

Appellate Court Decisions - Week of 7/1/13

First Appellate District of Ohio

State v. Tucker, Appeal No. C-120446, Trial No. 07CRB-12810A

New Trial

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120446_07032013.pdf

Summary from the First District:

The municipal court did not abuse its discretion in overruling defendant's Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence: the evidence was exculpatory, but had been effectively disclosed during the trial; therefore, defendant failed to demonstrate a due-process violation when the timing of the disclosure could not be said to have significantly impaired the fairness of the trial, and he was not entitled to relief under Crim.R. 33(A)(6) when his motion was not predicated upon new evidence that had been discovered since the trial.

In April 2007, Tucker was stopped by two uniformed police officers responding to a radio broadcast regarding the armed robbery of a pizza-delivery driver by three men. Because of his conduct during the encounter, Tucker was charged with aggravated menacing, obstructing official business, carrying a concealed weapon, and having weapons while under a disability. Tucker was later indicted by the grand jury with two counts of carrying concealed weapons and one count of tampering with evidence.

In December 2007, Tucker was convicted upon his guilty pleas to one carrying concealed weapons charge and the tampering with evidence. He did not appeal from those convictions. In August 2008, Tucker was tried and convicted on the aggravated menacing and obstructing official business charges in municipal court. He unsuccessfully appealed his aggravated-menacing conviction and lost his Crim.R. 33 motion for a new trial.

In this appeal, Tucker challenged the municipal court's overruling his motion for a new trial. At trial, one of the uniformed officers testified that he saw Tucker, who matched the description of the robbers, walking in the vicinity of the robbery. The officer instructed his partner to stop the cruiser in Tucker's path. The officers then got out of the cruiser and the first officer drew his gun. Tucker ignored the other officer's orders to stop and continued toward her. When the first officer ordered Tucker to stop, he did, but ignored the other officer's order to stop. The officer testified that when Tucker did start to turn, he pulled a gun from the hood of his sweatshirt. The officer then shot Tucker, who fled on foot.

The officers pursued Tucker on foot, but eventually abandoned their pursuit. The other officer asked the first officer whether he shot his gun, and he responded that he did. He asked the other officer whether she saw Tucker with the gun, and she said no. He then asked if she heard the noise his gun was making and she again said no. Other officers soon after apprehended Tucker and the first officer identified him.

The next day, a handgun was found during a search of the area of the shooting. Tucker was questioned about the incident and said that he had a gun, but it was in his waistband the whole time and that he threw it while running to avoid being caught with it. He testified at trial that when the officers approached him with their guns draw, he had a lit cigarette in his right hand and a cell phone in his left hand. He said the pistol was tucked in his belt. He testified that when the officers ordered him to stop, he tossed the cigarette, raised his hands, and turned and ran, tossing the gun in the process. While running, he heard the gunshot. He insisted the gun was never in his hood and that he never pointed it at the officers.

In his “Motion for New Trial,” Tucker argued that a new trial should be granted on the basis of newly discovered evidence – specifically, a transcript of the other officer’s April 2007 statement about the incident in question and a transcript of the video recorded from the officers’ cruiser’s MVR. The other officer’s statement was that Tucker automatically raised his hands when he realized he was being stopped and that she did see a lit cigarette in his right hand, but saw nothing in his left hand. She said Tucker complied with her order to turn around, but was slow to interlace his fingers behind his head. As he moved his hands toward his head, she heard the gunshot. The MVR just included communications between unidentified police officers about the situation, and it included a statement that “[t]he gunshot came from my partner.” Finally, Tucker’s motion also included an affidavit from defense counsel who said that he requested MVRs, but was never told any existed.

The First District held that because the favorable evidence was disclosed at trial – the first officer testified that the other officer said she didn’t see the gun – and because defense counsel did not request sanctions for nondisclosure or a continuance to further inquire into the matter, it cannot be said that Tucker was denied due process. Therefore, it affirmed the municipal court’s decision not to grant a new trial.

State v. Moore, Appeal No. C-120770, Trial No. B-1205835

Counsel: Sentencing: Theft/Receiving Stolen Property

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120770_07052013.pdf

Summary From the First District:

The defendant was not denied the effective assistance of counsel: counsel was not ineffective for failing to move for a mistrial based on the destruction of exculpatory evidence where a surveillance videotape that did

not show distinctive features of a car thief was not materially exculpatory and where the record did not demonstrate that the state had acted in bad faith in failing to preserve potentially useful evidence; counsel was not ineffective for failing to make a Crim.R. 29 motion for acquittal because the result of the trial would not have been different had counsel made a Crim.R. 29 motion where the trial court clearly found sufficient evidence to convict the defendant of the receiving-stolen-property offenses.

The trial court did not abuse its discretion in sentencing the defendant to the maximum allowable prison term: the appellate court may presume that the trial court considered the proper sentencing factors pursuant to R.C. 2929.11 and 2929.12.

Supreme Court of Ohio

In Re Disqualification of Burge, 2013-Ohio-2726

Affidavit of Disqualification: R.C. 2701.03

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2013/2013-ohio-2726.pdf>

Judge's comments to press and failure to respond to certain allegations in affidavit necessitated removal to avoid appearance of impropriety.

Anthony Cillo, counsel for the state, filed two affidavits under R.C. 2701.03 to disqualify Judge James M. Burge from presiding over the cases in question and all future cases in which Cillo appears as counsel of record.

In the case at issue, Cillo alleged that Judge Burge expressed an opinion on his motion for a new trial and should be removed. Cillo submitted the affidavit for an assistant prosecuting attorney assigned to Judge Burge's courtroom. That attorney said that when Cillo moved for Judge Burge to voluntarily recuse himself from the case, the judge said to him, "He [Cillo] thinks that I would make a ruling based on him when there's a man who certainly deserves a new trial." Judge Burge denied making the statement.

The Supreme Court said that such conflicting evidence is usually insufficient to overcome the presumption of a judge's impartiality. Judge Burge, however, did more than deny the statement in his response. He also commented to the media about Cillo's allegation. Specifically, (despite Jud.Cond.R. 2.10), he was quoted in two newspapers as saying, "I don't believe an assistant [county prosecutor] told him [Cillo] that and if he did, it would be false," and "[w]hen a person ascribes dishonest motives to another, it's usually because the accuser has dishonest motives himself and believes that everyone behaves the same way he does."

Beyond the statements in the newspaper, Judge Burge did not respond to some of the allegations in Cillo's supplemental affidavit, including the claim that Judge Burge "discarded the traditional route of reassignment in [the defendant's] case in order to preside over the case himself." Judge Burge had only been assigned to the case in question for a relatively short time as well. The Supreme Court held that "[g]iven the unique combination of facts here, prudent grounds exist to remove Judge Burge." It did make a point to say, however, that the reassignment "should not be interpreted as implying that Judge Burge actually expressed an opinion in the proceeding, holds a personal bias against Cillo, or engaged in any unethical conduct."

Regarding Cillo's requested blanket order of disqualification for all future cases, the Supreme Court said that Cillo failed to overcome the presumptions that a judge is presumed to follow the law and not be biased. Therefore, Cillo failed to establish an appearance of impropriety warranting a blanket order of disqualification.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.