

Appellate Court Decisions - Week of 7/22/13

First Appellate District of Ohio

State v. Ruff, Appeal Nos. C-120533, C-120534; Trial Nos. B-1000868, B-0907091

**Sex Offenses: Evidence: R.C. 2941.25: Procedure/Rules:
Burglary/B&E/Trespass: Witnesses**

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120533_07262013.pdf

The trial court erred when it didn't merge Defendant's convictions for aggravated burglary with the rape convictions because the state relied on the same conduct to prove both offenses.

Summary from the First District:

The trial court did not err in failing to grant the defendant's motion to sever the charges in two separate indictments involving five different victims where the evidence as to each victim was presented separately and was direct and uncomplicated.

Statements made by a rape victim to a sexual abuse nurse examiner were for the purposes of obtaining medical treatment; therefore, the admission at the defendant's trial of the statements after the death of the victim did not violate the defendant's right under the Confrontation Clause and did not constitute inadmissible hearsay.

The trial court did not err in prohibiting the defendant from impeaching a witness with extrinsic evidence of a prior inconsistent statement where the statement went to a matter that was collateral to the guilt or innocence of the defendant.

The defendant's convictions for three counts of aggravated burglary, three counts of rape, one count of attempted rape, and one count of sexual battery were based on sufficient evidence and were not against the manifest weight of the evidence.

The trial court violated R.C. 2941.25 by failing to merge each of the defendant's convictions for aggravated burglary under R.C. 2911.11(A)(1) with the corresponding rape offenses under R.C. 2907.02(A)(2), relating to each of three separate victims, where the state relied on the same conduct to prove the rape of each victim and the physical harm requirement of the aggravated-burglary statute, and where the offenses were committed neither separately nor with a separate animus. [*But see* DISSENT: The crimes of aggravated burglary and rape were distinct offenses, subject to separate punishment. The harm suffered by the rape victims was grossly disproportionate to and so exceeded the degree of harm required to prove aggravated burglary that a separate animus was demonstrated as to each aggravated burglary and the corresponding rape offense.]

Ninth Appellate District of Ohio

State v. New, 2013-Ohio-3193

Pre-Indictment Delay: Murder

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/9/2013/2013-ohio-3193.pdf>

The trial court erred in dismissing a murder charge for pre-indictment delay where the indictment came 35 years after the murder because a witness who brought forth new information was “unavailable” during the initial investigation/indictment and there was no reason to believe police knew of the information during the original indictment.

On June 30, 2011, Bobbie Lee New was indicted for the murder of Dorothy Spencer more than 35 years earlier. There is quite a bit of interesting detail about the case in the opinion, but it’s not important here. The case was first presented to the Lorain County Grand Jury in May 1976, but it returned a no bill, refusing to indict New for Spencer’s murder. The investigation became a cold case until 2010. Then, the son of a couple who knew New called the Lorain County Sherriff’s Department with information about Spencer’s death, which he had withheld until his parents died. The information the son had was that New confessed to the murder to his parents in front of him.

With the new information, New was indicted for Spencer’s murder. After the indictment, New filed a motion to dismiss the case due to pre-indictment delay. The trial court granted New’s motion to dismiss and the State appealed.

The Ninth District agreed with the State that the trial court erred when it found that the State failed to justify the 35-year delay in indicting New. There is a two-part test for determining whether an indictment should be dismissed due to pre-indictment delay. *State v. Luck*, 15 Ohio St.3d 150 (1984), reaffirmed by *State v. Whiting*, 84 Ohio St.3d 215, 217 (1998). The defendant must first prove that his defense has suffered actual prejudice due to the delay in the indictment. If the defendant can prove actual prejudice, the burden shifts to the State to establish a justifiable reason for the delay.

The State conceded that New was actually prejudiced by the delay in the indictment. Regarding a justifiable reason for the delay, the State argued that the delay in seeking the second indictment was justified because the son of the couple New allegedly confessed to did not approach the Lorain County Sheriff’s Office with the information until 2010. Although the son was never interviewed in 1976, he testified

that he would not have revealed any information even if he had been interviewed unless his parents would have told him to.

The Ninth District found that the trial court's determination that the son was "not unavailable" to investigators during 1976 is not supported by the evidence. The son did not reveal the information he had about that night until 2010. The Court said there is no evidence that the investigators knew about this information until the son approached the sheriff's department in 2010. It went on to say that it cannot conclude that the sole reason the evidence was not available was because the State failed to interview the son. It also said there was no evidence at the hearings in 2010 that the State delayed New's indictment to intentionally gain a tactical advantage. Therefore, it held that the trial court erred in finding that the State did not justify the reason for the 35-year delay in indicting New. It sustained the State's assignment of error and reversed.

Supreme Court of Ohio

Nothing new.

Fifth Circuit Court of Appeals

United States v. Pham, No. 11-50717

Ineffective Assistance of Counsel

Full Decision: <http://www.ca5.uscourts.gov/opinions/pub/11/11-50717-CVo.wpd.pdf>

Defense counsel was ineffective where, even with a plea deal that included an appeal waiver, he did not discuss with his client his appellate rights after the client expressed some interest in appealing after sentencing.

Pham is a refugee from Vietnam and speaks no English, so he had to communicate through an interpreter. He had no criminal record, but began cultivating marijuana to pay for his wife's treatment for a brain tumor. He was busted with more than 700 marijuana plants and faced a mandatory minimum sentence of five years. He pleaded guilty pursuant to a plea agreement that contained an appeal waiver, disclaimed any agreement "concerning any possible sentence," and authorized the government to file a motion for a downward departure if it concluded Pham had provided substantial assistance. Before signing the plea agreement, his attorney explained its terms to him and informed him he'd likely receive the mandatory minimum sentence unless he fully cooperated with the government. Pham held out hope for probation.

The government did not believe Pham's claims that he acted alone, and therefore did not believe he fully cooperated. Therefore, it did not agree with downward departure of the sentence. The district court sentenced him to the mandatory minimum of five years' imprisonment. After sentencing, Pham spoke with his attorney through an interpreter. Pham was visibly upset by the prison sentence, convinced his wife would die with him in jail. In speaking to his attorney, he "brought up that he was concerned about

getting 60 months and wanted to do something to get less time.” The attorney told him that if he would cooperate with the government, he might get a reduced sentence. The attorney, however, did not discuss the possibility of a direct appeal, and no notice of appeal was filed.

The Fifth Circuit Court of Appeals followed *United States v. Strickland*, 466 U.S. 668 (1984) and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Following those cases, it held that “Pham’s post-sentencing statement to counsel and his demeanor when uttering it reasonably demonstrated his interest in appealing his sentence, such that counsel had a duty to consult with Pham about an appeal. ... Because counsel failed to consult with his client about an appeal, counsel’s performance was objectively unreasonable under *Flores-Ortega*.”

So, long story short, if your client says anything might even possibly be construed as wanting an appeal, you should discuss their appellate rights with them.

Supreme Court of the United States

Nothing new.