controlled certain "narcotics" not listed as "narcotic drugs" under federal law. *Id.*, at 275. The BIA concluded that an alien's California conviction for offering to sell an unidentified "narcotic" was not a deportable offense, for it was possible that the conviction involved a substance controlled only under California, not federal, law. Under the *Paulus* analysis, Mellouli would not be deportable. The state law involved in Mellouli's conviction, like the California statute in *Paulus*, was not confined to federally controlled substances; it also included substances controlled only under state, not federal, law.

The BIA, however, announced and applied a different approach to drug-paraphernalia offenses (as distinguished from drug possession and distribution offenses) in *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118. There, the BIA ranked paraphernalia statutes as relating to "the drug trade in general," reasoning that a paraphernalia conviction "relates to" any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used. *Id.*, at 120–121. Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in §802.

The BIA's disparate approach to drug possession and distribution offenses and paraphernalia possession offenses finds no home in §1227(a)(2)(B)(i)'s text and "leads to consequences Congress could not have intended." *Moncrieffe* v. *Holder*, 569 U. S. ___, ___. That approach has the anomalous result of treating less grave paraphernalia possession misdemeanors more harshly than drug possession and distribution offenses. The incongruous upshot is that an alien is *not* removable for *possessing* a substance controlled only under Kansas law, but he *is* removable for using a sock to contain that substance. Because it makes scant sense, the BIA's interpretation is owed no deference under the doctrine described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843. Pp. 5–
11.

(b) The Government's interpretation of the statute is similarly flawed. The Government argues that aliens who commit *any* drug crime, not just paraphernalia offenses, in States whose drug schedules substantially overlap the federal schedules are deportable, for "state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws 'relating to' federally controlled substances." Brief for Respondent 17. While the words "relating to" are broad, the Government's reading stretches the construction of §1227(a)(2)(B)(i) to the breaking point, reaching state - court convictions, like Mellouli's, in which "[no] controlled substance(as defined in [§802])" figures as an element of the offense. Construction of §1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under §802. Accordingly, to trigger removal under§1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§802]." Pp. 11–14.
719 F. 3d 995, reversed.

Analysis from Blake Somers (THANK YOU, BLAKE!):

Mellouli v. Lynch, 575 U.S. ____ (2015), GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.

Petitioner, green card holder, plead guilty to and was convicted of a misdemeanor under a Kansas state law for possession of drug paraphernalia (a sock in which he had four unidentified orange tablets). Petitioner was placed into removal/deportation proceedings pursuant to 8 U. S. C. §1227(a)(2)(B)(i), which authorizes deportation for noncitizens who have been "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." The Immigration Judge found that the paraphernalia conviction qualified as a conviction "relating to a controlled substance," and ordered Petitioner deported. The Immigration Judge's decision was affirmed by the Board of Immigration Appeals (BIA), and the Eight Circuit denied the subsequent appeal pursuant to Mellouli's Petition for Review. The Supreme Court granted *certiorari* and reversed.

The Supreme Court applied the "categorical approach" to determining whether Mellouli's conviction was a deportable offense "relating to a controlled substance." The categorical approach "looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior . . . [and a] state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law." Under this approach, "[a]n alien's actual conduct is irrelevant to the inquiry, as the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute."

Under the categorical approach, Mellouli was not deportable. "At the time of Mellouli's conviction, Kansas' schedules of controlled substances included at least nine substances—e.g., salvia and jimson weed—not defined in §802. See Kan. Stat. Ann. §65–4105(d)(30), (31). The state law involved in Mellouli's conviction, therefore . . . was not confined to federally controlled substances; it required no proof by the prosecutor that Mellouli used his sock to conceal a substance listed under §802, as opposed to a substance controlled only under Kansas law. Under the categorical approach . . . Mellouli's drug-paraphernalia conviction does not render him deportable. In short, the state law under which he was charged categorically "relat[ed] to a controlled substance," but was not limited to substances "defined in [§802].""

Important notes: the Supreme Court's holding in *Mellouli* differs from (and presumably overrules) a previous approach adopted by the BIA where, generally, all drug paraphernalia offenses "related to" a controlled substance. Now, in order to constitute a deportable offense "relating to a controlled substance," it would appear under *Mellouli* that the drug to which the paraphernalia related was a controlled substance as defined by Federal law. *See generally*, 21 U. S. C. §802 for schedules. In fact, the Supreme Court specifically held that "to trigger removal under §1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug 'defined in [§802].'" And, under the categorical approach, also applied in *Mellouli*, it would further appear that the identity of the drug must arise either directly from the statute of conviction, or from the documents which are permitted to be reviewed under the "modified categorical" approach.[1]

This latter holding is especially important from this case, as the Petitioner had admitted that the drug in the sock was Adderall, and Adderall is a controlled substance under both Federal and State law. However, because that fact only arose from an admission, not from the statute or the record of proceedings, it did not fall within the range of reviewable information, and was thus excluded from consideration. Thus, depriving portions of the record in the state court proceedings can potentially help the non-citizen in future removal proceedings. However, if the drug appears in the reviewable portion of the criminal proceedings, it may still be admissible in the removal proceedings. *Mellouli* at 6, FN4.

One additional thing: I actually don't know if Ohio's drug schedules are coterminous with the Federal schedules. My recollection is that they are, but, I honestly don't know off the top of my head. I know that the CMC criminalizes non-Federal-Schedule substances (like, I think an 800 mg Ibuprofin is on there), but, I don't know about Ohio. If Ohio's are the exact same as the Federal statute, then Mellouli may not be as much of a help. Even if they are, there's potentially an vein of law to say that because Ohio's involves marijuana, and it's not necessarily deportable to possess less than 30 grams of marijuana, then a paraphernalia offense isn't necessarily deportable anyway, but, that's probably something for another day unless you want to get into that now.

[1] For more on documents available for review under the "modified categorical" approach, see *Mellouli* at 6, FN4.

***Elonis v. United States*, No. 13-983, 575 U.S. _____ (2015)**

Facebook Threats: Jury Instruction: Mental State

Full Decision: http://www.supremecourt.gov/opinions/14pdf/13-983_7l48.pdf

Syllabus of the Court:

After his wife left him, petitioner Anthony Douglas Elonis, under the pseudonym "Tone Dougie," used the social networking Web site Facebook to post self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement. These posts were often interspersed with disclaimers that the lyrics were "fictitious" and not intended to depict real persons, and with statements that Elonis was exercising his First Amendment rights. Many who knew him saw his posts as threatening, however, including his boss, who fired him for threatening co-workers, and his wife, who sought and was granted a state court protection-from-abuse order against him. When Elonis's former employer informed the Federal Bureau of Investigation of the posts, the agency began monitoring Elonis's Face- book activity and eventually arrested him. He was charged with five counts of violating 18 U. S. C. §875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." At trial, Elonis requested a jury instruction that the Government was required to prove that he intended to communicate a "true threat." Instead, the District Court told the jury that Elonis could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. Elonis was convicted on four of the five counts and renewed his jury instruction challenge on appeal. The Third Circuit affirmed, holding that Section 875(c) requires only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

***Held*:** The Third Circuit's instruction, requiring only negligence with respect to the communication of a threat, is not sufficient to support a conviction under Section 875(c). Pp. 7–17.

(a) Section 875(c) does not indicate whether the defendant must intend that the communication contain a threat, and the parties can show no indication of a particular mental state requirement in the statute's text. Elonis claims that the word "threat," by definition, conveys the intent to inflict harm. But common definitions of "threat" speak to what the statement conveys—not to the author's mental state. The Government argues that the express "intent to extort" requirements in neighboring Sections 875(b) and (d) should preclude courts from implying an unexpressed "intent to threaten" re- quirement in Section 875(c). The most that can be concluded from such a comparison, however, is that Congress did not mean to confine Section 875(c) to crimes of extortion, not that it meant to exclude amental state requirement. Pp. 7–9.

(b) The Court does not regard "mere omission from a criminal enactment of any mention of criminal intent" as dispensing with such a requirement. *Morissette* v. *United States*, 342 U. S. 246, 250. This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal," and that a defendant must be "blameworthy in mind" before he can be found guilty. *Id.,* at 252. The "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States* v. *Balint*, 258

U. S. 250, 251. Thus, criminal statutes are generally interpreted "to include broadly applicable scienter requirements, even where the statute . . . does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70. This does not mean that a defendant must know that his conduct is illegal, but a defendant must have knowledge of "the facts that make his conduct fit the definition of the offense." *Staples* v. *United States*, 511 U. S. 600, 608, n. 3. Federal criminal statutes that are silent on the required mental state should be read to include "only that *mens rea* which is necessary to separate" wrongful from innocent conduct. *Carter* v. *United States*, 530 U. S. 255, 269. In some cases, a general requirement that a defendant act knowingly is sufficient, but where such a requirement "would fail to protect the innocent actor," the statute "would need to be read to require . . . specific intent." *Ibid.* Pp. 9–13.

(c) The "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U. S., at 72. In the context of Section 875(c), that requires proof that a communication was transmitted and that it contained a threat. And because "the crucial element separating legal innocence from wrongful conduct," *id.,* at 73, is the threatening nature of the communication, the mental state requirement must apply to the fact that the communication contains a threat. Elonis's conviction was premised solely on how his posts would be viewed by a reasonable person, a standard feature of civil liability in tort law inconsistent with the conventional criminal conduct requirement of "awareness of some wrongdoing," *Staples*, 511 U. S., at 606–607. This Court "ha[s] long been reluctant to infer that a negligence standard was intended in criminal statutes." *Rogers* v. *United States*, 422 U. S. 35, 47 (Marshall, J., concurring). And the Government fails to show that the instructions in this case required more than a mental state of negligence. *Hamling* v. *United States*, 418 U. S. 87, distinguished. Section 875(c)'s mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. The Court declines to address whether a mental state of recklessness would also suffice. Given the disposition here, it is unnecessary to consider any First Amendment issues. Pp. 13–17.

730 F. 3d. 321, reversed and remanded.

My thoughts: Obviously, this case does not directly apply to Ohio law. However, it has made me think about menacing/aggravated menacing. Recently, I argued in the First District (it declined to reach the issue on appeal because it wasn't raised at trial and they found another issue dispositive) that the aggravated menacing statute is unconstitutional. The logic, or lack thereof, that I used would also apply to menacing.

The basic premise of my argument was that the statute was void for vagueness/unconstitutionally overbroad because (1) you can never know what your statements will cause *another* person to believe, and (2) the statute criminalizes otherwise innocuous statements, like, "I'm going to kill your team at the game on Friday." I then argued that the standard ought to be what a reasonable person (victim) would believe was a real threat, not what any particular person would think. My thought at the time was that making it a reasonable person standard would add some clarity to the law.

After reading the Supreme Court's opinion in this case, I am abandoning my argument entirely. One of the things the Supreme Court said in this opinion was, "Having liability turn on whether a 'reasonable person' regards the communication as a threat – regardless of what the defendant thinks – 'reduces culpability on the all-important element of the crime to negligence,' * * * and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes' * * *." The rest of the opinion led me to believe the Supreme Court would uphold Ohio's menacing statutes. That also led me to believe our current statute is good for the defense. (Note: I really dislike the menacing statutes, but if the crime must exist, I like our statute for the defense).

Here's why I like the statute: The State has to prove your client knew what he/she said would cause the alleged victim would believe he/she would cause the victim physical harm/serious physical harm. It can be argued, thanks to this Supreme Court case, that the state cannot get an instruction or claim that what your client said would cause a reasonable person to believe physical harm/serious physical harm would be done to him/her. If the State cannot rely on a reasonable person standard, it's going to have one heck of a time proving your client knew what effect his/her statements would have on that particular alleged client. You should hammer that point home in closing. Unless the State has shown your client is psychic, is aware from some past interaction with the victim what effect the statements would have, or made some unambiguous, obviously threatening statements, your client cannot be found guilty.