Appellate Court Decisions - Week of 6/17/13

First Appellate District of Ohio

***State v. Baker*, Appeal Nos. C-120470, C-120471; Trial Nos. C-11CRB-33848A,B**

Assault: Lesser Included Offenses: Evidence

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120470_06192013.pdf

Summary from the First District:

Negligent assault under R.C. 2903.14(A) is not a lesser-included offense of assault under R.C. 2903.13(A).

The evidence was sufficient to support the defendant's conviction for criminal damaging or endangering under R.C. 2909.06, which requires proof that the defendant acted knowingly, even though the trial court had acquitted him of an accompanying assault charge because the state had not proved that he had acted knowingly: the verdicts on the two counts were not necessarily inconsistent, but even if they were, inconsistent verdicts on different counts are not grounds for reversal.

Baker entered into an agreement to lease rims for his car from Rent-N-Roll. His account was severely delinquent, so Rent-N-Roll's sales manager, Adam Armacost, and a wheel technician, Edward Holbrook, went to Baker's place of employment to repossess the rims. The men blocked in Baker's car in the parking lot. Baker happened to be leaving work to go to the hospital to be with his wife who was giving birth at the hospital. Baker testified that he told the men that he had already talked to Rent-N-Roll's head manager about his account and that he needed to go to the hospital to be with his wife.

Armacost stood in front of Baker's car. He and Holbrook testified that Baker backed his car into the open passenger side door of their van, damaging the door. Baker then drove forward out of the parking space and hit Armacost, knocking him back and injuring his knee. Baker said he didn't back his car up because he had backed into the parking spot when he arrived and all he needed to do was pull out. He testified that Armacost came up to the driver's side door and told him "you're not leaving." Baker said he didn't have time to talk and then got in his car and started it. He said Armacost then slapped the fender on his car and again told him he wasn't leaving. Baker said he then drove off and did not hit Armacost or the van.

Baker was charged with assault and criminal damaging or endangering. The trial court convicted Baker of criminal damaging or endangering, but said the activity did not

rise to the level of misdemeanor one assault, so it found him guilty of what it believed to be the lesser included offense of negligent assault.

On appeal, the First District held that negligent assault is not a lesser-included offense of assault because it contains an additional element that is not contained in the offense of assault. The court reversed his conviction on that count and ordered him discharged on that count. The court, however, affirmed his criminal damaging or endangering conviction as having sufficient evidence and not being against the manifest weight of the evidence.

***State v. Ushery*, Appeal No. C-120515, Trial No. C-05CRB-47998**

Expungement

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120515_06192013.pdf

Summary from the First District:

The offender's failure to pay the court costs assigned in the criminal proceeding that resulted in her minor-misdemeanor conviction did not, as a matter of law, render her ineligible to have that conviction expunged, but it is a factor that the trial court may consider when determining, in its discretion, whether the expungement of the conviction is appropriate.

***State v. McMahon*, Appeal No. C-120728, Trial No. 12TRC-34824B**

OVI: Intoxilyzer 8000

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120728_06212013.pdf

Summary from the First District:

The trial court erred in granting the defendant's motion to suppress the results of his Intoxilyzer 8000 breath test on the ground that the director of the department of health had not promulgated the necessary requirements under

R.C. 3701.143 for obtaining the access card required for the operation of the Intoxilyzer 8000 machine.

Pursuant to R.C. 3701.143, the director of the department of health is charged with implementing methods for analyzing a person's breath, blood, or other bodily substance in order to determine the amount of alcohol in a particular bodily substance, and with ascertaining the qualifications required for a person to perform such analyses.

Ohio Adm.Code Chapter 3701-53 contains the department of health's codification of the methods and qualifications that it was charged with implementing under R.C. 3701.143.

When a statute is silent or ambiguous with respect to an issue, a court must give deference to an agency's interpretation of its own regulations if the interpretation is reasonable.

Ohio Adm.Code 3701-53-09(D) provides that a user of an Intoxilyzer 8000 machine is referred to as an operator, and that a person desiring to become an operator of the machine must apply for an operator access card, which is issued to a person who qualifies under the provisions of Ohio Adm.Code 3701-53-07.

Ohio Adm.Code 3701-53-07 provides the qualifications that must be met for an individual to be issued an operator's permit or a senior operator's permit.

Ohio Adm.Code 3701-53-09(D) and Ohio Adm.Code 3701-53-07, read in conjunction, provide that an operator access card is the type of permit that is issued to an operator of an Intoxilyzer 8000 machine: therefore, the department of health has promulgated the necessary requirements for the issuance of an operator access card.

Fourth Appellate District of Ohio

***In re: C.W.*, Case No. 11CA918**

Juvenile Courts: Sex Offender Registration: Jurisdiction

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/4/2013/2013-ohio-2483.pdf

Courts may not apply Senate Bill 10 (Adam Walsh Act) to individuals who committed sexually-oriented offenses before the bill's effective date (so it should have been Megan's Law), so the juvenile court's classification of the defendant as a Tier I juvenile sex offender is unconstitutional and void. Because the defendant had reached his 21st birthday, the juvenile court no

longer possesses jurisdiction to re-classify him using the law in effect at the time he committed the offenses.

C.W., at age 14, was adjudicated a delinquent child in 2005 for committing two counts of rape. In 2008, he was classified as a Tier III juvenile sex offender under Senate Bill 10, which became effective on January 1, 2008. The court later vacated that classification because of a procedural irregularity. In March 2010, the court held a second classification hearing and classified C.W. as a Tier III juvenile sex offender under Senate Bill 10. C.W. appealed that classification, and it was reversed because the court had not appointed a guardian ad litem for him. On remand, the juvenile court then classified him as a Tier I sex offender registrant under Senate Bill 10. He appealed that classification, but the Fourth District stayed the appeal pending two Ohio Supreme Court Decisions. *In re J.V.*, 134 Ohio St.3d 1 and *State v.* Williams, 129 Ohio St.3d 344. On February 16, 2012, C.W. turned 21.

The Fourth District held that because C.W.'s offense occurred before January 1, 2008, the juvenile court could not apply Senate Bill 10 to him, so his classification was unconstitutional and void. Because C.W. was adjudicated prior to turning 18 and he turned 21 before this appeal was decided, the juvenile court no longer has jurisdiction to reclassify him under the law in effect at the time he committed the delinquent acts.

Seventh Appellate District of Ohio

***State v. Bundy*, Case No. 12 MA 86**

Postrelease Control: Nunc Pro Tunc

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/7/2013/2013-ohio-2501.pdf

A trial court has no authority to issue a nunc pro tunc judgment entry containing the appropriate language notifying the convicted of his period of postrelease control after the convicted has completed his prison term.

In 2002, Bundy was convicted by a jury of aggravated robbery and conspiracy to commit aggravated robbery. He appealed and the aggravated robbery conviction was affirmed but the conspiracy conviction was reversed. That left Bundy with a 10-year sentence. He was released from prison in 2011 and is currently under Adult Parole Authority (APA) supervision for a five-year period.

In 2012, Bundy filed a Motion to Terminate Post Release Control. He asserted that four months before his release from prison, the APA notified him that as a result of their assessment, he would be put on postrelease control for five years. He then asserted that the trial court failed to properly notify him of postrelease control in his judgment entry of sentence or at his sentencing hearing. He also claimed that because he had already completed his prison term, he could not be subject to resentencing in order to correct the error. The state, however, filed a motion for a nunc pro tunc entry to correct

the "clerical error" contained in the sentencing entry and urged the court to overrule Bundy's motion. The trial court sided with the state and entered a nunc pro tunc judgment entry of sentence that included the appropriate language regarding Bundy's period of postrelease control.

The Seventh District held that the trial court was without authority to issue the nunc pro tunc order because Bundy had already completed his prison term. It then released him from his term of postrelease control.

Eighth Appellate District of Ohio

***State v. Zawitz*, No. 99179**

Sentencing: Nunc Pro Tunc

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/8/2013/2013-ohio-2540.pdf

The trial court erred in issuing a nunc pro tunc order not to correct a clerical error or to make the record speak the truth, but rather to increase defendant's sentence by two years.

Zawitz was serving prison time on several convictions when he filed a motion for judicial release, which was granted because he had served all of the mandatory prison time. The trial court sentenced him to five years of community control sanctions. After two community control sanctions violations, he was sentenced to a total prison term of two years, which was reflected in the journal entry.

A month and a half after the sentencing, the trial court issued a nunc pro tunc correction to sentencing journal entry, amending the journal entry to read that Zawitz was sentenced to a total of four years in prison, not two as was previously stated. After losing a motion to correct the improper nunc pro tunc entry, Zawitz appealed.

The Eighth District said that the purpose of nunc pro tunc entries is limited to reflect what the court actually decided and are not to be used to reflect what the court might or should have decided, or what it intended to decide. When the court goes beyond the limited purposes, the resulting nunc pro tunc order is invalid. Here, the trial court's nunc pro tun entry went beyond correcting a clerical error or making the record speak the truth, so the Eighth District held that its use was improper and the entry was void. It reinstated the trial courts original sentence.

Supreme Court of Ohio

***State v. Steele*, 2013-Ohio-2470**

Intimidation: R.C. 2921.03: Abduction: R.C. 2905.02(A)(1): Police Officers

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/0/2013/2013-ohio-2470.pdf

Police officer not exempt from prosecution for offense of intimidation for abusing power to interrogate or for knowingly filing a materially false complaint to intimidate or influence witness.

Jury instruction defining "privilege" in context of police officer's privilege to arrest and detain is not plain error when instruction is identical to definition of "privilege" in R.C. 2901.01(A)(12).

Police officer Julian Steele was indicted on 10 counts, including abduction, intimidation, extortion, rape, and sexual battery. The charges stemmed from his investigation of six robberies in the same neighborhood in Cincinnati. After one of the robberies, a suspicious vehicle was reported and it was linked to Alicia Maxton.

Steele became aware that Alicia had children. He went to their school, arrested three children, and had their lockers searched. Steele took one of the children, R.M., into custody by handcuffing him and placing him in the back seat of a police cruiser. Steele told the school employees not to tell Alicia that he had taken R.M. into custody. The next day, he told school employees that he knew R.M. was innocent. Despite the fact that R.M. did not fit the physical description of any of the robbers, Steele took him to the police station and interrogated him extensively, using threatening and coercive tactics, prior to offering him his *Miranda* warnings. After denying any involvement, Steele threatened R.M. by telling him that his mother would be jailed and his siblings would be taken away if he did not confess to the robberies. R.M. succumbed and made a false confession. Steele then Mirandized him and taped his confession. Steele then charged R.M. with the six robberies and had him imprisoned in juvenile detention.

While R.M. was imprisoned, Steele repeatedly persuaded his mother to meet him to talk about R.M.'s case, and he eventually convinced her to come to his apartment. During one of her visits to Steele's apartment, Steele asked her to engage in sexual activity with him. Alicia complied with those requests because she believed Steele could get R.M. released.

During the nine days R.M. was in detention, Steele kept telling the assistant prosecutor that he knew R.M. had nothing to do with the robberies, but that he locked R.M. up to compel Alicia to cooperate with the investigation. The prosecutor mistakenly assumed R.M. had been released on the day of his arrest. When she discovered that R.M. was still in lock-up, she immediately had him released and dismissed the charges.

The prosecutor's office questioned Steele, and he admitted that he had excluded R.M. as a suspect prior to locking him up. He also admitted he thought R.M. had given a false confession. He also said that he does not make arrests only on witness investigation, but instead uses a technique called "bullshitting," whereby he arrests people on less than probable cause on the hope that something promising will result.

At trial, Steele did not testify. During jury instructions, the trial court defined privilege as "an immunity, license, or right conferred by law or bestowed by express or implied grant or arising out of status, position, office, or relationship or growing out of necessity." The trial court also explained that police officers have the authority to arrest a person if the officer has reasonable grounds to believe that the person is guilty of committing a crime.

The jury found Steele guilty of abduction of R.M., intimidation of R.M., and each with an accompanying firearm specification. The jury acquitted Steele on the remaining charges. He received a prison sentence of five years and an additional five years of community control. On appeal, the First District affirmed his intimidation conviction as supported by sufficient evidence and not against the manifest weight, but it reversed his abduction convictions, holding that the trial court's instructions to the jury on abduction were fatally deficient. The First District said that the trial court should have explained to the jury that a police officer loses the privilege to arrest and detain a citizen only if he does not have a good-faith belief that there is probable cause for the arrest.

The Supreme Court of Ohio held that a police officer may be prosecuted for the offense of intimidation where the police officer's actions during an interrogation satisfy the elements provided in R.C. 2921.03. Therefore, it affirmed the First District's conclusion that Steel's intimidation conviction was supported by sufficient evidence and not against the manifest weight of the evidence.

The Supreme Court reversed the First District on the abduction charge, holding that the trial court's erroneous jury instruction did not rise to the level of plain error. It limited its holding however, by stating, "our holding today would reach only the rare circumstance of a police officer depriving a person of his or her liberty *when a reasonable police officer would know that there is no probable cause supporting the detention, no matter how brief*."

Sixth Circuit Court of Appeals

***United States v. Tavera*, No. 11-6175 (Decided and Filed June 20, 2013)**

Discovery: *Brady v. Maryland*

Full Decision: http://www.ca6.uscourts.gov/opinions.pdf/13a0167p-06.pdf

The failure of the prosecution to turn over to the defendant clear exculpatory *Brady* material – statements by his co-defendant that the defendant knew nothing about crime he was charged with participating in – is a due process violation.

Tavera was convicted by a jury and sentenced to 186 months of imprisonment for participating in a methamphetamine drug conspiracy. Tavera was riding with Placido Mendoza in a truck Mendoza was driving for several hours from North Carolina to

Tennessee. The truck contained construction equipment and a large quantity of meth hidden under nails. Both men were arrested after police discovered the drugs.

At his trial, Tavera, who was a roofer, testified that he did not know about the drugs and that he thought he was going to Tennessee to view a construction project. After he was convicted, he learned that a few days before trial Mendoza participated in plea negotiations with an Assistant U.S. Attorney who was the government's attorney in Tavera's case, and Mendoza told the Assistant U.S. Attorney that Tavera had no knowledge of the drug conspiracy. Mendoza pled guilty after the negotiations.

The Sixth Circuit said that Mendoza's statements to the Assistant U.S. Attorney were plainly exculpatory. They both corroborated Tavera's trial testimony and directly contradicted the story of the government's main witness, who testified that Tavera had detailed knowledge of the drugs in the truck and participated in the conspiracy. However, the prosecutor failed to disclose Mendoza's statements to Tavera.

The Court held that this case was not even close, but rather was a clear due process violation (and a clear violation of *Brady v. Maryland*.) It vacated Tavera's conviction and remanded for a new trial.

Supreme Court of the United States

***Salinas v. Texas*, No. 12-246**

Fifth Amendment: *Miranda*: Silence

Full Decision: http://www.supremecourt.gov/opinions/12pdf/12-246_1p24.pdf

One must expressly invoke his or her Fifth Amendment privilege against self-incrimination in order to claim it. Without expressly invoking the privilege, the prosecution may comment on a defendant's failure to answer a question as evidence of guilt.

Salinas voluntary answered the questions of a police officer who was investigating a murder without being placed in custody or receiving *Miranda* warnings. He remained silent, however, when the officer asked him whether a ballistics test would show that the shell casings found at the crime scene would match his shotgun. Salinas was subsequently charged with murder. At trial, prosecutors suggested that his silence in response to the officer's question suggested that he was guilty. He was found guilty and his convictions were upheld by both Texas state appellate courts.

Salinas argued on appeal that the statement about his silence violated his Fifth Amendment right not to be compelled to be a witness against himself. The United States Supreme Court held Salinas' "Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question. It has long been settled that the privilege 'generally is not self-executing' and that a witness who desires its protection 'must claim it.' " (citations omitted)

***Alleyne v. United States*, No. 11-9335**

Sentencing: Sixth Amendment: *Harris v. United States*

Full Decision: http://www.supremecourt.gov/opinions/12pdf/11-9335_i4dk.pdf

This case overrules *Harris v. United States*, 536 U.S. 545 (2002), where the U.S. Supreme Court "held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment." The Supreme Court held here that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Because mandatory minimum sentences increase the penalty for crimes, any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

From the U.S. Supreme Court Syllabus:

"Petitioner Alleyne was charged, as relevant here, with using or carrying a firearm in relation to a crime of violence, 18 U.S.C. §924(c)(1)(A), which carries a 5-year mandatory minimum sentence, §924(c)(1)(A)(i), that increases to a 7-year minimum 'if the firearm is brandished,' §924(c)(1)(A)(ii), and to a 10-year minimum 'if the firearm is discharged,' §924(c)(1)(A)(iii). In convicting Alleyne, the jury form indicated that he had '[u]sed or carried a firearm during and in relation to a crime of violence,' but not that the firearm was "[b]randished.' When the presentence report recommended a 7-year sentence on the §924(c) count, Alleyne objected, arguing that the verdict form clearly indicated that the jury did not find brandishing beyond a reasonable doubt and that raising his mandatory minimum sentence based on a sentencing judge's funding of brandishing would violate his Sixth Amendment right to a jury trial. The District Court overruled his objection, relying on this Court's holding in *Harris v. United States*, 536 U.S. 545, that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. The Fourth Circuit affirmed, agreeing that Alleyne's objection was foreclosed by *Harris*."

The U.S. Supreme Court vacated the conviction and overruled *Harris*, saying, "[b]ecause mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."

The Court also said, "[t]his ruling does not mean that any fact that influences judicial discretion must be found by a jury. This Court has long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."