

Appellate Court Decisions - Week of 7/27/15

First Appellate District of Ohio

State v. Bailey, 2015-Ohio-2997

Hearsay: Prosecutor: Counsel: Evidence: Sentencing: Allied Offenses: R.C. 2941.25

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-140129_07292015.pdf

Summary from the First District:

“The victim’s initial statements to her father describing her attack and identifying her “neighbor” as her assailant were admissible as excited utterances under Evid.R. 803(2), and their admission was not plain error, where they related to a brutal and terrifying attack, and they were made while the victim was under the stress of excitement caused by that startling attack, which dominated her reflective faculties.

“Plain error may not be invoked to exclude allegedly prejudicial hearsay testimony to which defense counsel did not object, when the record demonstrates that counsel’s failure to object was deliberate and a part of a legitimate trial strategy.

“The defendant failed to demonstrate prosecutorial misconduct during closing argument, where the challenged comments of the prosecutor were based on the evidence and within the latitude afforded the prosecutor in closing argument.

“The defendant failed to demonstrate that counsel was ineffective for not objecting to allegedly hearsay statements of the victim identifying her ‘neighbor’ as her assailant, where the victim’s initial statements to her father were admissible as excited utterances, and where counsel’s failure to object to the other allegedly hearsay statements was part of a reasonably sound trial strategy that fell within the wide range of professionally competent assistance as it provided the foundation for the argument that the victim, who was mentally disabled, had been misled into identifying the defendant as her assailant.

“The defendant’s convictions for burglary, robbery, and felonious assault were supported by sufficient evidence and were not against the manifest weight of the evidence, where the victim identified him as her assailant, the defendant demonstrated knowledge of an undisclosed crime detail during a police interview, his DNA was found on tape placed over the peephole on a neighbor’s door, and nothing in the record demonstrated that the jury lost its way in convicting the defendant.

“Where the trial court failed to incorporate the R.C. 2929.14(C)(4) findings for consecutive sentences into the sentencing entry, the failure must be corrected on remand.

“The merger of the burglary and robbery offenses was not appropriate: the offenses were of a dissimilar import where the commission of the robbery resulted in physical harm that had a significance apart from the harm inflicted when the defendant committed the burglary by trespassing into the victim’s apartment with the intent to deprive her of her property.

“The merger of the robbery and felonious-assault offenses was not appropriate: the defendant gratuitously and repeatedly inflicted serious physical harm on the victim by choking her with her scarf, beating her in the face, and stabbing her in the neck with a knife, and the manner in which the harm was inflicted, in conjunction with the other circumstances, including the absence of evidence that she resisted the attack, demonstrated that the defendant acted with a specific intent to seriously harm her.”

State v. Springer, C140485

Motion to Dismiss: Speedy Trial

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-140485_07292015.pdf

The trial court did not err in granting appellee’s motion to dismiss the charges against him because his constitutional right to a speedy trial had been violated. The delay in the case between charges being filed and the institution of proceedings was two-and-a-half years. Very little effort was made to locate and serve appellee with the charges in Kentucky.

State v. Fields, C140522

Jurisdiction: Bench Trial: Jury Waiver

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-140522_07292015.pdf

The trial court lacked jurisdiction to try appellant’s cause because the court failed to comply with R.C. 2945.05 after she demanded a jury trial. There was no jury waiver executed.

Second Appellate District of Ohio

State v. Harwell, 2015-Ohio-2966

Attempted Felony Murder

Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2015/2015-Ohio-2966.pdf>

Appellant's convictions for attempted felony murder are vacated and his case is remanded for resentencing because attempted felony murder is not a cognizable crime in Ohio.

Third Appellate District of Ohio

Nothing new.

Fourth Appellate District of Ohio

State v. Gavin, 2015-Ohio-2996

Tampering with Evidence: Sufficiency

Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/4/2015/2015-Ohio-2996.pdf>

Appellant's conviction for tampering with evidence was not based on sufficient evidence where, at the time he would have concealed the heroin in his car, there was no proceeding or investigation that appellant knew was in progress or was likely to occur. The Court rejected the state's argument that there was sufficient evidence appellant knew an investigation was likely because several weeks prior to appellant's arrest his girlfriend yelled at him about finding drugs on their dresser.

State v. Owens, 2015-Ohio-3017

Grand Jury Proceedings: Transcripts

Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/4/2015/2015-Ohio-3017.pdf>

The appellate court will conduct an in camera inspection of grand jury testimony and provide the relevant portions to both parties on appeal (and redact all other portions not relevant to the argument) where appellant "has shown a particularized need to review the grand jury transcript as it relates to his argument that there was an unauthorized person in the presence of the grand jury in violation of Crim.R. 6(E) and R.C. 2939.10."

Appellant claimed on appeal “that a representative of the Ohio Attorney General’s Office called, swore and examined witnesses, advised the grand jurors and advocated for the return of an indictment all when she was not authorized to do any of these things.”

Fifth Appellate District of Ohio

Nothing new.

Sixth Appellate District of Ohio

Nothing new.

Seventh Appellate District of Ohio

Nothing new.

Eighth Appellate District of Ohio

State v. Mason, 2015-Ohio-3034

Statute of Limitations: Rape

Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-3034.pdf>

The trial court did not err in granting appellee’s motion to dismiss his five-count indictment stemming from an alleged home invasion and rape on March 11, 1993. At the time the indictment was filed, more than 21 years had elapsed from the date of the offense. The statute of limitations was not tolled, despite capiases in other misdemeanor cases (some of which he ultimately paid fines and costs on the violations) and unreturned summonses in two civil cases, because there was no evidence he was attempting to abscond, change his identity, or otherwise purposely avoid prosecution in the other cases. Also, he did actually subject himself to prosecution by eventually appearing on those other cases.

State v. Evans, 2015-Ohio-3032

Robbery: Sufficiency

Full Decision:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-3032.pdf>

Appellant's robbery conviction was based on insufficient evidence and is remanded to the trial court for a theft conviction and sentence. Appellant reached into the victim's car and grabbed his cell phone from his hand. He told the victim if he wanted the phone back, he would have to give him \$20, and if he didn't, he would smash the phone. The victim eventually complied. The Eighth District held the state failed to present sufficient evidence that appellant used or threatened to use immediate force against the victim.

Ninth Appellate District of Ohio

Nothing new.

Tenth Appellate District of Ohio

Nothing new.

Eleventh Appellate District of Ohio

Nothing new.

Twelfth Appellate District of Ohio

Nothing new.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

United States v. Lowe, No. 14-5615

Knowingly Receiving, Distributing, and Possessing Child Pornography

Full Decision: <http://www.ca6.uscourts.gov/opinions.pdf/15a0169p-06.pdf>

Appellant's conviction for knowingly receiving, distributing, and possessing child pornography was based on insufficient evidence. "Notwithstanding Lowe's heavy burden, we agree with his argument that no rational juror could find him guilty beyond a reasonable doubt based on the evidence presented at trial. A juror could reasonably infer that James owned and occasionally used the laptop from (1) the device's sole username, 'Jamie,' a common diminutive of James; (2) Detective Allman's testimony that the laptop 'belonged to' James; and (3) Agent McFall's testimony about the March 10 visits to the Yahoo! email log-in page. But, without improperly

stacking inferences, no juror could infer from such limited evidence of ownership and use that James knowingly downloaded, possessed, and distributed the child pornography found on the laptop.”

Supreme Court of the United States

Nothing new.