

Appellate Court Decisions - Week of 8/19/13

First Appellate District of Ohio

State v. Lambert, Appeal No. C-120865, Trial No. 11TRC-57873-A

Motion to Suppress: OVI

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-120865_08212013.pdf

Summary from the First District:

The trial court erred in granting the defendant's motion to suppress the results of his Intoxilyer 8000 breath-alcohol test on the ground that the instrument certification had not been done in accordance with Ohio Admin.Code 3701-53-04(D) because the instrument had not been certified at the specific time and location where the instrument had been installed: the state demonstrated substantial compliance with Ohio Admin.Code 3701-53-04(D) where the evidence showed that the instrument had been certified in Columbus, had passed an additional diagnostic test when it was placed in service two days later in Cincinnati, and had not been serviced or repaired prior to the defendant's test, and the defendant did not argue that he had been prejudiced by anything less than strict compliance.

The trial court erred in granting the defendant's motion to suppress the results of his Intoxilyer 8000 breath-alcohol test on the ground that Ohio Admin.Code 3701-53-04(B) requires a dry gas control test in between a subject's breath samples because "Ohio Admin.Code 3701-53-04(B) requires a dry gas control test before a subject's first breath sample and after the subject's second breath sample, but not in between the two samples." See *Cincinnati v. Nicholson*, 1st Dist. Hamilton No. C-120332, 2013-Ohio-708, ¶ 11.

Sixth Appellate District of Ohio

State v. Jones, 2013-Ohio-3559

Traffic Violation: Out-of-State Offender

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/6/2013/2013-ohio-3559.pdf>

The trial court abused its discretion by not exercising its discretion where it failed to consider defendant's motion for leave to voluntarily waive his right to be present by trial because it had a blanket policy requiring the presence of defendants at trial. The trial court also erred in issuing notice of a

violation to the State of Illinois through the Nonresident Violator Compact of 1970 where the defendant did not violate the terms of his traffic citation.

Jones is a commercial driver from Chicago. On March 15, 2012, he was cited for failure to drive within the marked lanes in violation of R.C. 4511.33. The citation included a summons to appear in municipal court on March 30, 2012, at 10:00 a.m. The citation specifically stated that Jones' personal appearance was not required.

Jones obtained counsel, entered a plea of not guilty, and waived his right to a speedy trial. A pretrial hearing was held on May 7, 2012. Jones was allowed to attend by phone. On May 18, 2012, the trial court issued an order setting a June 13, 2012, trial date. Included in the order was the mandate that "DEFENDANT MUST BE PRESENT!"

On June 11, 2012, Jones filed a motion for leave to voluntarily waive his right to be present at trial. The case was called for trial on June 13, 2012. The trial court noted that Jones was not present and that a motion for leave had been filed. The State indicated its preference that Jones be present at trial and requested "an NRVC [Nonresident Violator Compact report] be issued for the defendant." Jones' counsel indicated on the record that he was prepared to move forward with the trial in Jones' absence and that if Jones had been present, he would not have taken the stand in his defense.

The trial court issued an oral decision denying Jones' motion for leave, stating that it requires the defendant to be present at trial and ordering the issuance of an NRVC until the defendant appears.

The issue in this case is whether it is an abuse of discretion for a trial court to deny a Crim.R. 43(A)(3) motion when the sole basis for the denial is the trial court's conformance with a fixed policy requiring all defendants to be physically present at trial.

The Sixth District Court of Appeals reversed, holding that "[t]he trial court abused its discretion by failing to exercise its discretion." In other words, the trial court's blanket policy requiring the presence of defendants, and the lack of anything in the record indicating why the waiver should be denied, made it clear that the trial court did not even consider the waiver. It could have denied the waiver if it gave a reason, but it did not. Therefore, the trial court abused its discretion by failing to exercise its discretion.

Jones also argued that the trial court erred when it issued a notice to the state of Illinois under the Nonresident Violator Compact of 1970, as set forth in R.C. 4510.71, that he was in violation of the terms of a traffic citation for failing to appear in court. The Sixth District held that because Jones' traffic citation expressly stated that his personal appearance was not required, he did not violate the terms of the citation. Therefore, the trial court had no authority to issue notice of violation to the state of Illinois.

Ninth Appellate District of Ohio

State v. Bates, 2013-Ohio-3565

Degree of Offense: Arson: Value of Item

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2013/2013-ohio-3565.pdf>

The year, make, and model of a burned pickup truck alone are not sufficient evidence to determine the value of the truck for the purposes of determining the level of an arson offense.

Among other charges, Bates was charged with arson in violation of R.C. 2909.03(A)(1). The trial court elevated the offense from a first-degree misdemeanor to a fourth-degree felony after the jury determined that the pickup truck that was burned was worth \$1000 or more.

At trial, the victim testified that the burned pickup truck was a 2000 Ford Ranger. He testified that after he saw the truck, he concluded it could not be repaired. His father testified that they let the impound company keep what was left of the burned frame and body. Neither the victims, nor any other witness, testified as to the value of, or the cost to replace, the Ford Ranger and/or its contents. The only evidence that was presented was the year, make, and model of the truck. The Ninth District held that this was insufficient evidence to determine the value of the truck prior to the fire. Therefore, Bates was improperly convicted of felony arson.

State v. Quarterman, 2013-Ohio-3306

Juvenile Transfer

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2013/2013-ohio-3306.pdf>

Juvenile waived the right to challenge the constitutionality of the transfer of his case to adult court by pleading guilty. He also waived his ineffective assistance of counsel claim where he did not argue on appeal that his counsel's performance caused his plea to not be made knowingly, intelligently and voluntarily.

A group of friends were playing cards when Quarterman robbed them at gunpoint. The victims filed complaints against him in juvenile court, alleging he was delinquent for committing acts that constitute aggravated robbery. Because of the nature of the offenses, the juvenile court was required by statute to transfer the case to adult court. The Grand Jury indicted him for three counts of aggravated robbery, each with a firearm specification. He pled guilty to one count of aggravated robbery and the

associated firearm specification. The other charges were dismissed. He was sentenced to four years imprisonment.

On appeal, Quarterman argued in his first three assignments of error that the statutory provisions that required the juvenile court to transfer his case to adult court violate his right to due process, equal protection, and to be free from cruel and unusual punishment. However, the Ninth District held that it need not address the merits of those arguments because Quarterman waived them by pleading guilty.

In his fourth assignment of error, Quarterman argued that his trial counsel was ineffective for not objecting to the constitutionality of his transfer to adult court. The Ninth District held that this argument was waived because Quarterman did not allege that his lawyer's performance caused the entry of his guilty plea to be less than knowing, intelligent and voluntary.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.