Appellate Court Decisions - Week of 6/27/16

First Appellate District of Ohio

State v. Holmes, 2016-Ohio-4608

Appellate Review: Jurisdiction

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-4608.pdf

Summary from the First District:

"The court of appeals must dismiss for lack of jurisdiction the appeal from the common pleas court's entry overruling defendant's postconviction motion seeking resentencing on the ground that the trial court had failed to provide at sentencing the notice required by R.C. 2947.23(A)(1), that defendant could be ordered to perform community service if he did not pay the costs of his prosecution: the court of appeals had no jurisdiction to entertain assignments of error challenging the denial of relief on grounds not advanced in the motion; the entry overruling the motion was not reviewable under the jurisdiction conferred upon an intermediate appeals court by R.C. 2953.02 or 2953.08 to review a judgment of conviction entered in a criminal case, by R.C. 2953.23(B) to review an order awarding or denying postconviction relief, or by R.C. 2505.03(A) to review, affirm, modify, or reverse a 'final order, judgment or decree'; and the matters raised on appeal were not reviewable by either the common pleas court or the court of appeals under its jurisdiction to correct a void judgment."

State v. Hackney, 2016-Ohio-4609

Confrontation: Hearsay: Trafficking: Evidence: Ineffective Assistance

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-4609.pdf

Summary from the First District:

"The trial court erred in allowing a police officer to testify about hearsay statements made by a confidential informant identifying his drug supplier as 'Hack' and identifying a picture of the defendant as his supplier, because that testimony went beyond just showing the steps in the investigation and connected the defendant to the crime; therefore, the testimony violated the defendant's right to confront the witnesses against him.

"The evidence was insufficient to support one of the defendant's convictions for trafficking in cocaine that involved the sale of cocaine to a confidential informant because the stated failed to prove the defendant's identity as the perpetrator where the informant did not testify, the police officers did not observe the sale, and the marked bills used in the buy were never recovered.

"The defendant was not denied the effective assistance of counsel for counsel's failing to object to evidence of plea negotiations: the record showed that the defendant had no reasonable expectation that a plea was being negotiated when he agreed to cooperate with police and act as a confidential informant, because his statements were made to the police officers at an early stage of the investigation and were not plea negotiations within the meaning of Evid.R. 410.

"The defendant was not denied the effective assistance of counsel where counsel stipulated to a laboratory report showing the amount of cocaine possessed by the defendant even though the state failed to present evidence of the cocaine's purity, because objecting to the report would not have been successful.

"The trial court erred in failing to record sidebar conferences, but that error was harmless because the defendant failed to show prejudice, and therefore, the defendant was not denied the effective assistance of counsel where his counsel failed to object to the procedure.

"The defendant was not denied the effective assistance of counsel where counsel failed to file a motion to suppress evidence based on the police officer's detention of the defendant while a search warrant for the defendant's apartment was executed several blocks away: the motion would not have been successful because the officers had probable cause to arrest the defendant.

"The defendant failed to show ineffective assistance of counsel based on his claim that his counsel gave him erroneous advice regarding a plea bargain where the record failed to show that but for counsel's advice the defendant would have accepted the plea bargain."

***State v. Phillips*, 2016-Ohio-4672**

Sentencing: Firearm Specification

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-4672.pdf

Summary from the First District:

"When the state appeals the trial court's failure to impose, as a matter of law, mandatory penalty enhancements for firearm specifications, the appellate court may

modify or vacate the challenged sentences only if it clearly and convincingly finds that they are contrary to law.

"The Ohio Supreme Court has rejected the sentencing-package doctrine, and thus an appellate court may not vacate a sentence which the appellant has chosen not to challenge on appeal.

"The word 'convicted,' when used in the phrase 'convicted of or pleads guilty to,' in sentencing statutes means only a determination of guilt and not the imposition of sentence upon that determination.

"A trial court that imposes an additional seven-year prison term for a peace-officer specification, under R.C. 2929.14(B)(1)(f), cannot also impose a three-year prison term for a firearm-facilitation specification, under R.C. 2929.14(B)(1)(a)(ii), for the same offense.

"When a trial court is required, as a matter of law, but fails to impose an additional one-year prison term for a firearm-possession specification, under R.C. 2929.14(B)(1)(a)(iii), and order it to be served consecutively to and prior to the term for the predicate felony offense, the sentence imposed is contrary to law.

"R.C. 2929.14(B)(1)(g) creates an exception to the general rule prohibiting multiple punishments for two or more firearm specifications arising out of a single act or transaction, and permits a trial court to impose separate prison terms for each of the two most serious specifications where (1) an offender is determined to be guilty of two or more felonies, one of which is a serious felony specifically enumerated in the statute, and (2) the offender is determined to be guilty of firearm specifications under R.C. 2929.14(B)(1)(a) in connection with two or more of the felonies.

"The R.C. 2929.14(B)(1)(g) exception to the general rule prohibiting multiple punishments for two or more firearm specifications arising out of a single act or transaction, does not mention the peace-officer specification, under R.C. 2929.14(B)(1)(f), and does not control the trial court's decision on whether to impose a penalty for a firearm specification consecutively to another specification not described in R.C. 2929.14(B)(1)(a); the General Assembly has provided that guidance in other statutory enactments including the last sentence of R.C. 2929.14(B)(1)(f) and 2929.14(C)(1)(c)."

***State v. Pompey*, 2016-Ohio-4610**

Sentencing

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-4610.pdf

Summary from the First District:

"The trial court did not err when it ordered defendant to serve four consecutive terms for firearm specifications attached to four counts of aggravated robbery: pursuant to R.C. 2929.14(B)(1)(g), the court was required to sentence the defendant for at least two specifications and had discretion to sentence him for four, and no consecutive-sentence findings were required under R.C. 2929.14(C)(4) because the court was required to impose consecutive sentences for the specifications."

***State v. Bell*, 2016-Ohio-4630**

Sentencing: Appellate Review: Habeas Corpus: Jurisdiction

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2016/2016-Ohio-4630.pdf

Summary from the First District:

"The common pleas court properly denied defendant the relief sought in his motion challenging the calculation under R.C. 2967.15 of the time served under his sentence, because the court lacked jurisdiction to entertain the motion on its merits.

"Defendant's motion challenging the calculation under R.C. 2967.15 of the time served under his sentence was not reviewable by the common pleas court under R.C. 2947.02 et seq. as a motion in arrest of judgment, because it was not timely filed and did not seek relief based on a jurisdictional or indictment deficiency; or under R.C. 2953.21 et seq. as a petition for postconviction relief, because the motion sought relief based on a statutory, rather than a constitutional, violation, and the alleged violation occurred following, rather than during, the proceedings resulting in his conviction; or under R.C. Chapter 2731 as a petition for a writ of mandamus or under R.C. Chapter 2721 as a claim or action for declaratory relief, because the motion did not satisfy the statutory procedural requirements; or under a court's jurisdiction to correct a void sentence, because the error, even if demonstrated, would not have rendered defendant's conviction void.

"R.C. Chapter 2725, governing habeas corpus, provided the procedure for defendant's claim that he was entitled to immediate release from prison based on an alleged 'lost time' error in the calculation under R.C. 2967.15 of the time served on a sentence, but the Hamilton County Common Pleas Court lacked jurisdiction to issue the writ because defendant was imprisoned in another county."

Second Appellate District of Ohio

Nothing new.

Third Appellate District of Ohio

Nothing new.

Fourth Appellate District of Ohio

Nothing new.

Fifth Appellate District of Ohio

***State v. Clark*, 2016-Ohio-4614**

Search: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2016/2016-Ohio-4614.pdf

The trial court erred in denying Appellant's motion to suppress the search of his vehicle. A state trooper stopped Appellant for speeding. He asked Appellant for license, registration, and insurance. Appellant provided his driver's license, but could not provide the other paperwork because it was a rental. The police officer suspicious the vehicle was stolen because there were no barcodes on the window typical of rentals, and there was a dealer bracket around the license plate. A license plate registration check showed it was on the right vehicle, but there was no other information in the computer file.

The trooper looked into the vehicle with his flashlight and saw no paperwork. He asked Appellant if the paperwork could in the trunk. Appellant voluntarily opened the trunk and they both searched for the registration and rental agreement paperwork, but found nothing.

The trooper searched inside the vehicle and found nothing. He did not ask for permission to search the vehicle. He tried to open the glove box, but it was locked. He then approached Appellant with his arm out and asked if Appellant had the keys. Appellant gave him the keys. The trooper did not specifically ask for the keys, or ask for permission to search the glove box, or ask Appellant to open the glove box. When the trooper started to open the glove box, Appellant told him there was a firearm inside, which the trooper found, loaded, along with the registration and rental agreement paperwork.

The Fifth District discounted the voluntary search of the trunk as a circumstance leading to appellant's voluntary consent to open the glove box. The trooper conducted his own search inside the vehicle, and

Appellant neither participated nor consented to that search. Regarding consent to the glove box, however, that too was disregarded. The Fifth District found that, "[b]y approaching appellant with an outstretched hand and asking for the keys, [the trooper] did so under the color and authority of his badge and uniform. In looking at the totality of the circumstances, we find the mere relinquishment of the keys by appellant to be insufficient to establish voluntary consent." Therefore, it held the trial court erred in denying the motion to suppress.

Sixth Appellate District of Ohio

Nothing new.

Seventh Appellate District of Ohio

***State v. Warner*, 2016-Ohio-4660**

Search: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/7/2016/2016-Ohio-4660.pdf

The trial court did not err in granting Appellee's motion to suppress where, "[it] found the state did not meet its burden or proving there was a reasonable suspicion that criminal activity was imminent, the 'investigatory stop was not based on a reasonable suspicion and therefore, any and all evidence obtained following the same is the fruit of an unconstitutional search and seizure." Basically, police got a call from a Family Dollar employee about a suspicious car in the parking lot. There were significant contradictions in the police testimony about what happened after they arrived. Long story short, the call itself did not establish a reasonable, articulable suspicion of criminal activity. Nothing about the initial observation of the vehicle presented any reasonable suspicion of criminal activity. The encounter was not consensual; it was a *Terry* stop from the start.

***State v. Anderson*, 2016-Ohio-4651**

Intervention in Lieu of Conviction: Due Process

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/7/2016/2016-Ohio-4651.pdf

The trial court erred in terminating Appellant's intervention in lieu of conviction. "Here, after finding that [Appellant] met the qualifications for ILC, the trial court imposed multiple conditions as part of the intervention plan in addition to those contained in R.C. 2951.041(D). [Appellant's] probation officer filed a motion to terminate intervention, alleging Anderson failed to stay inside the Ohio Valley Medical Center on one occasion, and failed to remain inside his residence on several other occasions, as directed by the supervising probation officer. However, at the ILC termination hearing, the prosecutor merely noted that the alleged violations were set forth in the motion to terminate; no argument whatsoever was made. No testimony or evidence was offered by the State regarding when and how Anderson allegedly violated the terms of his intervention plan. Nor did the State and defense counsel enter into any stipulations. Defense counsel merely offered argument against termination of ILC.

"Termination of [Appellant's] ILC based upon the record before us fails to comport with principles of due process * * *. The only reference to the specific alleged violations was argument made by defense counsel regarding two incidents. Counsel argued these did not constitute violations because [Appellant] never left either premises; he was merely outside of the hospital to smoke on one occasion and outside to mow the law at his grandmother's house where he lived on the other occasion. This does not constitute evidence. Thus, the State failed to meet its burden of proof, and, there was no basis for the trial court to terminate intervention in lieu of conviction."

Eighth Appellate District of Ohio

Nothing new.

Ninth Appellate District of Ohio

Nothing new.

Tenth Appellate District of Ohio

Nothing new.

Eleventh Appellate District of Ohio

***State v. Link*, 2016-Ohio-4597**

Search: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/11/2016/2016-Ohio-4597.pdf

The trial court erred in denying Appellant's motion to suppress the search of his home. No "exigent circumstances" and "immediate need" existed under R.C. 2933.33(A), nor under the basic principles of Fourth Amendment law, to justify the warrantless search of Appellant's home. Basically, the officers in this case received a tip about toxic fumes or chemical smells coming from Appellant's apartment. They waited four-and-a-half hours to implement a search. By then, any emergency or exigent circumstances ended. Also, when the police arrived at Appellant's home, they did not smell any chemical or toxic odor and did not observe any criminal activity.

Twelfth Appellate District of Ohio

Nothing new.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

***United States v. Brown*, Slip Opinion No. 13-1761**

Motion to Suppress: Search: Warrant: Good Faith

Full Decision: http://www.opn.ca6.uscourts.gov/opinions.pdf/16a0148p-06.pdf

The trial court erred in denying Appellant's motion to suppress evidence seized from his residence pursuant to a search warrant. The warrant was issued without probable cause and the good-faith exception does not apply. The affidavit in this case lacks the necessary nexus to "directly connect the residence with the suspected drug dealing activity," therefore, "it cannot be inferred that drugs will be found in the defendant's home – even if the defendant is a known drug dealer." The good faith exception did not apply because the search warrant was so lacking in indicia of probable cause that relying on it was unreasonable.

Supreme Court of the United States

***Voisine et al. v. United States*, Slip Opinion No. 14-10154**

U.S.C. § 922(g)(9): Misdemeanor Crime of Domestic Violence

Full Decision: http://www.supremecourt.gov/opinions/15pdf/14-10154_19m1.pdf

Syllabus:

In an effort to "close [a] dangerous loophole" in the gun control laws, *United States v. Castleman*, 572 U. S. ____, ____, Congress extended the federal prohibition on firearms possession by convicted felons to persons convicted of a "misdemeanor crime of domestic violence," 18 U. S. C. §922(g)(9). Section 921(a)(33)(A) defines that phrase to include a misdemeanor under federal, state, or tribal law, committed against a domestic relation that necessarily involves the "use . . . of physical force." In *Castleman*, this Court held that a knowing or intentional assault qualifies as such a crime, but left open whether the same was true of a reckless assault.

Petitioner Stephen Voisine pleaded guilty to assaulting his girlfriend in violation of §207 of the Maine Criminal Code, which makes it a misdemeanor to "intentionally, knowingly or recklessly cause[ ] bodily injury" to another. When law enforcement officials later investigated Voisine for killing a bald eagle, they learned that he owned a rifle. After a background check turned up Voisine's prior conviction under §207, the Government charged him with violating §922(g)(9). Petitioner William Armstrong pleaded guilty to assaulting his wife in violation of a Maine domestic violence law making it a misdemeanor to commit an assault prohibited by §207 against a family or household member. While searching Armstrong's home as part of a narcotics investigation a few years later, law enforcement officers discovered six guns and a large quantity of ammunition. Armstrong was also charged under §922(g)(9). Both men argued that they were not subject to §922(g)(9)'s prohibition because their prior convictions could have been based on reckless, rather than knowing or intentional, conduct and thus did not quality as misdemeanor crimes of domestic violence. The District Court rejected those claims, and each petitioner pleaded guilty. The First Circuit affirmed, holding that "an offense with a *mens rea* of recklessness may qualify as a 'misdemeanor crime of violence' under §922(g)(9)." Voisine and Armstrong filed a joint petition for certiorari, and their case was remanded for further consideration in light of *Castleman*. The First Circuit again upheld the convictions on the same ground.

Held: A reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under §922(g)(9). Pp. 4–12. (a) That conclusion follows from the statutory text. Nothing in the phrase "use. . . of physical force" indicates that §922(g)(9) distinguishes between domestic assaults committed knowingly or intentionally and those committed recklessly. Dictionaries consistently define the word "use" to mean the "act of employing" something. Accordingly, the force involved in a qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force. See *Castleman*, 572 U. S., at ____. But nothing about the definition of "use" demands that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Nor does *Leocal v. Ashcroft*, 543 U.

S. 1, which held that the "use" of force excludes accidents. Reckless conduct, which requires the conscious disregard of a known risk, is not an accident: It involves a deliberate decision to endanger another. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms. Pp. 5–8.

(b) So too does the relevant history. Congress enacted §922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies— from owning guns. Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm. In targeting those laws, Congress thus must have known it was sweeping in some persons who had engaged in reckless conduct. See, e.g., *United States v. Bailey*, 9 Pet. 238, 256. Indeed, that was part of the point: to apply the federal firearms restriction to those abusers, along with all others, covered by the States' ordinary misdemeanor assault laws.

Petitioners' reading risks rendering §922(g)(9) broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness. Consider Maine's law, which criminalizes "intentionally, knowingly or recklessly" injuring another. Assuming that statute defines a single crime, petitioners' view that §921(a)(33)(A) requires at least a knowing mens rea would mean that no conviction obtained under that law could qualify as a "misdemeanor crime of domestic violence." *Descamps v. United States*, 570 U. S. ____, ____. In *Castleman*, the Court declined to construe §921(a)(33)(A) so as to render §922(g)(9) ineffective in 10 States. All the more so here, where petitioners' view would jeopardize §922(g)(9)'s force in several times that many. Pp. 8–11.

778 F. 3d 176, affirmed.

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