# Appellate Court Decisions - Week of 9/11/17

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

## First Appellate District of Ohio

### *State v. Arszman*, 2017-Ohio-7581

**Sex Offenses: Registration**

**Full Decision:**
**http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-7581.pdf**

**Summary from the First District:**

"Where defendant, after his conviction for gross sexual imposition, was improperly classified as a Tier II sex offender, and the appellate court reversed the Tier II classification and remanded the cause for the trial court to correct the classification to Tier I, but the trial court did not carry out the remand order before defendant was released from his prison sentence, and where, after his release from prison, defendant filed a motion for relief from his duty to register as a sex offender and to vacate his sex-offender classification, the trial court's judgment overruling defendant's motion must be affirmed because there is no order in place requiring defendant to register as a sex offender and no classification to vacate, and the cause must be remanded for the trial court to consider whether it has authority to notify defendant of and impose upon him Tier I sex-offender registration requirements after he has been released from his term of imprisonment."

### *State v. Pitts*, 2017-Ohio-7623

**Appellate Review**

**Full Decision:**
**http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-7623.pdf**

**Summary from the First District:**

"Appellant's appeal from the overruling of his postconviction motion to correct the postrelease-control portion of his sentences is subject to dismissal as moot, because the court of appeals cannot provide appellant with any meaningful relief after the common pleas court entered judgment correcting postrelease control and that judgment was affirmed on appeal."

## *In re A.M.*, 2017-Ohio-7624

**Delinquency: Sentencing: Confinement Credit**

**Full Decision:**
**http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-7624.pdf**

**Summary from the First District:**

"The juvenile court erred by denying the juvenile defendant's motions to include as confinement credit under R.C. 2152.18(B) time served at the Abraxas Ohio Residential Treatment Center without taking any evidence or making any findings regarding the nature of the Abraxas facility or the juvenile's time at Abraxas under the guidelines set forth in *In re D.P.*, 1st Dist. Hamilton No. C-140518, 2014-Ohio-5414."

## *State v. Summerlin*, 2017-Ohio-7625

**Counsel: Evidence: Jury Instructions: Flight: Hearsay: Impeachment: Witness**

**Full Decision:**
**http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-7625.pdf**

**Summary from the First District:**

"The decision whether to appoint substitute counsel rests within the sound discretion of the trial court; in the exercise of its discretion the trial court is required to make an inquiry into defendant's request, including whether the motion was timely and whether there had been a complete breakdown in communication between defendant and his counsel.

"The trial court did not abuse its discretion in denying defendant's ill-timed, successive request for substitute counsel on the grounds that counsel had failed to share all discovery with defendant when, well before the request, the court had entertained an identical oral motion, had carefully explained the limitation placed on counsel by Crim.R. 16(C), and had appointed new counsel to represent defendant, and when the motion was renewed held an inquiry at which current appointed counsel explained that he had provided defendant with all discovery material that had not been designated 'counsel only' under Crim.R. 16(C), had met with defendant 15 times before trial and had explained to him the limitations placed on them by the discovery rules, had discussed at length their trial strategy and the plea negotiation, and had concluded that the attorney-client relationship had not broken down.

"Evid.R. 806(A) provides that when a hearsay statement has been admitted into evidence, 'the credibility of the declarant may be attacked * * * by any evidence that

would be admissible for those purposes if declarant had testified as a witness,' and Evid.R. 806(C) permits the use of Evid.R. 609 prior-conviction records to impeach a hearsay declarant even if that declarant does not testify.

"Evidence of flight is admissible to show consciousness of guilt, and a jury instruction on flight is proper if the record contains sufficient evidence to support the charge as long as the instruction does not raise a presumption of guilt or shift the burden of proof to defendant to explain his flight.

"The trial court did not abuse its discretion by instructing the jury on flight as consciousness of guilt where the state's evidence showed that defendant, knowing that the police would soon arrive, had immediately left the scene of shootings even though his victims lay seriously wounded, that he had removed himself from the city following the shootings, that he had made statements that he knew that he was 'hot,' acknowledging that the police were looking for him, and that he or his associates had offered one shooting victim money not to testify at trial.

"The trial court did not abuse its sound discretion over the admission or exclusion of relevant evidence when it admitted into evidence two prejudicial photographs taken from defendant's Facebook profile page, one photo showing defendant with a gun in his waistband, and the other photo showing defendant with another perpetrator of a shooting, each with a gun."

***State v. Schwarm*, 2017-Ohio-7626**

**Sentencing: Rule of Lenity: Competency**

**Full Decision:**
**http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-7626.pdf**

**Summary from the First District:**

"Under the rule of lenity, where the indictment alleged that defendant had committed offenses during a range of time that encompassed pre-Senate Bill 2 and post-Senate Bill 2 time periods, defendant was entitled to be sentenced under the law in effect post-Senate Bill 2, where the maximum sentence that could have been imposed for each rape offense was ten years, as opposed to the 11 years that could have been imposed if the offenses had been committed prior to the enactment of Senate Bill 2.

"Where the trial court was required to make findings in support of consecutive sentences at the sentencing hearing, and where the appellate court cannot discern from the record that the trial court engaged in the required analysis, the trial court's imposition of consecutive sentences was erroneous.

"Where the record does not contain evidence to create a sufficient doubt that defendant was incompetent, the trial court did not err in failing to sua sponte order that defendant undergo a competency evaluation."

***State v. Kirkpatrick*, 2017-Ohio-7629**

**OVI: Reasonable Suspicion: R.C. 4511.36**

**Full Decision:**
**http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2017/2017-Ohio-7629.pdf**

**Summary from the First District:**

"In an OVI prosecution, the trial court properly overruled the defendant's motion to suppress evidence stemming from a traffic stop, which the defendant alleged had not been supported by reasonable suspicion: although the defendant-driver's conduct in turning into the outside, right lane, instead of the inside, left lane did not violate R.C. 4511.36(A)(2), the basis for the police officer's traffic stop, the police officer made a reasonable mistake of law in concluding that the defendant had violated the statute based upon dicta from the previous opinion of this court in *State v. Stadelmann*, 1st Dist. Hamilton No. C-130138, 2013-Ohio-5035.

"Because the clear and unambiguous language of R.C. 4511.36(A)(2) does not prohibit a driver from turning into the outside, right lane, instead of the inside, left lane, the defendant's conviction under R.C. 4511.36(A)(2) constitutes plain error."

## Second Appellate District of Ohio

***Nothing to report.***

## Third Appellate District of Ohio

***Nothing to report.***

## Fourth Appellate District of Ohio

***Nothing to report.***

## Fifth Appellate District of Ohio

***State v. Gwynne*, 2017-Ohio-7570**

**Sentencing**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2017/2017-Ohio-7570.pdf**

**Well, here's something you don't see every day. The Fifth District Court of Appeals overturned the "imposition of a 65-year sentence for a series of non-violent theft offenses" because such a sentence "for a first time felon shocks the consciousness." Ultimately, it reduced Appellant's sentence to 15 years.**

## Sixth Appellate District of Ohio

***Nothing to report.***

## Seventh Appellate District of Ohio

***Nothing to report.***

## Eighth Appellate District of Ohio

***State v. Walker*, 2017-Ohio-7609**

**Sentencing**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2017/2017-Ohio-7609.pdf**

**Summary from the Eighth District:**

"Trial court erred in denying defendant's motion to correct void sentences because the trial court imposed sentencing upon the 'violation' of an expired sanction in one case and in the other case, the community control sanctions being imposed consecutive to a prison term were invalid ab initio."

## Ninth Appellate District of Ohio

***Nothing to report.***

## Tenth Appellate District of Ohio

***State v. J.S.*, 2017-Ohio-7613**

**Sealing Record of Conviction**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2017/2017-Ohio-7613.pdf**

**The trial court erred in denying Appellant's application to seal the record of her second-degree misdemeanor assault conviction. The Tenth District held "that the trial court's ruling was unreasonable because no sound reasoning supported it." It remanded the application with instructions to grant the application to seal the record of conviction.**

***State v. Hairston*, 2017-Ohio-7612**

**Motion to Suppress: Stop: Search**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2017/2017-Ohio-7612.pdf**

**The trial court erred in denying Appellant's motion to suppress the statements he made to police and the search of his person where police lacked a reasonable suspicion to justify the stop. "The only fact in the record from which the officers could infer that criminal activity was afoot was that they heard gunshots from somewhere to the west" and Appellant "was simply the first person the officers saw after driving nearly one-half mile from where they stood when they heard the gunshots.**

## Eleventh Appellate District of Ohio

***Nothing to report.***

## Twelfth Appellate District of Ohio

***Nothing to report.***

## Supreme Court of Ohio

***Reid v. Cleveland Police Dept.*, 2017-Ohio-7527**

**Law-of-the-Case Doctrine**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2017/2017-Ohio-7527.pdf**

**"In this appeal, we address whether the law-of-the-case doctrine requires a court to follow a superior court's decision in a prior appeal involving one of**

**the parties but in the context of a different case. We hold that it does not. The law-of-the-case doctrine applies only to rulings in the same case. Accordingly, we reverse the judgment of the Eighth District Court of Appeals."**

***State v. Martin*, 2017-Ohio-7556**

**Criminal Law: Aggravated Murder: Death Penalty**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2017/2017-Ohio-7556.pdf**

**Appellant's convictions and death sentence affirmed.**

***State v. Morgan*, 2017-Ohio-7565**

**Juvenile Procedure: R.C. 2151.281: Juv.R. 4: Gaurdian Ad Litem**

**Full Decision:**
**https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2017/2017-Ohio-7565.pdf**

**"In this discretionary appeal, we consider whether the Tenth District Court of Appeals correctly held that a juvenile court's failure, during an amenability hearing, to appoint a guardian ad litem ("GAL") pursuant to R.C. 2151.281(A)(1) and Juv.R. 4(B)(1) to protect the interests of a juvenile whose parents are deceased was not plain error.**

**"For the reasons that follow, we hold that when a juvenile whose parents are deceased appears at an amenability hearing, the juvenile is not required to ask for the appointment of a GAL; a GAL must be appointed as mandated by R.C. 2151.281(A)(1) and Juv.R. 4(B)(1). We further hold that the juvenile court's failure to appoint a GAL in a delinquency proceeding is subject to criminal plain error review. However, because the evidence presented failed to prove that the error affected the outcome of the proceeding, we affirm the judgment of the court of appeals, albeit on different grounds."**

**O'Connor, C.J., dissenting: "I agree with the majority that 'a juvenile is not required to ask for the appointment of a [guardian ad litem ('GAL')] when the juvenile appears at an amenability hearing and has no parent.' Majority opinion at ¶ 30. I also agree that '[t]here is no doubt that an obvious error occurred when the juvenile court failed to appoint a GAL for Morgan at the amenability hearing.' Majority opinion at ¶ 51. But I disagree with the majority's application of the criminal plain-error standard of review for the purported protection of the juvenile offender when the result is to remove important protections. And it is particularly troubling that the majority**

**uses this case, in which the parties have not raised the issue, see majority opinion at ¶ 34, to generally hold that 'criminal plain-error review applies to unpreserved errors that occur in a juvenile-delinquency proceeding,' majority opinion at ¶ 54."**

## Sixth Circuit Court of Appeals

***Nothing to report.***

## Supreme Court of the United States

***Nothing to report.***

## Hamilton County Court of Common Pleas

***State v. Jones*, Case No. B-17-01909**

**Entry Granting Defendant's Motion to Dismiss Indictment and Direct Removal from Sex Offender Registry**

**E-mail me at jathompson@cms.hamilton-co.org if you would like a copy of the decision (it is extremely thorough).**

**The trial court granted the defendant's motion to dismiss his indictment and to direct his removal from the sex offender registry. The trial court determined that the defendant's 1985 convictions for felonious assault do not constitute "sexually oriented offenses" under Megan's Law. It also concluded the doctrine of *res judicata* does not preclude review of a prior consideration of the defendant's status under Megan's law. Finally, the trial court ruled that even if *res judicata* were applicable, the doctrine should not be applied in this case because it would be unfair to require the defendant to register a sex offender and face criminal liability for the failure to register when his duty to register never existed *ab initio*.**