Appellate Court Decisions - Week of 6/3/13

First Appellate District of Ohio

***State v. Vanzandt*, Appeal No. C-130079, B-1200737-B**

Expungement

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130079_06052013.pdf

Courts possess an inherent authority to unseal previously sealed records in rare and exceptional cases. In this case, defendant's trafficking acquittal was unsealed so it could be used against him in a witness-retaliation charge.

Summary from the First District:

The trial court did not err in unsealing the record of the defendant's acquittal because, even absent express statutory authorization, a court possesses inherent authority to unseal previously sealed records in rare and exceptional cases.

The trial court did not abuse its discretion in unsealing the record of the defendant's acquittal where the defendant sought to keep the record sealed only to prevent the state from using it in a subsequent prosecution for witness retaliation, where the state's request to unseal the record came shortly after the order to seal was granted, and where the trial court limited its order unsealing the record to allow its use only in the subsequent witness-retaliation case against the defendant, which stemmed from the sealed case.

Fifth Appellate District of Ohio

***State v. Hahn*, Case No. 2012 AP 08 0050**

OVI: Motion to Suppress: Probable Cause

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/5/2013/2013-ohio-2308.pdf

If an officer does not see the defendant engage in any unlawful activity, the officer does not have a reasonable and articulable suspicion of criminal activity to engage in a traffic stop.

A New Philadelphia police officer responded around 1 a.m. to a report of a person outside of a residence and the sound of someone trying to open car doors. When the officer was investigating the call, he saw a vehicle driving fast, leaving from the direction from where the sounds allegedly came. Because of the suspicious driving and

the proximity to the initial complaint, the officer stopped the card to identify the driver and determine whether he was involved with the noise complaint.

When the officer contacted the driver, the officer noticed his eyes were bloodshot and glassy. The officer also noticed a strong odor of alcohol emanating from the driver, as well as open Budweiser cans on the backseat floor. The driver admitted to drinking earlier in the day and said he was headed home for the evening. The officer determined, however, that the driver was headed in the direction opposite his home. The officer then had the driver perform the field sobriety tests, and he failed all of them. The driver was arrested for an OVI in violation of R.C. 4511.19(A)(1)(a) and then blew a 0.193.

The driver's attorney filed a motion to suppress, which was overruled. The driver's attorney then filed an objection to the magistrate's decision, and the decision was remanded to the magistrate for reconsideration in light of new case law, *State v. Hill* (no cite given in opinion). However, the magistrate reaffirmed her decision to overrule the motion to suppress. The driver's attorney again filed objections, which were heard by a visiting judge. The visiting judge overruled the driver's objections.

The driver appealed, and the Fifth District reversed. At trial, the officer testified that he only saw the driver's car moving at a "high rate of speed," but he did not visually estimate the speed and that was not the reason he pulled the car over. The officer said he did not stop the driver for any traffic violation, but rather because of the complaint that was called in because the area was a high crime area. The Fifth District held that the officer did not observe the driver engage in any unlawful activity, and therefore the officer did not have a reasonable and articulable suspicion of criminal activity.

Seventh Appellate District of Ohio

***State v. Antill*, Case No. 12 BE 3**

Ineffective Assistance of Counsel: Other Acts Evidence

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/7/2013/2013-ohio-2265.pdf

Defendant was prejudiced because defense counsel submitted an Ohio Uniform Incident Report into evidence without redacting "other bad acts" evidence from it.

Antill was convicted of assault on a police officer and aggravated robbery for getting into a struggle with two police officers who came to his home to tell him to stop making threating phone calls to a restaurant and going after one officer's gun during the struggle. At trial, defense counsel used the Ohio Uniform Incident Report from the incident to question one of the police officers about why he didn't include certain details in his report. Defense counsel then introduced the report into evidence, but neglected to redact prejudicial other bad acts statements that were included in the report. The statements mentioned Antill's several previous domestic violence arrests, his

banishment from restaurants for fighting, an altercation he got into a friend's party, and that officers who have dealt with him say he's polite when sober, but mean, loud, and violent after even a little bit of alcohol.

The Seventh District held that Antill was prejudiced by the introduction of the report containing those statements into evidence, so it reversed the conviction and remanded for a new trial.

Eighth Appellate District of Ohio

***State v. Simpson*, No. 12AP-904**

Sentencing

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/10/2013/2013-ohio-2336.pdf

The trial court cannot add days to a sentence after a sentence that is a valid final judgment has been made.

Simpson was convicted of two counts of aggravated menacing (first degree misdemeanors) and one count possession of drugs (minor misdemeanor). He was sentenced to 180 days, 150 suspended and two years of community control. He was also given 12 days of jail time credit but was required to serve 38 days forthwith. At sentencing, the court said that it was asking for their version of EMU/EMD called EMHI for 30 days to ensure the stay away was enforced. The trial court's sentencing entry also called for a "[s]weep for guns before EMHI."

According to the sentence, Simpson was to be released from jail on Oct. 13, 2012. On Oct. 12, the court held a hearing where the court stated that it still did not have the information on where Simpson would be staying upon his release from jail, so it did not have time to get the consent of the person he would be living with or to sweep the location for anything that would violate his probation. Therefore, the trial court decided to hold Simpson over in jail until Oct. 16, 2012, to do those things. Defense counsel objected, but was overruled.

The Eighth District held that because the trial court's sentence was a valid final judgment that did not require correction, the court was without authority to reconsider the original sentence.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Maryland v. King, No. 12-207

Fourth Amendment: Arrest: DNA

Full Decision: http://www.supremecourt.gov/opinions/12pdf/12-207_d18e.pdf

When officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

Note: This has been going on in Ohio since July 1, 2011 under R.C. 2901.07, so nothing actually changes here. The state simply has backup from the U.S. Supreme Court now.

Syllabus of the Court:

After his 2009 arrest on first- and second-degree assault charges, respondent King was processed through a Wicomico County, Maryland, facility, where booking personnel used a cheek swab to take a DNA sample pursuant to the Maryland DNA Collection Act (Act). The swab was matched to an unsolved 2003 rape, and King was charged with that crime. He moved to suppress the DNA match, arguing that the Act violated the Fourth Amendment, but the Circuit Court Judge found the law constitutional. King was convicted of rape. The Maryland Court of Appeals set aside the conviction, finding unconstitutional the portions of the Act authorizing DNA collection from felony arrestees.

Held: When officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

(a) DNA testing may "significantly improve both the criminal justice system and police investigative practices," *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U. S. 52, 55, by making it "possible to determine whether a biological tissue matches a suspect with near certainty," id., at 62. Maryland's Act authorizes law enforcement authorities to collect DNA samples from, as relevant here, persons charged with violent crimes, including first-degree assault. A sample may not be added to a database before an individual is arraigned, and it must be destroyed if, e.g., he is not convicted. Only identity information may be added to the database. Here, the officer collected a DNA sample using the common "buccal swab" procedure, which is quick and painless, requires no "surgical intrusio[n] beneaththe skin," *Winston v. Lee*, 470 U. S. 753, 760, and poses no threat to the arrestee's "health or safety," id., at 763. Respondent's

identification as the rapist resulted in part through the operation of the Combined DNA Index System (CODIS), which connects DNA laboratories at the local, state, and national level, and which standardizes the points of comparison, i.e., loci, used in DNA analysis.

(b) The framework for deciding the issue presented is well established. Using a buccal swab inside a person's cheek to obtain a DNA sample is a search under the Fourth Amendment. And the fact that the intrusion is negligible is of central relevance to determining whether the search is reasonable, "the ultimate measure of the constitutionality of a governmental search," *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 652. Because the need for a warrant is greatly diminished here, where the arrestee was already in valid police custody for a serious offense supported by probable cause, the search is analyzed by reference to "reasonableness, not individualized suspicion," *Samson v. California*, 547 U. S. 843, 855, n. 4, and reasonableness is determined by weighing "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy," *Wyoming v. Houghton*, 526 U. S. 295, 300.

(c) In this balance of reasonableness, great weight is given to both the significant government interest at stake in the identification of arrestees and DNA identification's unmatched potential to serve that interest.

(1) The Act serves a well-established, legitimate government interest: the need of law enforcement officers in a safe and accurate way to process and identify persons and possessions taken into custody. "[P]robable cause provides legal justification for arresting [suspect], and for a brief period of detention to take the administrative steps incident to arrest," *Gerstein v. Pugh*, 420 U. S. 103, 113– 114; and the "validity of the search of a person incident to a lawful arrest" is settled, *United States v. Robinson*, 414 U. S. 218, 224. Individual suspicion is not necessary. The "routine administrative procedure[s] at a police station house incident to booking and jailing the suspect" have different origins and different constitutional justifications than, say, the search of a place not incident to arrest, *Illinois v. Lafayette*, 462 U. S. 640, 643, which depends on the "fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois v. Gates*, 462 U. S. 213, 238. And when probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests. First, the government has an interest in properly identifying "who has been arrested and who is being tried." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 191. Criminal history is critical to officers who are processing a suspect for detention. They already seek identity information through routine and accepted means: comparing booking photographs to sketch artists' depictions, showing mugshots to potential witnesses, and comparing fingerprints against electronic databases of known criminals and unsolved crimes. The only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police. Second, officers must ensure that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee population,

and for a new detainee." *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U. S. ____, ____. DNA allows officers to know the type of person being detained. Third, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials." *Bell v. Wolfish*, 441 U. S. 520, 534. An arrestee may be more inclined to flee if he thinks that continued contact with the criminal justice system may expose another serious offense. Fourth, an arrestee's past conduct is essential to assessing the danger he poses to the public, which will inform a court's bail determination. Knowing that the defendant is wanted for a previous violent crime based on DNA identification may be especially probative in this regard. Finally, in the interests of justice, identifying an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned.

(2) DNA identification is an important advance in the techniques long used by law enforcement to serve legitimate police concerns. Police routinely have used scientific advancements as standard procedures for identifying arrestees. Fingerprinting, perhaps the most direct historical analogue to DNA technology, has, from its advent, been viewed as a natural part of "the administrative steps incident to arrest." *County of Riverside v. McLaughlin*, 500 U. S. 44, 58. However, DNA identification is far superior. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, and DNA identification is markedly more accurate. It may not be as fast as fingerprinting, but rapid fingerprint analysis is itself of recent vintage, and the question of how long it takes to process identifying information goes to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search. Rapid technical advances are also reducing DNA processing times.

(d) The government interest is not outweighed by respondent's privacy interests.

(1) By comparison to the substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is minimal. Reasonableness must be considered in the context of an individual's legitimate privacy expectations, which necessarily diminish when he is taken into police custody. Bell, supra, at 557. Such searches thus differ from the socalled special needs searches of, e.g., otherwise law-abiding motorists at checkpoints. See *Indianapolis v. Edmond*, 531 U. S. 32. The reasonableness inquiry considers two other circumstances in which particularized suspicion is not categorically required: "diminished expectations of privacy [and a] minimal intrusion." *Illinois v. McArthur*, 531 U. S. 326, 330. An invasive surgery may raise privacy concerns weighty enough for the search to require a warrant, notwithstanding the arrestee's diminished privacy expectations, but a buccal swab, which involves a brief and minimal intrusion with "virtually no risk, trauma, or pain," *Schmerber v. California*, 384 U. S. 757, 771, does not increase the indignity already attendant to normal incidents of arrest.

(2) The processing of respondent's DNA sample's CODIS loci also did not intrude on his privacy in a way that would make his DNA identification unconstitutional. Those loci came from noncoding DNA parts that do not reveal an arrestee's genetic traits and are unlikely to reveal any private medical information. Even if they could provide such

information, they are not in fact tested for that end. Finally, the Act provides statutory protections to guard against such invasions of privacy.

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

***Nevada, et al. v. Jackson*, No. 12-694**

Confrontation Clause: Evidence: Extrinsic Evidence: Impeachment

Full Decision: http://www.supremecourt.gov/opinions/12pdf/12-694_5368.pdf

The Confrontation Clause does not entitle a criminal defendant to introduce extrinsic evidence for impeachment purposes.

Calvin Jackson had been a rough 10-year relationship with Annette Heathmon. Heathmon had tried several times to end the relationship, but only succeeded by moving to a new apartment in North Las Vegas without telling Jackson where she was going. Nevertheless, Jackson discovered where she was and he went there.

Heathmon's version of the events is that Jackson forced his way into the apartment and threatened to kill her if she did not have sex with him. Jackson then raped her, hit her, stole a ring from her bedroom, and dragged her out of the apartment and toward his car by her neck and hair. A witness confronted them and Jackson fled. The police observed injuries to Heathmon that were consistent with her version of the events.

Jackson did not testify at trial, but he did speak to police. He told them that Heathmon might have agreed to the sex because they were alone and she was scared, but the sex was consensual. He also admitted to hitting her in the apartment, but denied dragging her out by her neck and hair.

Before trial, Heathmon sent the judge a letter recanting her prior story and telling the judge she wouldn't testify. She went into hiding, but police found her and took her into custody. Once in custody, she recanted the letter and agreed to testify to her original story. Regarding the letter, she said three of Jackson's associates forced her to write it and threatened to hurt her if she went to court.

At trial, the defense's theory was that Heathmon fabricated the sexual assault. To support its theory, the defense sought to introduce testimony and police reports showing that Heathmon had called the police on several prior occasions claiming that respondent had raped her or otherwise assaulted her. The police could not corroborate many of the prior allegations, and in several of the cases they were skeptical of her claims. The trial court gave the defense wide latitude to cross-examine Heathmon, but it refused to admit the police reports or allow the defense to call as witnesses the officers involved. Defendant was found guilty by a jury and sentenced to life imprisonment.

Defendant exhausted his remedies in state court, then filed for habeas corpus in federal court. The District Court denied relief, but the Ninth Circuit reversed. The state then appealed to the U.S. Supreme Court.

The U.S. Supreme Court held that the Confrontation Clause does not entitle a criminal defendant to introduce extrinsic evidence for impeachment purposes. Therefore, it reversed the Ninth Circuit and remanded for proceedings consistent with its opinion.