Appellate Court Decisions - Week of 6/23/14

First Appellate District of Ohio

State v. Arszman, 2014-Ohio-2727

Sex Offenses: Sentencing: Postrelease Control

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130133_06252014.pdf

Summary from the First District:

"The trial court erred in classifying the defendant as a Tier II sex offender in conjunction with his conviction for gross sexual imposition under R.C. 2907.05(A)(1): under the plain language of R.C. 2950.01(E)(1)(c), the court was required to classify the defendant a Tier I sex offender.

"The trial court erred in imposing postrelease control where the court failed to inform the defendant, at the sentencing hearing, that he was subject to a mandatory five-year term of postrelease control under R.C. 2967.28(B)(1). [*But see* DISSENT: The court's oral notification, as informed by the sentencing entry, sufficiently notified the defendant of his postrelease-control obligations.]"

State v. Adams, 2014-Ohio-2728

Contempt

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130559_06252014.pdf

Summary from the First District:

"The trial court's order, finding the attorney-defendant in contempt of court and imposing a jail sentence and fine, was final and appealable, even though the order allowed the defendant to purge the contempt by issuing an apology to the court and to the city prosecutor: the purge condition expired on a certain date, which had passed, and the condition did not seek the defendant's compliance with a court order, but was more akin to punishment.

"The trial court abused its discretion in finding the attorney-defendant in direct criminal contempt under R.C. 2705.01 where, at a hearing, the defendant suggested that the prosecutor did not know the law and wanted to punish the defendant's client, and the defendant stated that, 'Government is evil;' although uncivil and discourteous, the defendant's conduct did not, beyond a reasonable doubt, amount to misbehavior that obstructed justice and required immediate punishment."

State v. Davenport

Homicide: Nondisclosure of Witnesses: Prosecutorial Misconduct: Sufficiency: Manifest Weight: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130307_06272014.pdf

Summary from the First District:

"Although the state's written certification of nondisclosure under Crim.R. 16(D) lacked specific articulable facts to show that disclosing the identity of its civilian witnesses would jeopardize their safety, the trial court did not abuse its discretion in granting the state's motion for nondisclosure where, at a hearing held under Crim.R. 16(F), the state presented testimony from the lead investigator that the defendant, his family, and his friends had tried to identify the state's witnesses and contact them, and that some of the witnesses were so concerned for their safety they had called police to report the contacts, and in some instances officers had been dispatched to take aggravated-menacing reports.

"The state's failure to disclose the names of the civilian witnesses on its witness list until the day of trial did not prevent the defendant from discovering evidence favorable to him in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), where the defendant had received all the witnesses' names prior to trial, and the trial court had granted the defendant a 30-day continuance to investigate based upon the disclosure.

"The defendant was not denied a fair trial due to prosecutorial misconduct where the prosecutor did not improperly elicit witness-intimidation and other-acts testimony, and the prosecutor's allegedly improper statements during closing argument were permissible comments on the evidence, were responsive to arguments made by the defense, and did not ask the jury to return a guilty verdict based on anything other than the evidence.

"The trial court did not abuse its discretion in overruling the defendant's motion for a mistrial, which argued that the state had violated the court's order for separation of witnesses and the defendant's constitutional right to compulsory process by having a detective, who was a witness in the case, interview three defense witnesses during the trial, where all three defense witnesses had appeared for trial, one of the witnesses had testified, providing the defendant with an alibi, and the defendant had failed to present any evidence to show the other two witnesses' failure to testify at trial was either related to the detective's interview or prejudicial to the defense.

"The defendant was not denied the effective assistance of counsel, despite his claims that his counsel had failed to object to victim-impact and other-acts evidence, testimony relating to a CAD report, and to leading questions, where much of the conduct

in question could be construed as legitimate trial strategy and where the defendant had failed to demonstrate any prejudice.

"The defendant's convictions for aggravated murder with a three-year firearm specification and having a weapon under a disability were supported by sufficient evidence where three eyewitnesses testified that the defendant, who had a prior conviction for aggravated possession of drugs, approached the victim, pulled out a gun, shot the victim in the abdomen, and took his sunglasses, wallet, and cell phone.

"The weight to be given the evidence and the credibility of the witnesses were primarily for the trier of fact: the jury did not lose its way in rejecting an alibi defense and finding the defendant guilty of aggravated murder, its accompanying three-year firearm specification, and having a weapon under a disability where the testimony of the state's witnesses was sufficiently consistent and detailed in identifying the defendant as the perpetrator of the offenses and was corroborated by other physical and circumstantial evidence, and where the testimony from the alibi witness was not compelling.

"The defendant's sentence was contrary to law where the trial court imposed consecutive sentences without making the findings required by R.C. 2929.14(C)."

State v. Haywood

Drugs: R.C. 2941.25: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130525_06272014.pdf

Summary from the First District:

"The trial court did not abuse its discretion in denying the defendant's presentence motion to withdraw his guilty pleas because the motion was not timely made and was based solely on a change of heart.

"Where the trial court imposed a sentence that the parties had previously agreed would be imposed if the defendant, who had been released on a recognizance bond, failed to appear at sentencing, the sentence was not an agreed sentence as contemplated by R.C. 2953.08(G), and therefore, was subject to review.

"The defendant's convictions for trafficking in heroin and trafficking in cocaine were separately punishable under R.C. 2941.25 because they were committed both separately and with a separate animus.

"The trial court was not required by R.C. 2929.14(D) to inform the defendant of his eligibility to earn days of credit as prescribed by R.C. 2967.193.

"The requirements in R.C. 2929.19(B)(2)(f), that the trial court inform an offender at sentencing that the offender cannot ingest or be injected with a drug of abuse while in prison and that the offender will be required to submit to random drug testing while incarcerated, conferred no substantive rights upon the defendant, and any error resulting from the trial court's failure to comply with the statutory provision was harmless."

State v. Thomas

Evidence: Counsel: R.C. 2941.25

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130620_06272014.pdf

Summary from the First District:

"The defendant's convictions for menacing by stalking were based on sufficient evidence and were not against the manifest weight of the evidence: the defendant engaged in a course of conduct in which he came to the victim's home at night on multiple occasions and left 'gifts' outside, the defendant admitted to leaving the gifts and sending the victim numerous emails, and the victim testified that his actions terrified her and interfered with her ability to function.

"The defendant's convictions for telecommunications harassment were based on sufficient evidence and were not against the manifest weight of the evidence: the defendant sent the victim multiple emails per day over the course of a few weeks with purpose to harass after she told him not to contact her.

"The defendant's convictions were not allied offenses subject to merger: the defendant's conduct occurred over multiple days and at multiple times throughout each day, and the defendant committed separate acts with regard to each of the convictions.

"The defendant was not denied the effective assistance of counsel where the defendant represented himself at trial and where his prior counsel could not have subpoenaed an alibi witness prior to the trial date having been set.

"The defendant was not prejudiced by the trial court's admission into evidence of two emails not previously disclosed in discovery: the emails were cumulative of other evidence, and one had been sent after the complaints had been filed.

"The defendant was not denied a fair trial and his due process rights were not violated based on the cumulative effect of all the errors in the case because there were not multiple instances of harmless error."

Second Appellate District of Ohio

***State v. Christian*, 2014-Ohio-2672**

Engaging In A Pattern Of Corrupt Activity: Sufficiency

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2014/2014-ohio-2672.pdf

The prosecution failed to present sufficient evidence that Appellant and her co-defendants engaged in a pattern of corrupt activity where there was no evidence that the "structure" of the activities in which they engaged extended beyond the crimes they committed. In other words, the structure of their "organization" was not separate or distinct from the corrupt activity in which they engaged.

The trial court erred in ordering Appellant to pay restitution to governmental agencies providing law enforcement and fire services. The trial court also erred in ordering that her house be forfeited because Appellant did not receive notice in the indictment that the state sought forfeiture of her home, and the jury did not make the special finding required for forfeiture.

Third Appellate District of Ohio

***State v. Hurley*, 2014-Ohio-2716**

Trafficking in Counterfeit Controlled Substances: Sufficiency

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/3/2014/2014-ohio-2716.pdf

The state failed to present sufficient evidence to convict Appellant of trafficking in counterfeit controlled substances under R.C. 2901.22(B) where it presented no evidence that Appellant knew some of the heroin he sold to the confidential informant was not actually heroin.

***State v. Duncan*, 2014-Ohio-2720**

Verdict Form

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/3/2014/2014-ohio-2720.pdf

Appellant could only be convicted of a third-degree felony robbery rather than a second-degree robbery where the verdict form did not specify the degree of the offense and did not state the additional element that would increase the degree of the offense.

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

***State v. Johnson*, 2014-Ohio-2646**

Postconviction: DNA Testing

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2014/2014-ohio-2646.pdf

The trial court erred in denying Appellant's post-conviction motion for DNA testing where DNA testing had significantly improved since his 2001 conviction and it would be outcome determinative because the robbery for which he was convicted had only one perpetrator, he was excluded as a contributor to the DNA found in the hat the perpetrator wore, and another person later confessed to the crime in an affidavit.

Ninth Appellate District of Ohio

Nothing new.

Tenth Appellate District of Ohio

***State v. Patterson*, 2014-Ohio-2740**

Jury Instruction

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2014/2014-ohio-2740.pdf

In a trial for felonious assault, the trial court erred in failing to give an instruction for aggravated assault where the Appellant was sufficiently provoked by his seven-year-old stepson's allegations that the victim of the assault had propositioned him for oral sex.

Eleventh Appellate District of Ohio

***State v. Raia*, 2014-Ohio-2707**

Evidence: Cross-Examination

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/11/2014/2014-ohio-2707.pdf

The trial court erred in Appellant's trial on a charge of exposing his private parts in preventing him from cross-examining a witness who testified that Appellant did not engage in sexual conduct but gave a prior statement that he had. It also erred in preventing Appellant from cross-examining another witness regarding whether she had a bias against men.

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

***Riley v. California*, No. 13-132**

Fourth Amendment: Search and Seizure: Warrantless Searches: Cell Phones

Full Decision: http://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf

Fact summaries of the two combined cases:

"In No. 13-132, petitioner Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated used of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that police had obtained from his cell phone. The trial court denied the motion, and Riley was convicted. The California Court of Appeal "affirmed."

"In No. 13-212, respondent Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from Wuire's person and notice that the phone was receiving multiple calls from a source identified as 'my house' on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the 'my house' label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion, and Wurie was convicted. The First Circuit reversed the denial of the motion to suppress and vacated the relevant convictions."

Syllabus excerpts:

"*Held:* The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested."

"(b) The Court declines to extend [*United States v.] Robinson's* [, 414 U.S. 218] categorical rule to searches of data stored on cell phones. … But a

search of digital information on a cell phone does not further the government interests identified in *Chimel* [*v. California*, 395 U.S. 752], and implicates substantially greater individual privacy interests than a brief physical search."

"(1) The digital data stored on cell phones does not present either *Chimel* risk."

"(i) Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Officers may examine the phone's physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one. To the extent that a search of cell phone data might warn officers of an impending danger, *e.g.*, that the arrestee's confederates are headed to the scene, such a concern is better addressed through consideration of case-specific exceptions to the warrant requirement, such as exigent circumstances."