

## **Appellate Court Decisions - Week of 8/5/13**

### **First Appellate District of Ohio**

**State v. Grant, Appeal No. C-120695, Trial No. B-9702360-A, 2013-Ohio-3421**

**Postconviction: Allied Offenses**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120695\\_08072013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120695_08072013.pdf)

#### **Summary from the First District:**

The common pleas court had no jurisdiction to grant defendant the relief sought in his postconviction motion: the motion was reviewable as a postconviction petition under R.C. 2953.21 et seq., because it did not specify the statute or rule under which relief was sought, and because the postconviction statutes provide the exclusive means for collaterally challenging a criminal conviction; but the postconviction statutes did not confer jurisdiction to review the motion, because it did not satisfy R.C. 2953.21(A)(2)'s time restrictions or R.C. 2953.23's jurisdictional requirements; and defendant's allied-offenses claim, even if demonstrated, would not have rendered his sentences void. [*But see* DISSENT: The court had jurisdiction to entertain the allied-offenses claims and to vacate and remand for resentencing on either involuntary manslaughter or aggravated burglary, for the death of a single victim, because a sentence imposed in violation of R.C. 2941.25 is void, and because the statute did not authorize the imposition of a sentence for each offense, when the state had relied on the same conduct to prove each offense, and the offenses had been committed neither separately nor with a separate animus as to each; but R.C. 2941.25 did not preclude separate sentences for aggravated robberies involving separate victims, nor did it preclude a separate sentence for kidnapping, when the record permitted a conclusion that the offense had been committed separately from the involuntary manslaughter and aggravated burglary of the same victim.]

**State v. Thomas, Appeal No. C-120836, Trial No. B-0905981, 2013-Ohio-3422**

**Postconviction: Allied Offenses**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120836\\_08072013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120836_08072013.pdf)

#### **Summary from the First District:**

The common pleas court had no jurisdiction to grant defendant the relief sought in his postconviction motion: the motion was reviewable under the standards provided by the postconviction statutes, R.C. 2953.21 et seq., because it did not specify the statute or rule under which relief was sought, and because the postconviction statutes provide

the exclusive means for collaterally challenging a criminal conviction; but the postconviction statutes did not confer jurisdiction to entertain the motion, because it did not satisfy R.C. 2953.21(A)(2)'s time restrictions or R.C. 2953.23's jurisdictional requirements; and defendant's allied-offenses claim, even if demonstrated, would not have rendered his sentences void. [*But see* DISSENT: The court had jurisdiction to entertain the allied-offenses claim because a sentence imposed in violation of R.C. 2941.25 is void; but R.C. 2941.25 authorized sentences for both aggravated robbery in violation of R.C. 2911.01(A)(1) and felonious assault in violation of R.C. 2903.11(A)(2), because the record showed that each offense had been committed with a separate animus.]

### **State v. Maley, Appeal No. C-120599, Trial No. B-1200674**

#### **Witness: Procedure/Rules: Separation of Witnesses**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120599\\_08092013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120599_08092013.pdf)

#### **Summary from the First District:**

The trial court did not abuse its discretion in allowing the victim to remain in the courtroom throughout the trial, even though the court had ordered the separation of witnesses, where the defendant failed to present particularized evidence showing that the victim's testimony would be so affected by being present during the testimony of the other witnesses that the defendant's right to a fair trial would be violated: general assertions that having the victim present and able to hear testimony allowed for the possibility of an unfair trial were insufficient to overcome the right of the victim, codified in R.C. 2930.09, to be present during the trial.

### **Third Appellate District of Ohio**

#### **State v. Godfrey, 2013-Ohio-3396**

#### **Vehicular Manslaughter**

**Full Decision:** <http://www.sconet.state.oh.us/rod/docs/pdf/3/2013/2013-ohio-3396.pdf>

**In a vehicular manslaughter case, once the defendant has raised the presumption that the decedent was traveling in an unlawful manner, the trial court is obligated to resolve the issue.**

**The trial court also erred in allowing the decedent's private civil counsel to file and argue in court its brief in opposition to the defendant's motion for a new trial.**

In November 2004, Godfrey was turning his semi-truck and trailer left onto a state route when a Chevrolet Tahoe driven by Juliana Karmann struck his trailer behind the rear wheels. Karmann's vehicle traveled through the median and struck another vehicle and some trees before stopping. Karmann was killed and her three passengers were injured. Godfrey was charged with vehicular homicide, vehicular manslaughter, and failure to yield. After a bench trial, Godfrey was found not guilty of vehicular homicide, but guilty of the remaining charges. Soon after, he filed a motion for a new trial. The state filed no response to the motion, but the Karmann family's private attorneys filed a motion in opposition to Godfrey's motion. The trial court overruled the motion.

On appeal, Godfrey argued that the trial court did not use the correct legal standard in determining whether Karmann had forfeited her right of way by proceeding in an unreasonable manner. The Third District said that it has previously held that once the presumption is raised that the decedent was traveling in an unlawful manner, the trial court is obligated to resolve the issue. Although evidence of speed alone is inconclusive to determine whether one has forfeited the right of way, it is sufficient to raise the issue and require the trial court to determine whether the speed of the opposing vehicle was reasonable.

In this case, the trial court determined that Godfrey was at fault because he failed to yield the right of way. However, Godfrey presented substantial evidence that Karmann was traveling well above the posted speed limit. Therefore, the Third District said, the trial court had an obligation to determine whether Karmann was traveling at a reasonable speed for the conditions. If she was not, then she no longer had the right of way and Godfrey would not be guilty of failure to yield and thus not guilty of vehicular manslaughter. The trial court made no such determination, which is an error at law that required reversal to weigh the evidence to determine the unresolved issue of whether Karmann was operating her vehicle in a lawful manner so that she maintained the right of way at the time of the accident.

Godfrey also argued that the trial court erred by allowing the civil attorney for Karmann's family to 1) confer with the State about a possible objection and 2) to file a brief opposing his motion for a new trial. The Third District did not reach the first issue because the objection was overruled and, therefore, any error would be harmless. It agreed however, that allowing the attorney to file the brief opposing the motion was error. It also erred by allowing the attorney to argue the brief. Simply, there is no procedure in the trial court for a non-party to file a brief or to make an argument in a criminal case.

## **Fourth Appellate District of Ohio**

### **State v. Clemons, 2013-Ohio-3415**

#### **Corrupting Another With Drugs**

**Full Decision:** <http://www.sconet.state.oh.us/rod/docs/pdf/4/2013/2013-ohio-3415.pdf>

**Where a mother took illegal drugs during her pregnancy, but no harm was done to the child, the trial court erred in not dismissing both charges against her for corrupting another with drugs under R.C. 2925.02(A)(1) and (A)(3).**

Clemons gave birth to a child who, upon birth, tested positive for marijuana, morphine and oxycodone. She also later informed a Children's Services worker that she ingested Percocet, without a prescription, prior to giving birth, and had used marijuana throughout the pregnancy. Based on those events, she was indicted on two counts of corrupting another with drugs, in violation of R.C. 2925.02(A)(1) and (A)(3).

Clemons filed a motion to dismiss both charges, claiming they were not valid based upon the plain language of the statute. After the motion hearing, the trial court granted the motion as to (A)(3) charge only, based on the fact that it appeared the child had suffered no injury as a result of the drug exposure. Clemons eventually entered a plea of no contest to the (A)(1) charge and was sentenced to two years imprisonment, which were stayed pending appeal.

R.C. 2925.02(A)(1) provides that:

“(A) No person shall knowingly do any of the following:

- (1) By threat, force, or deception, administer to another or induce or cause another to use a controlled substance[.]”

The Fourth District determined that “another” means “person,” which, under R.C. 2901.01, includes an unborn human who is viable. It held, however, that the plain language of R.C. 2925.02, read in conjunction with the definitions and exceptions thereto contained in R.C. 2901.01, do not support the application of the statute to the facts in this case. It also found merit to Clemons' argument that it is “incongruous” to disallow prosecution for a woman's conduct during pregnancy that results in harm to her unborn child, while allowing prosecution for conduct that does not harm her child.

## Supreme Court of Ohio

*Nothing new.*

## Sixth Circuit Court of Appeals

***United States v. Nelson, No. 12-5477***

**Evidence: Hearsay**

**Full Decision:** <http://www.ca6.uscourts.gov/opinions.pdf/13a0210p-06.pdf>

**Five police officers testified regarding an anonymous 911 caller's description of the suspect/defendant who allegedly had a gun. It was hearsay evidence admitted to prove that the suspect/defendant possessed a gun. The Government argued it was simply background information, but the Sixth Circuit held that the testimony, based on an anonymous, out-of-court declarant's observations, went directly to the key issue for jury resolution, was not necessary for the Government to provide the jury with a coherent narrative explaining the officers' actions, and was too prejudicial to be cured with a limiting instruction. Furthermore, it was not harmless error and reversal of the conviction was required.**

On June 15, 2009, Murfreesboro, Tennessee police officers Meredith and Massey were dispatched in response to an anonymous 911 call reporting that a black man wearing a blue shirt, with a "poofy" afro, riding a bicycle, was armed with a pistol. Meredith arrived first and began talking with Nelson, who precisely matched the description. Massey then arrived and saw Meredith with Nelson. As Meredith started to get out of his car, Nelson started to ride away on his bike. Massey followed Nelson in his car and saw Nelson reach into his waistband and throw a large, heavy object, which Massey believed to be a gun, into nearby bushes. Massey continued to follow Nelson, who tried to abandon his bike and flee on foot. By that point, additional officers had arrived and Nelson was quickly stopped.

When Nelson was arrested and searched, bullets were recovered from his pocket. A loaded gun was located where Massey saw Nelson throw the heavy object into the bushes. Nelson was eventually charged with being a convicted felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g).

At trial, the central question for the jury was whether Nelson possessed a gun, and the district court permitted the Government to present the testimony of five police officers describing in detail what the 911 dispatcher told them about the suspect. The district court accepted the Government's argument that this evidence was admissible as background information, and gave the jury a limiting instruction after each officer's testimony. After the trial, the jury found Nelson guilty.

The Sixth Circuit rejected Nelson's argument that there was not sufficient evidence of his guilt to sustain the jury's verdict, but it held that the judgment of conviction must be vacated because of the prejudicial admission of the hearsay evidence – what the 911 dispatcher told the officers – notwithstanding the Government's contention that the evidence was admitted only as background information.

It said that reversal is required because the police officers' testimony regarding the anonymous 911 caller's description of the suspect was hearsay evidence admitted to prove that Nelson possessed a gun. The five officers' detailed testimony, which was based on an anonymous, out-of-court declarant's observations, went directly to the key issue for jury resolution, was not necessary for the Government to provide the jury with a coherent narrative explaining the officers' actions, and was too prejudicial for the harm to be cured with a limiting instruction. Furthermore, the error was not harmless because it is more probable than not that it had a material impact on the jury's verdict.

### **Supreme Court of the United States**

***Nothing new.***