Appellate Court Decisions - Week of 6/26/17

Note: This is not a comprehensive list of every case released this week.

First Appellate District of Ohio

State v. Jones, 2017-Ohio-5517

Competency: Jurisdiction: Evidence

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-5517.pdf

Summary from the First District:

"Former R.C. 2945.39, which allowed the trial court to retain jurisdiction over an incompetent defendant where there was not a substantial probability that the defendant would become competent to stand trial within one year was 'manifestly civil in its intent.'

"A police officer's testimony about the victim's statements was sufficient to prove by clear and convincing evidence that the incompetent defendant had committed three counts of rape and one count of attempted rape, and therefore, the trial court did not err in retaining jurisdiction over the defendant under former R.C. 2945.39.

"The trial court's reliance on hearsay in determining if clear and convincing evidence showed that the incompetent defendant had committed the charged offenses was not error, because the applicable statute gave the court the discretion to consider all relevant evidence, and because the defendant forfeited any error by failing to object.

"The trial court's reliance on hearsay did not violate the incompetent defendant's right to confront the witnesses against him: the Ohio Supreme Court has held that because former R.C. 2945.39 was civil in nature, a person committed under that statute need not have been afforded the constitutional rights afforded to a defendant in a criminal prosecution, and the defendant forfeited any error by failing to raise the issue in the trial court."

State v. Brooks, 2017-Ohio-5518

Driver's License Suspension: Sufficiency

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-5518.pdf

Summary from the First District:

"The defendant's conviction for driving under a 12-point suspension in violation of R.C. 4510.037(J) was based upon insufficient evidence where the state failed to prove that the registrar of the bureau of motor vehicles had notified the defendant of the suspension pursuant to R.C. 4510.037(B)."

***State v. Bandy*, 2017-Ohio-5593**

Aggravated Murder: Aggravated Robbery: Self-Defense: Evidence: Allied Offenses: R.C. 2941.25: Jury Instructions: Ineffective Assistance

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-5593.pdf

Summary from the First District:

"Defendant's aggravated-murder and aggravated-robbery convictions with firearm specifications were supported by sufficient evidence where the surviving victim of the aggravated robbery testified that the defendant and an accomplice brandishing guns approached him and his brother on a basketball court and attempted to take their jewelry, the defendant shot the brother as he was escaping over a fence, killing him, and then the defendant turned his gun on the surviving brother, who shot the defendant with the accomplice's dropped gun.

"The jury did not lose its way in rejecting the defendant's testimony that he had been the victim of a robbery and had only shot the deceased in self-defense while lying on the ground after being shot where the defendant's testimony was not corroborated by the evidence at trial, including bystander eyewitness testimony and the coroner's testimony concerning the path of the bullet.

"The trial court did not commit plain error by failing to merge aggravated-murder and aggravated-robbery offenses, because the defendant's conduct with respect to the aggravated murder demonstrated a specific intent to kill that was separate from the animus involved in the aggravated robbery of the same victim.

"Where the jury rejected the defendant's defense of self-defense with respect to the count of aggravated murder while committing an aggravated robbery, the defendant cannot demonstrate that the trial court's instruction that the defense of self-defense did not apply to a separate count of aggravated robbery, even if erroneous, was outcome-determinative and subject to notice under Crim.R. 52(B) despite the defendant's failure to object at trial.

"The defendant failed to demonstrate that any error by trial counsel in withdrawing a motion to suppress his false exculpatory statements to the police that conflicted with his trial testimony prejudiced him where the defendant testified at trial in support of

his claim of self-defense and his prior inconsistent statements would have been admissible to impeach his trial testimony even if the trial court had suppressed the statements."

***State v. Harris*, 2017-Ohio-5594**

Appellate Review: OVI: Evidence: Crim.R. 29(C): Inconsistent Verdicts

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-5594.pdf

Summary from the First District:

"The sole purpose of a Crim.R. 29 motion is to test the sufficiency of the evidence and, when that evidence is insufficient, to take the case from the jury; a Crim.R. 29(C) post-verdict motion challenges defects in the sufficiency of the evidence that only become apparent after the jury returns its verdicts.

"The standard for reviewing a post-verdict motion for judgment of acquittal made pursuant to Crim.R. 29(C) is identical to the standard for reviewing a motion for acquittal made during a trial pursuant to Crim.R. 29(A).

"A Crim.R. 29(C) motion is not the proper vehicle for raising errors that do not challenge the sufficiency of the evidence adduced at trial.

"Although specificity of grounds is not required in a Crim.R. 29(C) motion, if a defendant sets forth specific grounds in his motion for judgment of acquittal, he forfeits review of all grounds not specified.

"Each of the four types of OVI offenses described in R.C. 4511.19(A) constitutes a separate offense.

"Operation of a motor vehicle under the influence of alcohol or drugs, as proscribed in R.C. 4511.19(A)(1)(a), is the basic OVI offense; a conviction under R.C. 4511.19(A)(2) also requires proof beyond a reasonable doubt that the defendant operated a motor vehicle while under the influence of alcohol or drugs but is distinguished from a violation under R.C. 4511.19(A)(1)(a) because the state must also prove that the defendant refused to submit to a chemical test while under arrest for the current OVI violation and that he had a prior OVI conviction within 20 years of the current violation.

"For purposes of a conviction under R.C. 4511.19(A)(2), the refusal to take a chemical test is not itself an offense but the refusal is an element of the offense as is a prior OVI conviction within 20 years of the current violation.

"Seeming inconsistency between verdicts on two different charges is not a basis for reversal where the several charges are not interdependent and an inconsistency in a

verdict does not arise out of inconsistent responses to different charges, but only arises out of inconsistent responses to the same charge.

"There is no inconsistency in jury verdicts that find a defendant not guilty under R.C. 4511.19(A)(1)(a) yet guilty under R.C. 4511.19(A)(2) where the offenses were charged together, the evidence supported the conviction under R.C. 4511.19(A)(2), the trial court instructed the jury that the two operating-under-the-influence charges were to be decided independently and separately, and the R.C. 4511.19(A)(2) conviction was not dependent upon a finding of guilt on the other charge.

"The method of proving a prior conviction set forth in R.C. 2945.75(B)(1) is not the only means available to the state to carry its burden of proof; an offender's stipulation that he has committed the prior conviction satisfies the state's obligation of proof.

"To receive consideration on appeal, trial court errors must be raised by assignment of error and must be argued and supported by legal authority and citation to the record; where an appellant fails to take these actions, the court will dismiss the appeal."

***State v. Hamm*, 2017-Ohio-5595**

Other Acts: Joinder: Hearsay: Excited Utterance: Confrontation Clause: Due Process: Witnesses: Ineffective Assistance: Cumulative Error

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-5595.pdf

Summary from the First District:

"The trial court did not abuse its discretion in admitting other-acts evidence under Evid.R. 404(B) and R.C. 2945.59 where the evidence was relevant, where it was admitted to show defendant's motive and intent, and where the court properly instructed the jury that the other-acts evidence could be considered only in regard to the charge it was admitted in connection with and that the evidence could not be considered to prove defendant's character or that he acted in conformity with that character in committing the crime charged.

"The trial court did not abuse its discretion in admitting evidence that defendant had threatened two jail-house informants who had agreed to testify against him, because evidence of threats or intimidation of witnesses reflected a consciousness of guilt and was admissible as an admission by conduct.

"The trial court did not abuse its discretion in joining defendant's indictments for trial where the evidence of each crime charged was simple and direct and the trial court instructed the jury to consider each charge separately.

"Generally, an excited utterance is not testimonial in nature and does not implicate the Confrontation Clause.

"The trial court did not abuse its discretion in allowing a statement into evidence as an excited utterance where there had been a startling event, in this case a shooting, the statement had been made within a minute or two after the event, the statement related to the event, and the declarant had personally observed the matters asserted.

"Defendant was not denied the effective assistance of trial counsel on the record presented: the ineffective-assistance arguments made on appeal were not based on counsel's actual performance as shown in the record, but on unsworn representations and inconclusive evidence of a potential conflict of interest.

"Defendant was not denied due process of law where the trial court allowed a witness, who had been represented by defendant's prior counsel, to testify against defendant where there was inconclusive evidence concerning whether defendant's counsel had been ineffective due to a conflict of interest: there is no 'exclusionary rule' for Sixth Amendment violations, and defendant explored the witness's connection to defendant's former counsel and tested the witness's credibility through cross-examination.

"The cumulative-error doctrine does not apply where there has been no error."

***State v. West*, 2017-Ohio-5596**

Jurisdiction: Guilty Plea: Crim.R. 32.1: Ineffective Assistance: Actual Innocence

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-5596.pdf

Summary from the District:

"The common pleas court had jurisdiction to decide defendant's Crim.R. 32.1 motion to withdraw his guilty pleas to sexual battery after his convictions based on those pleas had been affirmed on direct appeal, where his ineffective-counsel and actual-innocence claims depended for their resolution upon evidence outside the record of proceedings leading to his convictions and thus could not have been raised on direct appeal.

"The common pleas court did not abuse its discretion in denying, without a hearing, relief under Crim.R. 32.1 based on defendant's ineffective-counsel claim, when defendant did not support the claim with evidence demonstrating the alleged deficiency in counsel's performance.

"The common pleas court abused its discretion in denying relief under Crim.R. 32.1 without first conducting an evidentiary hearing on defendant's claim of actual innocence: throughout the proceedings leading to his convictions and on direct appeal, defendant consistently maintained his innocence of the sexual-battery charges to which

he pled; his actual-innocence claim was supported by the victim's affidavit exonerating him; and the court abused its discretion in discounting the credibility of that affidavit."

Second Appellate District of Ohio

Nothing to report.

Third Appellate District of Ohio

***State v. Bentz*, 2017-Ohio-5483**

Sufficiency: Kidnapping: Sexual Battery

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/3/2017/2017-Ohio-5483.pdf

Appellant's kidnapping conviction under R.C. 2905.01(A)(2) was based on insufficient evidence. Appellant's direction to the victim to hide in the closet after the rape and sexual battery were committed were not sufficient to satisfy the flight element of kidnapping. Appellant remained at the house after the crimes were committed. (It's a very long story, read the whole opinion if you want an explanation.) The trial court also erred in finding Appellant guilty of sexual battery under R.C. 2907.03(A)(13) because, pursuant to *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, the statute is unconstitutional.

More from the Third District: "The admission of evidence related to the elements of the now unconstitutional R.C. 2907.03(A)(13) does not warrant Bentz a new trial because that evidence was probative of whether Bentz was guilty of the other crimes for which he was on trial. Bentz's trial counsel was not ineffective for failing to object to the State's asking K.A. leading questions during direct examination."

Fourth Appellate District of Ohio

***State v. Willis*, 2017-Ohio-4456**

Plea: Judicial Release

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2017/2017-Ohio-4456.pdf

Appellant's guilty plea was not knowing, voluntary and intelligent where the trial court incorrectly informed her as to when she would be eligible to apply for judicial release.

***State v. Williams*, 2017-Ohio-4455**

OVI: Motion to Suppress

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2017/2017-Ohio-4455.pdf

"[T]he State argues that the trial court incorrectly suppressed the results of Williams's BAC DataMaster test. The State contends that the trial court erred in finding that the law enforcement officer who administered Williams's test lacked a valid permit to operate the machine. The State further claims that the trial court wrongly construed the Ohio Director of Health ('ODH') regulations to mean that a BAC DataMaster senior operator permit holder must complete a proficiency examination that includes accepting 'subject samples' in order for a renewal to be valid. We agree with the State. A plain reading of the regulations fails to support the trial court's conclusion. Instead, the regulations clearly outline the qualifications for renewal and do not require a BAC DataMaster senior operator permit holder seeking renewal to complete a proficiency examination before the renewal becomes valid. *See* Ohio Adm.Code 3701-53-09(F) and 3701-53-07(D). The regulation regarding proficiency examinations for BAC DataMaster senior operator permit holders states that the proficiency examinations are conducted 'at the director's discretion,' and not that they are required in order to obtain a renewal. Ohio Adm.Code 3701-53-08(C)."

Fifth Appellate District of Ohio

***State v. Elschlager*, 2017-Ohio-5545**

Search: Motion to Suppress

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2017/2017-Ohio-5545.pdf

The trial court did not err in granting Appellee's motion to suppress a handgun found during a search of his home. The incriminating nature of the firearm was not immediately apparent because the police did not have probable cause to associate it with a criminal purpose. Appellee carried the firearm as part of his job responsibilities. The seizure of the firearm was also not justified under the community caretaking exception. The officers' actions did not fall within the good faith exception because the firearm was taken because it was in plain view. The warrant did not provide for the seizure of firearms.

***State v. Unger*, 2017-Ohio-5553**

OVI: Motion to Suppress

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2017/2017-Ohio-5553.pdf

The trial court erred in denying Appellant's motion to suppress. The police officer lacked a reasonable articulable suspicion to stop Appellant's vehicle where no traffic violations were observed, and Appellant was stopped only because the color of his vehicle did not match the color shown in the records system.

Sixth Appellate District of Ohio

***State v. Kelly*, 2017-Ohio-4475**

Evidence: Evid.R. 404(B)

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2017/2017-Ohio-4475.pdf

Summary from the Sixth District: "The state's introduction, without notice, of evidence of acts germane to the offense charged, which occurred outside the period set forth in the indictment, constitutes plain error when such evidence is the only evidence introduced by the state that corroborates the ex-wife/coconspirator's testimony that ex-husband/appellant knowingly exerted control over public assistance benefits the household was not eligible to receive."

***State v. Young*, 2017-Ohio-4476**

Sentencing: Repeat Violent Offender Specification

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2017/2017-Ohio-4476.pdf

Summary from the Sixth District: "Appellant failed to establish ineffective assistance of counsel. Determination of appellant's repeat violent offender status should have been decided by trial judge, not by the jury."

Seventh Appellate District of Ohio

Nothing to report.

Eighth Appellate District of Ohio

***State v. Bates*, 2017-Ohio-4445**

Bond

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2017/2017-Ohio-4445.pdf

Summary from the Eighth District: "The trial court lacked statutory authority to order a return of a portion of a bond premium when the court relieved the surety of liability under R.C. 2937.40 after the principal failed to appear as required."

Ninth Appellate District of Ohio

***State v. Sieminiski*, 2017-Ohio-5480**

Drug Offense

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/9/2017/2017-Ohio-5480.pdf

"[T]he trial court erred when it determined that the immunity provided in R.C. 2925.11(B)(2)(b) applied to defendants who committed a minor drug offense prior to the amendment's enactment." (Immunity based on evidence of drug possession found while the person is seeking medical assistance or experiencing an overdose).

Tenth Appellate District of Ohio

***State v. Wintermeyer*, 2017-Ohio-5521**

Search: Plain Feel: Motion to Suppress

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2017/2017-Ohio-5521.pdf

This is a *Terry* stop issue. Summary from the Tenth District: "Trial court did not err in suppressing evidence where appellee was detained without reasonable suspicion."

Eleventh Appellate District of Ohio

Nothing to report.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

Nothing to report.

Sixth Circuit Court of Appeals

***In re: Ohio Execution Protocol*, No. 17-3076**

Capital Punishment

Full Decision: http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0136p-06.pdf

The Sixth Circuit reversed the district court's grant of a preliminary injunction of Ohio's three-drug death penalty protocol.

Supreme Court of the United States

***Davilla v. Davis*, 582 U.S. ____ (2017)**

Post-Conviction: Ineffective Assistance

Full Decision: https://www.supremecourt.gov/opinions/16pdf/16-6219_i425.pdf

***Syllabus*:**

In petitioner's state capital murder trial, the trial court overruled counsel's objection to a proposed jury instruction and submitted the instruction to the jury, which convicted petitioner. Appellate counsel did not challenge the jury instruction, and petitioner's conviction and sentence were affirmed. Petitioner's state habeas counsel did not raise the instructional issue or challenge appellate counsel's failure to raise it on appeal, and the state habeas court denied relief. Petitioner then sought federal habeas relief. Invoking *Martinez v. Ryan*, 566 U. S. 1, and *Trevino v. Thaler*, 569 U. S. 413, petitioner

argued that his state habeas counsel's ineffective assistance in failing to raise an ineffective-assistance-of-appellate-counsel claim provided cause to excuse the procedural default of that claim. The District Court denied relief, concluding that *Martinez* and *Trevino* apply exclusively to ineffective-assistance-of-trial-counsel claims. The Fifth Circuit denied a certificate of appealability.

Held: The ineffective assistance of postconviction counsel does not provide cause to excuse the procedural default of ineffective-assistanceof-appellate-counsel claims. Pp. 4–16.

(a) In *Coleman v. Thompson*, 501 U. S. 722, this Court held that attorney error committed in the course of state postconviction proceedings—for which the Constitution does not guarantee the right to counsel—cannot supply cause to excuse a procedural default that occurs in those proceedings. Id., at 755. In *Martinez*, the Court announced an "equitable . . . qualification" of *Coleman*'s rule that applies where state law requires a claim of ineffective assistance of trial counsel to be raised in an "initial-review collateral proceeding," rather than on direct appeal. 566 U. S., at 16, 17. In those situations, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if" the default results from the ineffective assistance of the prisoner's counsel in the collateral proceeding. Id., at 17. The Court clarified in *Trevino* that *Martinez*'s exception also applies where the State's "procedural framework, by reason of its design and operation, makes it unlikely in a typical case that a defendant will have a meaningful opportunity to raise" the claim on direct appeal. 569 U. S., at ____. Pp. 4–7.

(b) This Court declines to extend the *Martinez* exception to allow a federal court to hear a substantial, but procedurally defaulted, claim of appellate ineffectiveness when a prisoner's state postconviction counsel provides ineffective assistance by failing to raise it. Pp. 7–16.

(1) *Martinez* itself does not support extending this exception to new categories of procedurally defaulted claims. The *Martinez* Court did not purport to displace *Coleman* as the general rule governing procedural default. Rather, it "qualifie[d] *Coleman* by recognizing a narrow exception," 566 U. S., at 9, and made clear that "[t]he rule of *Coleman* governs in all but th[ose] limited circumstances," id., at 16. Applying *Martinez*'s highly circumscribed, equitable exception to new categories of procedurally defaulted claims would do precisely what this Court disclaimed in that case. P. 7

(2) *Martinez*'s underlying rationale does not support extending its exception to appellate-ineffectiveness claims. Petitioner argues that his situation is analogous to *Martinez*, where the Court expressed concern that trial-ineffectiveness claims might completely evade review. The Court in *Martinez* made clear, however, that it exercised its equitable discretion in view of the unique importance of protecting a defendant's trial rights, particularly the right to effective assistance of trial counsel. Declining to expand *Martinez* to the appellate-ineffectiveness context does no more than respect that judgment. Nor is petitioner's rule required to ensure that meritorious claims of trial error receive review by at least one state or federal court—*Martinez*'s chief concern. See

566 U. S., at 10, 12. A claim of trial error, preserved by trial counsel but not raised by counsel on appeal, will have been addressed by the trial court. If an unpreserved trial error was so obvious that appellate counsel was constitutionally required to raise it on appeal, then trial counsel likely provided ineffective assistance by failing to raise it at trial. In that circumstance, the prisoner likely could invoke *Martinez* or *Coleman* to obtain review of trial counsel's failure to object. Similarly, if the underlying, defaulted claim of trial error was ineffective assistance of trial counsel premised on something other than the failure to object, then *Martinez* and *Coleman* again already provide a vehicle for obtaining review of that error in most circumstances. Pp. 7–11.

(3) The equitable concerns addressed in *Martinez* do not apply to appellate-ineffectiveness claims. In *Martinez* and *Trevino*, the States deliberately chose to make postconviction process the only means for raising trial-ineffectiveness claims. The Court determined that it would be inequitable to refuse to hear a defaulted claim when the State had channeled that claim to a forum where the prisoner might lack the assistance of counsel in raising it. The States have not made a similar choice with respect to appellate-ineffectiveness claims—nor could they, since such claims generally cannot be presented until after the termination of direct appeal. The fact that appellate ineffectiveness claims are considered in proceedings in which counsel is not constitutionally guaranteed is a function of the nature of the claim, not of the States' deliberate choices. Pp. 11–12.

(4) The *Martinez* decision was also grounded in part on the belief that its narrow exception was unlikely to impose significant systemic costs. See 566 U. S., at 15–16. But adopting petitioner's proposed extension could flood the federal courts with defaulted appellate ineffectiveness claims, and potentially serve as a gateway to federal review of a host of defaulted claims of trial error. It would also aggravate the harm to federalism that federal habeas review of state convictions necessarily causes. Not only would these burdens on the federal courts and federal system be severe, but the systemic benefit would be small, as claims heard in federal court solely by virtue of petitioner's proposed rule would likely be largely meritless. Pp. 12– 16.

650 Fed. Appx. 860, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, ALITO, and GORSUCH, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.