

Appellate Court Decisions - Week of 6/24/13

First Appellate District of Ohio

State v. McCants, Appeal No. C-120725, Trial No. B-1103329

Community Control: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120725_06262013.pdf

Summary from the First District:

The trial court did not err in revoking the defendant's community control despite the defendant's acquittal for possessing a concealed weapon, where the state presented evidence that the defendant had committed a number of misdemeanors in the same course of conduct that had led to the felony charge and where the hearing afforded the defendant comported with the minimal due-process standards applicable to revocation proceedings.

The trial court did not err in sentencing the defendant to a 12-month term of imprisonment: the sentence was within the range authorized for a fifth-degree felony, it did not exceed the term specified at the original sentencing hearing, and the trial court was not required to make further findings under R.C. 2929.13(B)(1)(d).

McCants was placed on community control in 2011 after pleading guilty to attempting to possess a concealed weapon. The trial court told him at sentencing that it would impose a 12-month prison sentence if he violated community control.

In 2012, McCants was indicted for carrying a concealed weapon. As a result of that indictment, a community-control violation was filed against McCants. The CCW went to trial and McCants was acquitted. After that, the community-control officer amended the violation to allege that McCants failed to conduct himself while on community control. The basis for the amended violation as McCant's alleged commission of misdemeanors that accompanied the CCW charge that were ignored by the grand jury.

At the community control violation hearing, a Cincinnati police officer testified that he saw McCants engage in a drug transaction then flee when he saw the officer's police cruiser. According to the officer, a gun fell out of McCants' waistband when he was scaling a fence. The officer also testified that McCants had been warned to remain off CMHA's premises.

Another officer testified that he saw McCants engage in an apparent drug transaction. That officer stated that the first officer chased McCants and that McCants

discarded a bag of what appeared to be marijuana before surrendering. McCants objected to the admission of a lab report showing the substance was marijuana, but the trial court accepted it into evidence.

Based on all of that, the trial court held that the state had established a community control violation. It revoked his community control and sentenced him to 12 months in prison.

McCants first argued on appeal that the trial court erred in revoking his community control. He argued that his CCW acquittal removed any factual basis for finding a violation. The First District pointed to Ohio Supreme Court precedent that community control may be revoked even if the underlying charges are dismissed, the defendant is acquitted, or the conviction is overturned, unless all factual support for the revocation is removed. It also pointed out that the standard of proof for a community control revocation is “substantial” evidence. The First District then held that substantial evidence was presented that McCants fled from the officers when ordered to stop, had possessed marijuana, and had trespassed on CMHA property. Therefore, it affirmed the community control revocation.

McCants also raised several due process arguments, but the First District pointed to precedent that says revocation proceedings are informal and require only “a minimal threshold of due process.” First, he argued that he was denied due process because the state failed to provide a witness list prior to the hearing, but he failed to raise the issue in the trial court, so the issue was forfeited. Next, he argued the trial court erred in admitting the lab report because he didn’t have an opportunity to confront a representative of the coroner’s lab, but the First District said there was no prejudice because of the officer’s testimony and because this was in the context of a revocation hearing. Third, he argued that the trial court erred in admitting evidence he had been banned from CMHA property, but the First District said that in light of the other misconduct, this was harmless error. Finally, he argued that he was not afforded a neutral and detached finder of fact, but the First District held that he cited nothing to support the assertion in the record.

State v. Thompson, Appeal No. C-130053, Trial No. B-1204220

Constitutional Law: Double Jeopardy

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130053_06262013.pdf

Summary from the First District:

The trial court did not err in overruling the defendant’s motion to dismiss the indictment against him for burglary on double-jeopardy grounds where the defendant had previously been convicted of receiving stolen property because successive-prosecution cases are controlled by *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306

(1932), not by R.C. 2941.25, and burglary requires proof that the defendant trespassed, an element not required by the receiving-stolen-property statute.

Thompson was charged on January 25, 2012, with receiving stolen property – a Vizio television – that had been taken from the victim’s home the same day. On June 21, 2012, Thompson and a co-defendant were charged with burglary for entering that same victim’s home and stealing two TVs and a cell phone. Thompson pleaded no contest to the receiving stolen property and received 30 days in jail. He then pleaded no contest to burglary after the trial court overruled his motion to dismiss his indictment on double-jeopardy grounds. He was sentenced to two years in prison.

Thompson argued on appeal that because the receiving stolen property and burglary offenses were allied offenses and subject to merger, his prosecution for burglary violated his double jeopardy rights. The First District held that, “[a]pplying the *Blockburger* test to the instant case, burglary requires proof that a defendant trespassed, an element not required by the receiving-stolen-property statute; therefore, Thompson’s double-jeopardy rights were not violated by his prosecution for burglary.”

State v. Wood, Appeal No. C-120598, Trial No. B-1106540

Sex Offenses

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120598_06282013.pdf

Summary from the First District:

The trial court erred in dismissing the indictment against the defendant, which charged him with failing to provide notice of a change of address, where the indictment properly stated the offense, which constituted a violation of R.C. 2950.05 under both Megan’s Law and the Adam Walsh Act, and where the defendant, who was a sexually oriented offender by operation of law under the Megan’s Law version of the statute, had a duty to comply with the Megan’s Law version of the statute.

Wood was convicted of rape in 1993 and sentenced to eight to 25 years in prison. Megan’s Law was enacted in 1997. It was repealed and replaced by the Adam Walsh Act in 2008. Wood was released on parole in 2012. At that point, the Ohio Supreme Court had not yet ruled on the retroactivity of AWA. His registration requirements were determined under AWA. However, he did not keep up with the requirements and was indicted for failure to provide notice of his change of address in 2011. He moved to dismiss and the trial court ruled that the sex-offender regulations from AWA and Megan’s Law did not apply to him, so it granted his motion to dismiss.

The First District held that Megan’s Law still applied to Wood and reversed.

State v. Johnson, Appeal No. C-120250, Trial No. B-1105638-C

Prosecutor: Juries: Counsel

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120250_06282013.pdf

Summary from the First District:

An assistant prosecutor's actions in speaking with a newspaper reporter and his directing of a secret service agent to speak with the reporter in the middle of the defendant's trial for his participation in a check-floating scheme, and the reporter's subsequent publication of an article about the defendant's trial, did not deprive the defendant of a fair trial, where the defendant could not demonstrate that he had been prejudiced by the prosecutor's conduct: following the appearance of the article in the newspaper, the trial court questioned each juror individually, permitting full participation by the parties' counsel, and determined that with the exception of one juror, who had retained the specific details from the article and was dismissed, the remaining jurors had minimal exposure to the article and that its publication would not affect their ability to remain fair and impartial.

The defendant was not denied the effective assistance of counsel where defense counsel's decisions, following the publication of the newspaper article, not to more thoroughly question the jurors about the article and not to impeach the jury's verdict could be construed as legitimate trial strategy and where the defendant could demonstrate no prejudice arising from the challenged performance.

The trial court did not abuse its discretion in denying the defendant's motion for a mistrial based upon the jury's exposure to a newspaper article about the defendant in the middle of the trial, where the trial court conducted a voir dire of the jury, questioning each one individually about their exposure to the article, and determined that most of the jurors had not read the article, and that the three remaining jurors who had read the article and were retained following the voir dire, had not been unduly influenced by their exposure to the article and that they could remain fair and impartial in deciding the defendant's case.

State v. Brown, C-120327, B-1102585

Evidence/Witness/Trial: Juries: Search and Seizure: Sentencing: Weapons

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120327_06282013.pdf

Summary from the First District:

The trial court did not err in denying for lack of standing the defendant's motion to suppress evidence found in his girlfriend's apartment where the evidence presented showed that the defendant stayed at the apartment only sporadically, and, therefore, he did not have a reasonable expectation of privacy in the apartment.

A detective's testimony that he recognized the defendant's voice from personally listening to 75 to 80 recordings of the defendant's telephone calls from jail and that during the calls the defendant and others had referred to the defendant was sufficient to authenticate a CD of recordings of the defendant's calls.

The trial court properly allowed recordings of the defendant's telephone calls from jail into evidence even though the defendant alleged that they contained improper other-acts evidence where during the calls the defendant tried to recruit others to testify that they had possessed the gun that the defendant was charged with possessing, which were attempts to subvert the state's case, and where the so-called other-acts evidence related to the charges being tried.

The trial court did not err in allowing a witness to testify about threats made to him because that evidence was relevant to show why the witness had not come forward earlier and helped to rebut attacks on the witness's credibility.

The trial court did not err in denying the defendant's motion for a mistrial based on a police officer's mistaken reference to the defendant having been in prison where evidence had been presented that the defendant had been on parole and where the trial court instructed the jury to disregard the prison reference.

The trial court did not err in denying the defendant's motion for a mistrial based on members of the gallery's attempts to communicate with or to intimidate jurors where the trial court spoke to the affected jurors who all indicated that they could remain fair and impartial, and where the court took additional steps to increase security and to make sure that no more improper communication occurred.

The sentence imposed by the trial court was not contrary to law even though the court did not state on the record that it had considered the purposes and principles of sentencing or any of the factors set forth in R.C. 2929.11 and 2929.12 before imposing sentence because an appellate court can presume from a silent record that the trial court considered the factors unless the defendant affirmatively demonstrates that the trial court failed to do so.

State v. Harris, Appeal No. C-120531, Trial Nos. B-0705705, B-0802251, B-1005851B

Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120531_06282013.pdf

Summary from the First District:

The trial court erred in imposing consecutive sentences without making the findings required under R.C. 2929.14(C).

The trial court erred in imposing court costs without notifying defendant, as required by R.C. 2947.23(A), that it could order him to perform community service in lieu of paying costs, requiring the appeals court to vacate costs and remand for proper community-service notification.

State v. Winters, Appeal Nos. C-120543, C-120544; Trial Nos. B-1000393, B-1203109

R.C. 2941.25

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120543_06282013.pdf

Summary from the First District:

Where the defendant was found guilty of two theft offenses that related to the same property, the trial court erred in sentencing him for both offenses because they had been committed with the same animus and were subject to merger pursuant to R.C. 2941.25.

Where the defendant was found guilty of misuse of a credit card and theft, and both charges related to the same loss, the trial court erred in sentencing the defendant for both offenses because they had been

committed with the same animus and were subject to merger pursuant to R.C. 2941.25.

Fourth Appellate District of Ohio

State v. Jackson, Case No. 12CA16, 2013-Ohio-2628

Evidence: Motion in Limine: Objections: Preserve for Appeal

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/4/2013/2013-ohio-2628.pdf>

If you file a motion in limine and lose, then fail to renew your objection when the evidence is actually introduced at trial, the issue will not be preserved for appeal.

The facts are not important in this case for our purpose. What is important is that the attorney filed a motion in limine prior to trial and it was denied. When the evidence was introduced at trial, the attorney failed to renew the objection. The Fourth District held (following plenty of precedent) that the issue was not preserved for appeal and therefore waived.

So, heed this lesson – renew your objections at trial or they’ll be waived on appeal.

State v. Mullins, Case No. 12CA3350

OVI: Urine Testing: Motion to Suppress

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/4/2013/2013-ohio-2688.pdf>

Defendant was convicted for an OVI with a prohibited concentration of alcohol in her urine. The parties stipulated that after a trooper took the urine sample, he gave it to another trooper who did not refrigerate it and did not place it in the mail for testing until nearly 12 hours later. Because that was not a de minimis or minor procedural deviation, the State failed to prove substantial compliance and the trial court erred when it denied the motion to suppress.

Mullins was charged with violating R.C. 4511.19(A)(1)(a), (A)(1)€ and R.C. 4511.202. She filed a motion to suppress the results of her urine test because the State failed to keep her urine specimen refrigerated when it was not in transit or under examination. The parties stipulated that the urine sample was never refrigerated and not placed in the mail until 12 hours after it was collected. The trial court stated that the case was close, but overruled the motion to suppress.

The Fourth District pointed to R.C. 4511.19(D)(1)(b) which says that the State must have urine analyzed in accordance with methods approved by the director of health. Ohio Adm. Code 3701-53-05(F) provides: “While not in transit or under examination, all blood and urine specimens shall be refrigerated.” Because Mullins challenged the validity of the urine test results in a motion to suppress, the State had the burden to show the test was administered in substantial compliance with the methods approved by the director of health.

The State argued on appeal that because the sample was collected and mailed within a single shift, the failure to refrigerate was a de minimis violation of Ohio Adm. Code 3701-53-05(F). The Fourth District declined to make such a bright-line test. Instead, the Fourth District held that 12-hour period without refrigeration was violation of the Administrative Code and the test should have been suppressed.

Fifth Appellate District of Ohio

State v. Smith, Case No. 13-CA-9

Allied Offenses: Record

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/5/2013/2013-ohio-2650.pdf>

“By their very nature, guilty plea proceedings are necessarily devoid of facts to prove the underlying offenses. If a defendant who pleads guilty wishes to make an allied offenses argument at sentencing, that defendant has the responsibility in the first instance to ensure that the record contains facts to support that argument. If the defendant fails to do so, any argument on appeal is waived.” *State v. Rogers*, 8th Dist. Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 203-Ohio-1027, ¶9.

This case is another learning opportunity. Smith was charged with breaking and entering and vandalism. He pleaded guilty, and his attorney argued at closing that the offenses were allied offenses of similar import and should merge for sentencing purposes. The only facts presented were those presented by the prosecution at the change of plea hearing. The damage for the vandalism charge was said to be to several pieces of property, including one large door.

Smith’s attorney argued the only damage was to the door, which was damaged in the process of the breaking and entering. The prosecution argued that the damage occurred after Smith was already in the building. The Fifth District said the record did not clearly demonstrate either version of the facts. It then held that, following the reasoning above, that because Smith did not place facts in the record to support his allied offenses argument, his assignment of error was overruled.

State v. Marcum, Case No. 12-CA-88

Traffic Stops: Reasonable Suspicion

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/5/2013/2013-ohio-2652.pdf>

A driver must drive over or across the white fog line or double yellow lines, not merely on either of those lines, for a police officer to have a reasonably articulable suspicion to initiate a traffic stop.

Marcum was charged with operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(2) and/or (A)(1)(a) and a marked lanes violation in violation of R.C. 4511.33. He entered a plea of not guilty, and later filed a motion to suppress.

At the suppression hearing, the Ohio State Highway Patrol Trooper testified that he saw Marcum's vehicle go over the solid white fog line on the right and then over the double yellow line on the left. The trooper also testified that his video recorder did not capture the vehicle driving over the white fog line because of the grade on the roadway, but he was able to see the vehicle's tires on the right hand side completely cross over the white line. He also testified that the video did show Marcum crossing over the solid yellow line and into an area containing cross-hatched markings. The video was admitted into evidence.

On cross-examination, the trooper testified that, regarding the white fog line, the entire tire width was over the white line. He also testified that he had no doubt that Marcum's tire went completely over the yellow lane line. After seeing the alleged line crossings, the trooper initiated a traffic stop that resulted in the charges above.

The trial court, after viewing the video, said it was not convinced Marcum drove completely over the white line and that he did not completely cross the double yellow lines. Therefore, there was no violation of R.C. 4511.33 and the trooper had no basis to stop Marcum. The trial court then granted his motion to suppress.

The state appealed, and the Fifth District affirmed. It said the issue was whether the trooper had a reasonable, articulable suspicion to stop Marcum's vehicle. It viewed the video recording and could not find that the trial court's finding regarding whether Marcum crossed the white line was against the manifest weight of the evidence. In the end, the Fifth District affirmed the grant of the motion to suppress because it was not against the manifest weight of the evidence for the trial court to find that Marcum did not go across or over either line.

State v. Rush, Case No. CT12-0038

Sentencing: Felony

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/5/2013/2013-ohio-2728.pdf>

The trial court erred in sentencing Defendant to a prison sentence when his conviction, although it was reduced from a violent felony, was for a non-violent felony of the fourth degree. The trial court was required to sentence him to community control.

Rush was charged with six counts of gross sexual imposition (fourth-degree felonies), one count of rape (first-degree), one count of sexual battery (third-degree), and one count of child endangering (first-degree misdemeanor). The prosecution entered a nolle prosequi on counts two through nine and amended count one to attempted child endangering, a felony of the fourth degree. Rush entered a plea of no contest to the amended charge of attempted child endangering. He was found guilty and sentenced to a prison term of 18 months.

The record indicated that the trial court's sentencing decision was based on the fact that the resulting attempted child endangering conviction was reduced from gross sexual imposition. However, attempted child endangering is not an offense of violence. Therefore, because Rush was convicted of one count of a non-violent felony of the fourth degree, the Fifth District held that the trial court was required to sentence Rush to community control and erred in sentencing him to a prison term.

Eleventh Appellate District of Ohio

State v. Armstrong, 2012-P-0018

Fourth Amendment: Search and Seizure: Search Warrants

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/11/2013/2013-ohio-2618.pdf>

A black memo notebook containing the defendant's confession should have been suppressed where the search warrant called for a search for DNA and a key, neither of which justified a page-by-page look through the notebook.

Armstrong was indicted on two counts of murder, pursuant to R.C. 2903.02(A) and (B), for the death of Jeffrey Sipes. He filed a motion to suppress his statements made to police on June 16, 17, 21, and 22 of 2011. He also moved to suppress a black memo notebook taken by police from his apartment pursuant to a search warrant.

At the suppression hearing, the prosecution presented the testimony of Detective DiJerome, who was assigned to investigate Sipes' murder. Sipes had been stabbed

multiple times in his apartment. A broken kitchen knife was also found in his apartment – the blade was on the kitchen counter and the handle in the hallway. DNA was found on the handle of the knife.

Detective DiJerome learned that Armstrong had lived with Sipes and might have a key to his apartment, so DiJerome ran a background check on Armstrong. He discovered Armstrong had a criminal history in New Jersey and Florida. He then learned that the DNA on the knife had a partial hit on the CODIS database from New Jersey.

DiJerome and another officer went to Armstrong's apartment to talk with him on June 16, 2011. They talked for nine minutes and did not advise Armstrong of his rights because he was not under arrest. DiJerome and Officer Ennermoser went to Armstrong's apartment the next day, with the interview lasting 16 minutes that time. Again, Armstrong was not advised of his rights because he was free to leave at any time and the interview occurred at his own residence. During that visit, DiJerome took a DNA sample from Armstrong to check anyone who had been in the apartment.

On June 21, 2011, DiJerome and Ennermoser returned again, this time interviewing Armstrong for 14 minutes. Armstrong was not read his rights, but he was told he was not under arrest and did not have to answer any questions. DiJerome showed Armstrong a picture of the knife handle and told him DNA was found on it. Armstrong said he should talk with an attorney and the detective and officer left.

The next day, June 22, 2011, DiJerome, Detective Bassett, Officer Harris, and Officer Ennermoser went to Armstrong's apartment to execute a search warrant. The purpose of the search warrant was to look for the following: "Any object or item that may contain biological evidence (blood/DNA), including but not limited to shoes or clothing. Key(s) to apartment located at 933 Lawrence Drive, and keys(s) [sic] to apartment #303, located at 933 Lawrence Drive, located in the City of Kent, County of Portage, State of Ohio."

Armstrong was home when the officers arrived. He was advised that he was free to leave and was not under arrest, but he chose to stay on the front porch. During the search, Detective DiJerome opened a drawer and found a memo book, which he knew, in his experience, could be used to conceal items like keys and money. He opened the book and observed writing about the homicide on the third page. Officer Ennermoser, who took a picture of the page, flipped to the next page. It contained a confession to the murder.

DiJerome did not look through any more pages, but took the book to Armstrong and asked if it belonged to him and if it was his writing. Armstrong admitted to both. DiJerome then went inside to continue the search, but Ennermoser stayed on the porch. DiJerome heard the two talking and came back out. He told Armstrong that he'd feel better if he just told the truth, and Armstrong confessed to the murder. Armstrong was not Mirandized until he was at the police station.

The trial court overruled the motion to suppress. Armstrong was sentenced and appealed. His first assignment of error was regarding the motion to suppress the black memo notebook.

The Eleventh District first took note that the search warrant was so broad, it was virtually limitless. It did not specify whose DNA was being sought, but presumably it was the victim's as Armstrong's had been taken already. There was no indication why the officers had probable cause to believe the victim's DNA would be in Armstrong's apartment. Getting to the notebook, there was no justification to believe the victim's DNA was inside the notebook, or what type of DNA the notebook might have contained. There was also no justification for a page-by-page look through the book. In the end, the Eleventh District held that black memo notebook was not within the scope of the search warrant and should have been suppressed.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.