Appellate Court Decisions - Week of 8/14/17

Note: This is not a comprehensive list of every case released this week.

First Appellate District of Ohio

State v. Robertson, 2017-Ohio-7225

New Trial: Newly Discovered Evidence

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-7225.pdf

Summary from the First District:

"The trial court did not abuse its discretion in ordering a new trial on the ground of newly discovered evidence: the newly discovered evidence did more than merely impeach or contradict the evidence presented at trial; and the trial court did not abuse its discretion in determining that the newly discovered evidence disclosed a strong probability that it would change the result if a new trial was granted.

"The trial court abused its discretion in ordering a new trial on charges remotely related to the newly discovered evidence: the evidence presented at trial overwhelmingly tied the defendant to those crimes; therefore, the newly discovered evidence did not disclose a strong probability of a different outcome if a new trial on those charges was granted."

State v. Vasquez, 2017-Ohio-7255

OVI: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-7255.pdf

Summary from the First District:

"The trial court erred when it imposed upon the state at a suppression hearing the burden of establishing probable cause to arrest for drunk driving, an offense that involved the operation of a vehicle, when it was undisputed that the arresting officer had probable cause to arrest defendant for having physical control of a vehicle while under the influence of alcohol.

"The trial court erred when it suppressed breath-test results in a drunk-driving case for operating a vehicle while under the influence of alcohol, despite the state's failure at the suppression hearing to demonstrate that the sample had been collected within

three hours of the alleged violation, as contemplated by R.C. 4511.19(D)(1)(b), because the three-hour rule of R.C. 4511.19(D)(1)(b) is not applied in an 'exclusionary manner' in drunk-driving cases involving the operation of a vehicle while under the influence of alcohol, only in per se drunk-driving cases."

Second Appellate District of Ohio

***State v. Ewing*, 2017-Ohio-7194**

Motion to Suppress: Pat-Down Search

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2017/2017-Ohio-7194.pdf

Summary from the Second District:

"The trial court did not err in granting Appellee's motion to suppress. Although police officers stopped Appellee for jaywalking, appellee did not flee from the officers, and they lacked a reasonable articulable suspicion that Appellee was involved in drug activity and/or armed."

A little more from the decision:

"Regarding the State's assertion in its brief, however, that 'under the totality of the circumstances, the officers had reasonable suspicion that Ewing was involved in drug-trafficking and, accordingly, was armed and dangerous,' as well as the State's assertion in its reply brief that Ewing 'was lawfully stopped as part of a valid Terry stop based on reasonable suspicion of drug activity even if he did not commit a jaywalking violation,' we disagree. "Reasonable suspicion has been defined as something that is -22- more than an inchoate hunch or unparticularized suspicion or hunch, but is less than the level of suspicion required for probable cause.' *State v. Mackey*, 141 Ohio App.3d 604, 752 N.E.2d 350 (2d Dist. 2001).

"Reeb testified that he intended solely 'to make a stop on [Ewing] for jaywalking across More Avenue.' R.C. 2935.26 provides that a citation for a minor misdemeanor must be used rather than an arrest, in the absence of certain exceptions, and there was no evidence in the record that the listed exceptions in R.C. 2935.26 apply. For example, one of the exceptions to issuing a citation is that the 'offender cannot or will not offer satisfactory evidence of his identity.' R.C. 2935.26(A)(2). While Reeb initially asked for Ewing's identification, as the trial court determined, Ewing 'was not given an opportunity to identify himself,' since Reeb then indicated that he intended to pat Ewing down before allowing him to reach into his pocket to retrieve his identification.

"Further, while Ewing exited 28 More Avenue after a very brief time inside, neither the source nor the reliability of the complaint that drug activity was occurring

there are part of the record. While Reeb, who was not alone but was accompanied by Conrads, testified that he patted Ewing down due to where Ewing 'came from,' due to the general area's association with drug activity and prostitution, and due to the fact that drugs and weapons are often found together, Reeb further testified that Ewing did not engage in any furtive movements, such as reaching into his clothing, as in Wilks, and that he did not observe any bulges about Ewing's person that might be suggestive of weapons. There was no suggestion that Ewing observed the officers as he exited 28 More Avenue and attempted to evade their detection, as in Barton; Reeb testified that he 'was able to get directly behind [Ewing] before he even recognized us.' Further, there was no suggestion -23- that Ewing was known to the officers based upon a prior criminal history. Regarding the State's focus on the fact that Ewing twice backed away from Reeb, we note that in *Sumlin*, 2009-Ohio-2185, ¶ 50, upon which Ewing relies, this Court found "that the action of simply backing away, slowly, over a short distance, from two police officers exiting a police cruiser, in a high crime neighborhood, with ones hands behind ones back, is not sufficient to give rise to a reasonable, articulable suspicion that criminal activity is afoot, as required for a stop under *Terry v. Ohio* * * *." Further, we conclude that Ewing's movement presented no appreciable prospect of danger to the officers. Reeb testified that Ewing did not have the opportunity to flee, like the defendants in Williams and Lewis, before he was seized and taken to the ground. Reeb testified that Ewing was arrested specifically for the contraband found on his person. Under the totality of the circumstances, we conclude that Reeb lacked an individualized suspicion, specific to Ewing, which suggested a threat to the officers' safety."

***State v. Wilson*, 2017-Ohio-7223**

Juvenile Bindover

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2017/2017-Ohio-7223.pdf

Summary from the Second District:

"The juvenile court did not abuse its discretion in its decision to transfer Defendant-appellant's case to the adult criminal system. The general division court, based upon *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, decided after Defendant-appellant was sentenced, did err by imposing a mandatory prison term. Judgment affirmed in part, reversed in part, and remanded for resentencing."

Third Appellate District of Ohio

Nothing to report.

Fourth Appellate District of Ohio

***State v. Filous*, 2107-Ohio-7203**

Sentencing: Community Control: Postrelease Control

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2017/2017-Ohio-7203.pdf

"[B]ecause we find that the trial court failed to properly notify Appellant of the correct term of post-release control when it sentenced him to prison for a community control violation, the imposition of post-release control is void. Further, because Appellant has already completed the prison term re-imposed as a result of his subsequent judicial release violation, the trial court has no jurisdiction to correct the error related to the improper imposition of post-release control."

***State v. Frazier*, 2017-Ohio-7221**

Criminal Contempt: Right to Counsel

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2017/2017-Ohio-7221.pdf

The appellant was not Frazier, who was the defendant in this case. Instead, the appellant was the victim, who was found guilty of contempt and sentenced to 30 days, a $250 fine, and court costs, for failing to appear pursuant to a subpoena. The Fourth District held that appellant's due process rights were violated during the contempt heargi. He was not informed of his right to counsel and the trial court also failed to obtain a valid waiver of counsel before the hearing. Appellant is entitled to a new hearing on the charge.

Fifth Appellate District of Ohio

Nothing to report.

Sixth Appellate District of Ohio

Nothing to report.

Seventh Appellate District of Ohio

Nothing to report.

Eighth Appellate District of Ohio

***State v. Gardner*, 2017-Ohio-7241**

Having Weapons While Under Disability: Sufficiency

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2017/2017-Ohio-7241.pdf

Summary from the Eighth District:

"Defendant's convictions for aggravated menacing and obstructing official business were supported by sufficient evidence and were not against the manifest weight of the evidence. State did not present sufficient evidence of defendant's actual or constructive possession of firearm recovered from fire pit in defendants' parents' backyard after defendant was apprehended to support his conviction for having a weapon while under disability. Defendant's contention that trial court erred in ordering him to pay costs that it did not impose at the sentencing hearing was moot."

Ninth Appellate District of Ohio

Nothing to report.

Tenth Appellate District of Ohio

Nothing to report.

Eleventh Appellate District of Ohio

Nothing to report.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

Nothing to report.

Sixth Circuit Court of Appeals

***Tanner v. Yukins*, No. 15-1691**

***Habeas Corpus*: *Jackson v. Virginia*, 443 U.S. 307 (1979)**

Full Decision: http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0180p-06.pdf

"Hattie Mae Tanner, who was convicted of murder in 2000, argues that the district court erred by denying habeas relief on two grounds. First, Tanner argues that the Michigan Supreme Court unreasonably applied *Ake v. Oklahoma*, 470 U.S. 68 (1985), when it held that the trial court properly denied Tanner's trial counsel funding for a serology or DNA expert, and that the district court erred by upholding the Michigan Supreme Court's application of Ake. Second, Tanner argues that the Michigan Supreme Court unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), when it held that there was sufficient evidence to convict Tanner, and that the district court erred by upholding the Michigan Supreme Court's application of *Jackson*. We agree with Tanner that she was convicted based on insufficient evidence and that the Michigan Supreme Court unreasonably applied Jackson. We REVERSE the district court's judgment denying habeas relief on Tanner's *Jackson* claim. Because we hold that Tanner is entitled to habeas relief on the ground that the Michigan Supreme Court unreasonably applied *Jackson*, we do not address whether the Michigan Supreme Court also unreasonably applied *Ake*."

Supreme Court of the United States

Nothing to report.