

Appellate Court Decisions - Week of 8/12/13

First Appellate District of Ohio

***State v. Trusty*, Appeal Nos. C-120378, C-120386; Trial No. B-1105783**

Evidence: Hearsay: Counsel: Sex Offenses

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120378_08162013.pdf

Summary from the First District:

The defendant failed to demonstrate that the erroneous admission of testimony relating to the defendant's invocation of his Fifth Amendment right to remain silent during pre-arrest questioning was plain error, because the reference was isolated and not elicited or commented upon by the prosecutor as part of a trial strategy; defense counsel likely chose not to object to the testimony to avoid drawing attention to it; and the victim unequivocally testified, without impeachment, that the defendant—her uncle—had taken her hand and placed it on his penis.

The defendant failed to show that the admission of hearsay evidence—the victim's letter disclosing the allegations—was plain error, because the challenged evidence was cumulative to the testimony presented by the victim at trial and that testimony was not impeached; the case was not based on circumstantial evidence; the hearsay evidence was not used to bolster identification testimony; and defense counsel's failure to object was likely the result of trial strategy to show that the victim's allegations were too vague and that the defendant was not hiding information from the jury.

Because defense counsel's conduct fell within the wide range of professionally competent assistance, the defendant failed to demonstrate that counsel's failure to make objections to inadmissible evidence denied the defendant the effective assistance of trial counsel.

The defendant's conviction for gross sexual imposition was supported by sufficient evidence and was not against the manifest weight of the evidence: the victim gave credible testimony and the state was not required under the law to present physical evidence to corroborate her testimony about the crime.

Fifth Appellate District of Ohio

***State v. Urwin*, 2013-Ohio-3495**

Sentencing: Jail-Time Credit

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2013/2013-ohio-3495.pdf>

Appellant was in jail in Marion County awaiting trial but had a community control holder in Morrow County. She was found not guilty on her Marion County charge. The trial court erred in denying her jail time credit for the time spent in jail in the Marion County jail when it sentenced her for the community control violation in Morrow County.

Appellant was indicted by the Morrow County Grand Jury on two counts of possessing a controlled substance. She pled guilty to one of the counts and the remaining count was dismissed. By judgment entry, the trial court sentenced her to 11 months in prison, suspended in lieu of five years of community control.

A motion to revoke appellant's community control was later filed. A community control holder for the Morrow County probation department was placed on her because she was in jail on an unrelated felony arrest in Marion County. She ended up being acquitted on the Marion County charge. A hearing was then held in Morrow County on the community control violation and she was sentenced to the previously suspended sentence of 11 months and granted 152 days of jail-time credit. The trial court found she was not entitled to credit for the time she was in jail on the Marion County case even though she was under a community control holder.

The Fifth District held that Appellant should have been given jail-time credit for the time served in Marion County. But for the community control holder, she could have bonded out in the Marion County case. (She had a \$15,000 bond in Marion County). If she had been convicted in Marion County, the jail-time credit would have been applied to that sentence. The Court said the presence of a bond in Marion County reinforced her argument for jail time credit.

State v. Dunn, 2013-Ohio-3490

Impaired Driving

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2013/2013-ohio-3490.pdf>

The trial court erred in denying Appellant's motion to terminate his administrative license suspension because it failed to hold an evidentiary hearing as required by R.C. 4511.197(D). The Fifth District reversed and remanded for an evidentiary hearing.

Ninth Appellate District of Ohio

State v. Swiger, 2013-Ohio-3519

OVI: Jury Instruction: Insanity

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/9/2013/2013-ohio-3519.pdf>

The trial court erred by refusing to issue the jury an NGRI instruction on Appellant's aggravated vehicular assault and OVI counts. NGRI can be a defense to an OVI where it originates from a felony indictment rather than a traffic citation. Regarding the strict-liability nature of the offenses, the court said, "regardless of the nature of an offense, criminal responsibility cannot be imposed upon a person who is legally insane at the time of the commission of the offense."

On the morning of August 23, 2011, Swiger stopped her minivan in the middle of the road, exited, and opened the driver's side rear passenger door. She removed her three-year-old son and placed him in the middle of the four-lane road, got back in the van, and drove off. A woman who lived on the road saw the incident and ran into traffic to save the boy. Meanwhile, Swiger drove through an intersection at an excessive rate of speed and collided with two other vehicles.

One of other the drivers was seriously injured, but Swiger only received minor injuries. After her minivan came to a stop, Swiger got out and walked down the middle of the street. She was mumbling and uncooperative when she was arrested, though she later became compliant. The paramedic who treated her described her as disoriented and unable to respond to questions. Swiger was admitted to the hospital and spent nearly nine days in the psychiatric unit.

Swiger was indicted on aggravated vehicular assault (R.C. 2903.08(A)(1)), operating a vehicle under the influence of drugs or alcohol (R.C. 4511.19(A)(1)(a)), a red light violation (R.C. 4511.13), reckless operation (R.C. 4511.20), hit skip (R.C. 4549.02), and endangering children (R.C. 2919.22(A)). She initially pleaded not guilty on all counts, but later filed notice that she intended to plead NRGI on all counts.

Swiger proceeded to a jury trial on all counts except the minor misdemeanor offenses for the red light violation and reckless operation. Near the end of trial, the trial judge informed Swiger's counsel that she could not give an NGRI instruction on the aggravated vehicular assault or the OVI, as both were strict liability offenses and the OVI was also a traffic offense. The judge only gave an NGRI instruction on the counts for hit skip and child endangering. The jury then found Swiger guilty on all four counts and the court found her guilty on the two minor misdemeanor counts. She was sentenced to a total of four years in prison.

Swiger argued on appeal that the trial court erred by refusing to issue the jury an NGRI instruction with regard to the aggravated vehicular assault and OVI counts. The Ninth District agreed. The Court looked at *State v. Ungerer*, 87 Ohio App.3d 110 (9th Dist.1993), which the trial court relied on in its decision. *Ungerer* arose from a misdemeanor OVI that started as a citation and proceeded as a traffic case. Traf.R. 10(A) does not recognize the NGRI plea, which is why the *Ungerer* court would not allow an

NGRI plea in that case. The Ninth District distinguished this case from *Ungerer*, however, because Swiger was charged with several different offenses, including felonies, meaning her charges arose from a felony indictment. Therefore, Traf.R. 10 (A) and *Ungerer* did not operate as a bar to her NGRI instruction request.

The Ninth District then addressed the other basis the trial court used in denying the request for an NGRI instruction – that the aggravated vehicular assault and OVI counts were strict liability offenses and therefore did not contain a mens rea element that could be overcome by the NGRI plea. The Court went through a lengthy discussion of strict liability, mens rea and voluntariness and reached the holding that, “regardless of the nature of an offense, criminal responsibility cannot be imposed upon a person who is legally insane at the time of the commission of the offense.”

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.