

Appellate Court Decisions - Week of 7/15/13

First Appellate District of Ohio

State v. Love, 2013-Ohio-3096

Sex Offenses: Megan's Law Classification

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120642_07172013.pdf

Summary from the First District:

Where the defendant had been incarcerated for a sex offense during the time that the Megan's Law version of R.C. Chapter 2950 had been in effect, he is subject to the classification, registration and notification provisions of Megan's Law, regardless of when he committed the sex offense.

Where the defendant's 1996 rape convictions had been vacated on appeal, any classification which had arisen as a matter of law under Megan's Law had necessarily been vacated as well since the commission of a sex offense is a predicate to a Megan's Law classification.

Where the defendant entered guilty pleas to sex offenses that had occurred in 1989 and where the defendant agreed that the "time served" on those offenses, for which the trial court credited the defendant, had occurred when Megan's Law had been in effect, the trial court correctly conducted a sexual-offender-classification hearing under the Megan's Law version of R.C. Chapter 2950.

In Re: K.G., Appeal No. C-120772, Trial No. F12-1163

Dependency: Evidence

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120772_07192013.pdf

Summary from the First District:

In a juvenile court adjudication of a child as abused, neglected and dependent, the magistrate considered an inadmissible hearsay statement contained in the child's medical records, but that error was harmless in light of other evidence adduced at the adjudication hearing, where the other statements in the medical records relied upon by the magistrate were admissible under exceptions to the hearsay rule.

The juvenile court's finding that the juvenile was abused, neglected and dependent was supported by clear and convincing evidence.

State v. Combs, Appeal No. C-120756, Trial No. B-1204769

Prosecutor: Constitutional Law/Criminal: Counsel: Evidence

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120756_07192013.pdf

Summary from the First District:

The prosecutor engaged in improper vouching where he stated in closing argument that he believed the victim's story, that he believed the evidence warranted a guilty conviction, and that he would have known if the witness-police officers had credibility issues; however, given the evidence produced at trial, the prosecutor's remarks did not amount to plain error under Crim.R. 52(B) because the remarks did not clearly affect the outcome of the case.

The reference to the defendant's post-arrest silence during direct examination of a police officer did not violate the defendant's due process rights where the prosecutor's question was not clearly targeted to elicit a response from the officer regarding the defendant's post-arrest silence, the prosecutor directed the officer away from the defendant's silence immediately afterward with further questioning, and the reference to the defendant's silence was used to show the chronology of events during the officer's investigation.

Trial counsel was not ineffective for failing to object to an officer's testimony at trial that the victim had told the officer that the defendant had hit her and had choked her: the testimony was admissible as an excited utterance under Evid.R. 803(2) because it did not result from reason or reflection where the officer testified that the victim had still been upset when she had made the statement, the victim had been topless, covered in blood, and had had a visible gash on her head that she had been covering with a towel or shirt, and the bedroom had been blood stained.

Trial counsel was not ineffective for failing to object to the playing of a 911 tape at trial where the statements contained in the tape of a neighbor's call to the 911 operator were admissible as present sense impressions under Evid.R. 803(1), and the statements from the victim, as relayed by the neighbor, were admissible as excited utterances under Evid.R. 803(2).

Although counsel failed to object to improper vouching by the prosecutor, given the evidence presented at trial, no reasonable probability exists that the result of the proceeding would have been different had counsel objected: the defendant's testimony was simply not credible in light of all the evidence presented.

State v. Patton, Appeal No. C-120718, Trial No. B-1105144

Search and Seizure

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120718_07192013.pdf

Summary from the First District:

The trial court erred as a matter of law in granting the defendant's motion to suppress evidence obtained from his home pursuant to a search warrant on the basis that the police officer's observations, during an allegedly illegal protective sweep of the defendant's home, had tainted the affidavit for the search warrant where the affidavit did not include any observations made by the officer during the protective sweep, and the officer's averments that police had received an anonymous tip from the defendant's neighbor that the defendant had marijuana plants growing in his backyard, and that the officer had visually confirmed the presence of 20-30 seven-foot-tall marijuana plants and had smelled the raw odor of marijuana, provided the municipal court with sufficient probable cause to issue the warrant to search the defendant's home.

Second Appellate District of Ohio

State v. Caulfield, 2013-Ohio-3029

Motion to Suppress

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/2/2013/2013-ohio-3029.pdf>

Where the defendant was the passenger in a vehicle with a driver who had open warrants, it was not illegal for the arresting officers to detain her incident to the lawful search of the vehicle. However, the drugs that were found in her purse and on her person must be suppressed because the defendant did not consent to the search of her purse, she did not have access to the passenger compartment of the vehicle during the search, there was no criminal activity observed, there was no contraband discovered prior to the search of the vehicle, and the driver's consent to search the vehicle did not extend to the defendant.

“Plaintiff-Appellant, the State of Ohio, appeals from the trial court's decision granting a motion to suppress evidence filed by Defendant-Appellee, Michelle Caulfield. The evidence at issue was discovered as a result of a deputy searching Caulfield's purse while she was a passenger in a vehicle stopped for a traffic violation. The driver of the vehicle was subsequently arrested due to an outstanding warrant.

“The State contends that the evidence obtained as a result of searching Caulfield's purse should not have been suppressed because the search and seizure of the purse was

reasonable for officer safety. The State also contends that the search was conducted pursuant to Caulfield's consent.

"In response, Caulfield claims that the evidence was correctly suppressed because the deputy illegally detained her after the driver's arrest. Caulfield also claims that the deputy did not have credible grounds to search her purse.

"We conclude that Caulfield's detention was lawful, but that the suppression decision must still be sustained. The trial court's findings indicate that Caulfield did not consent to have her purse searched by the deputy, and the record indicates that: (1) the deputy did not have reasonable grounds to believe that there was contraband in the vehicle relating to the arrest; (2) the arrested driver was not within the vicinity of the vehicle at the time of the search justifying a search incident to arrest; (3) there is no evidence that any contraband was discovered in the vehicle prior to the search of Caulfield's purse; and (4) the driver's consent to search the vehicle did not extend to Caulfield's purse. Under these circumstances, the search of Caulfield's purse was unreasonable and in violation of her Fourth Amendment rights."

State v. White, 2013-Ohio-3027

Motion to Suppress

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/2/2013/2013-ohio-3027.pdf>

Defendant's continued detention was illegal where there were the officer failed to articulate sufficient facts giving rise to a reasonable suspicion of criminal activity that would justify prolonging her detention. Where the detention was unlawful, her consent to search was presumptively invalid.

Officer Lukas Hammermeister, a park ranger, was patrolling a park when he observed Meagan White sitting in her parked car in a rear parking lot away from other vehicles and park buildings. As the officer drove by, he saw White hunched over the center console of her car. She sat up, saw the officer and blurted "a common epithet." The officer observed that White had a panicked look on her face. She then got out of her vehicle and walked into the adjacent woods. The officer, based off his experience, believed White's actions were suspicious.

The officer continued to watch White's car. Soon after, she returned from the woods and drove away. The officer followed and noticed she had a broken tail light when she stopped at a stop sign. He initiated a traffic stop, during which he noticed White was nervous, her voice was trembling, and her hands were shaking. He then gave her a verbal warning for the tail light and told her she was free to leave. However, he then asked her "if it was okay [for him] to ask her a question before [he] got out of there." She responded, "Yes, you ask me a question." He asked if she had anything illegal in the car and she said, "Not to my knowledge." The officer then asked for permission to search her vehicle and White verbally agreed. He did not inform her she could deny consent

and didn't need to answer any questions. The search yielded heroin and a marijuana pipe. He read her *Miranda* rights and she admitted that the officer had in fact found heroin.

White was indicted for possession of heroin in an amount less than one gram. She moved to suppress the evidence against her on the grounds that Hammermeister had engaged in an unlawful search and seizure. The trial court sustained the motion to suppress.

The issues in this case, according to the Second District, are whether White's continued detention was unlawful and whether her consent to search her vehicle was valid in light of the fact that Hammermeister requested her consent during a post-traffic-stop detention. The Second District said that White's detention after the traffic stop was an illegal seizure because Hammermeister did not articulate sufficient facts giving rise to a reasonable suspicion of criminal activity that would justify prolonging her detention. Furthermore, regarding White's consent, the Second District found that because White's post-traffic-stop detention was unlawful, her consent is not presumptively valid. Therefore, the burden was on the State to prove that her consent was an independent act of free will and not a product of illegal detention. The facts here, the Court said, indicate that White's consent was not freely and voluntarily given.

Eighth Appellate District of Ohio

State v. Mole, 2013-Ohio-3131

Equal Protection: Motion to Suppress: R.C. 2907.03(A)(13)

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/8/2013/2013-ohio-3131.pdf>

R.C. 2907.03(A)(13), Sexual Battery, which states that “No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: ... (13) The other person is a minor, the offender is a peace officer, and the offender is more than two years older than the other person” violates the Equal Protection Clauses of the Ohio and United States constitutions.

Mole was charged with one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and one count of sexual battery in violation of R.C. 2907.03(A)(13). He filed a motion to dismiss the sexual battery charge, which the trial court denied.

The charges stemmed from a single sexual encounter that Mole, 36, who was a police officer for the city of Waite Hill, had with J.S., 14. Mole met J.S. in an online chat room; J.S. told Mole that he was in high school but 18 years old. J.S. did not know that Mole was a police officer.

A jury trial was held on the unlawful sexual conduct charge and a bench trial on the sexual battery charge. The jury hung on the unlawful sexual conduct charge. The trial court found Mole guilty of sexual battery, sentenced him to two years in prison, and classified him as a Tier III sex offender. The state elected not to retry Mole on the unlawful sexual conduct charge.

On appeal, Mole argued that R.C. 2907.03(A)(13) is unconstitutional on its face in violation of the Fourteenth Amendment to the United States Constitution and Article I, Sections 2 and 16 of the Ohio Constitution. The statute does not implicate a fundamental right or a suspect classification, therefore, a rational basis review applies.

Without going through the entire analysis – because it’s quite lengthy – the Eighth District held that while there was a valid state interest in creating a law prohibiting sexual conduct between peace officers and minors, the statute bears no rational relationship to a legitimate government interest because one’s occupation as a peace officer alone, without more, does not provide a person with an “unconscionable advantage” over a minor.

Eleventh Appellate District of Ohio

*****YOU SHOULD READ *STATE v. BERGMAN**** SERIOUSLY!*****

***State v. Bergman*, 2013-Ohio-3073**

OVI: Intoxilyzer 8000: Motion to Suppress

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/11/2013/2013-ohio-3073.pdf>

Preface: The Eleventh Appellate District is the first appellate court I’ve seen reach this decision. It absolutely conflicts with the decisions of the other appellate courts in Ohio. It had a strong dissent and will likely result in an *en banc* hearing in that district.

***State v. Vega*, 12 Ohio St.3d 185 (1984) is no longer good law because the version of R.C. 4511.19 in effect at the time that opinion was issued did not have a strict-liability provision for a breath test over the limit – rather, the results of a breath test over the statutory level merely created a rebuttable presumption that the defendant was intoxicated, which did not prevent the defendant from showing, through other evidence, that he or she was not impaired.**

“One of the liberty interests constitutionally protected by substantive due process is ‘freedom from bodily restraint and punishment.’ *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶14. Conviction under the OVI laws can result in deprivation of this liberty interest. Consequently, substantive due process demands that such convictions be premised on

proceedings and procedures which are constitutionally proper. The state has a compelling interest in preventing driving while impaired – but any procedure adopted under the OVI laws must be narrowly tailored to serve that interest. Presently, use of the Intoxilyzer 8000 does not meet this standard. It appears that the state itself is unaware of exactly *how* the machine functions, and generates results. A criminal defendant is deprived of substantive due process when convicted using a procedure which is not merely unknown, but unknowable. Further, a criminal defendant’s substantive due process rights cannot be overridden by a legislative enactment, and there is no need to interpret Ohio’s laws regarding approval of breath analysis machines in a way that does. Similarly, the decision in *Vega*, premised on the use of ‘proper equipment,’ necessarily recognizes the duty of our trial courts to protect defendants’ substantive due process rights by requiring them to insure that the equipment is proper. *Vega*, 12 Ohio St.3d at 186.”

The trial court in this case granted a motion to suppress an Intoxilyzer 8000 breath test in an OVI case because the state declined to present any evidence that the Intoxilyzer 8000 is reliable. *State v. Vega*, 12 Ohio St.3d 185 (1984) says that they don’t have to, but the Eleventh District Court of Appeals held that *Vega* is no longer good law. It goes through quite an analysis that I can’t really summarize without retyping the entire decision. I highly recommend that you read the decision and use from it what you can.

Supreme Court of Ohio

State v. Lalain, 2013-Ohio-3093

R.C. 2929.18: Restitution

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2013/2013-ohio-3093.pdf>

“A trial court has discretion to order restitution in an appropriate case and may base the amount it orders on a recommendation of the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, but the amount ordered cannot be greater than the amount of economic loss suffered as a direct and proximate result of the commission of the offense.”

“A trial court is required to conduct a hearing on restitution only if the offender, victim, or survivor disputes the amount of restitution ordered.”

Lalain worked as an engineer for Aero-Instruments, a Cleveland company that designs aviation and aerospace components. In June 2008, he resigned without notice,

taking electronic files copied from his work computer and duplicates of documents from his office files. He also retained two probes he had previously taken home for testing.

In July 2008, Aero-Instruments commenced civil action against Lalain seeking recovery for misappropriation of trade secrets and proprietary product information. The company also contacted law enforcement, claiming Lalain had stolen intellectual property. Police officers executed a search warrant at Lalain's home and recovered the property he had taken. After investigating the matter, Aero-Instruments dismissed its civil suit after it determined that all of its property had been recovered and that Lalain had not disclosed any proprietary information.

Lalain was indicted for first-degree felony theft of property allegedly valued at \$1 million or more. He eventually pleaded guilty to an amended indictment for fifth-degree-felony theft of property valued at \$500 or more but less than \$5,000. The parties did not discuss the amount of restitution at the plea hearing, nor did they include restitution as an express term of the plea agreement.

Aero-Instruments asked for \$55,456.00 in restitution for the time spent by its employees in support of the case and \$7,665.00 as the cost of contracting with a forensic accounting company to determine a valuation of the property that was taken from the company. The trial court sentenced Lalain to four years of community control and ordered him to pay all the restitution Aero-Instruments asked for. Lalain appealed the amount of restitution.

When the case reached the Supreme Court of Ohio, two issues were presented: "whether restitution for a theft offense is limited to the property value corresponding to the degree of the theft conviction and whether the court may order restitution without conducting a hearing to determine the economic loss sustained as a direct and proximate result of the commission of the offense if the offender disputes the amount of restitution."

The Supreme Court held that R.C. 2929.18(A)(1) "limits the amount of restitution to the amount of the economic detriment suffered by the victim as a direct and proximate result of the commission of the offense." It also held that "although the statute allows the court to base the amount of restitution on an amount recommended by the victim or the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, it does not provide restitution for the costs of preparing such a report. It also mandates that the court must hold a hearing on restitution if the offender, victim, or survivor of the victim disputes the amount." Furthermore, the Court recognized "that the amount of restitution is not correlated to the degree of the theft offense."

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.