

Appellate Court Decisions - Week of 9/16/13

First Appellate District of Ohio

State v. Wurzelbacher, Appeal No. C-130011, Trial No. B-0009162

Declaratory Judgment: Postconviction: Sentencing

Full Decision: http://www.hamilton-co.org/appealscourt/docs/decisions/C-130011_09182013.pdf

Summary from the First District:

Defendant's postconviction motion for a declaratory judgment was subject to dismissal for lack of jurisdiction because neither the Declaratory Judgment Act nor the postconviction statutes conferred on the common pleas court the jurisdiction to entertain the motion.

A court has jurisdiction to correct a void judgment, but defendant's sentences were not void due to the trial court's failure to merge allied offenses or to notify him concerning his appeal rights, the requirement that he give a DNA specimen, or the imposition of community service in lieu of court costs.

The common pleas court had jurisdiction to review and to set aside defendant's sentences to the extent that they were void for lack of a mandatory driver's license suspension and postrelease-control notification; but the sentences could not be corrected after defendant had been discharged, and defendant could not be placed on postrelease control or be sanctioned for a postrelease-control violation. [*But see* DISSENT: The court had jurisdiction to entertain defendant's allied-offenses claim, because a sentence imposed in violation of R.C. 2941.25 is void; but R.C. 2941.25 authorized a sentence for each offense, because the record showed that each offense had been committed separately.]

Second Appellate District of Ohio

State v. Stephens, 2013-Ohio-3944

Sentencing: Driver's License Suspensions

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2013/2013-ohio-3944.pdf>

The trial court erred in running the defendant's driver's license suspensions for Trafficking in Cocaine and Failure to Comply consecutively.

Stephens pleaded guilty to Trafficking in Crack Cocaine and Failure to Comply. As part of the sentence, the trial court ordered a two-year driver's license suspension on the Trafficking count and three years on the Failure to comply, to run consecutive for a total of five years. The Second District held that the suspensions cannot be run consecutively because it is "aware of no statutory provision authorizing that those penalties be made to run consecutively" and the rule of lenity in R.C. 2901.04(A) impels it to the conclusion it reached.

Third Appellate District of Ohio

State v. Dulaney, 2013-Ohio-3985

Fourth Amendment: Search and Seizure

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/3/2013/2013-ohio-3985.pdf>

The trial court erred in denying the defendant's motion to suppress where the judge who signed the search warrant was from a different county than where the blood samples seized were located, which means the judge lacked statutory authority to sign the warrant. The lack of statutory authority means the judge was not a judge for Fourth Amendment purposes and renders the warrant void ab initio. However, because the trial court did not analyze whether the Fourth Amendment violation requires suppression, the Third District remanded the case to determine that issue.

Dulaney was driving a vehicle with two passengers. She lost control and the vehicle rolled. One passenger was ejected and died. The other passenger fractured his pelvis. Dulaney was charged with aggravated vehicular assault and aggravated vehicular homicide.

Dulaney filed a motion to suppress any blood alcohol tests obtained from the seizure of samples of her blood on the basis that it was done pursuant to an invalid warrant. The search warrant was signed by a judge from the Paulding County county court (yes, county twice is right), but it authorized the seizure of the samples from the Defiance Regional Medical Center in Defiance County, Ohio. The trial court denied the motion to suppress. Dulaney then pleaded no contest to aggravated vehicular homicide in exchange for the aggravated vehicular assault being dismissed. She was sentenced to 18 months in prison.

The Third District reversed the trial court's decision, holding that the State did violate Dulaney's Fourth Amendment rights when it seized her blood samples pursuant to an invalid warrant. The warrant was invalid because the Paulding County county court judge lacked statutory authority to issue a search warrant for Dulaney's blood samples located in Defiance County. "Under well-settled federal law, this lack of authority indicates that the issuing judge was not a judge for Fourth Amendment purposes and renders the warrant void ab initio. Accordingly, the investigating officers

executed their search pursuant to an invalid warrant in violation of the Fourth Amendment.” However, because the trial court did not reach the issue of whether suppression was appropriate, the Third District remanded the case for determination on that issue.

Fifth Appellate District of Ohio

State v. Boss, 2013-Ohio-4005

OVI: Motion to Suppress: Substantial Compliance: Ohio Adm. Code 3701-53-04(A)

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2013/2013-ohio-4005.pdf>

The trial court did not err in granting defendant’s motion to suppress her breath test results where the RFI check preceding her test and after her test were more than 192 hours apart, in violation of OAC 3701-53-04(A).

Boss was charged with OVI under R.C. 4511.19(A)(1)(a) and (B). She filed a motion to suppress, the relevant part here being for the result of her breath test taken on the Ohio State Highway Patrol’s BAC Datamaster. The primary issue raised regarding the breath test was the timing of the performance of the Radio Frequency Interference (“RFI”) checks as required in OAC 3701-53-04(A). Specifically, the BAC Datamaster printouts for the RFI checks showed that the checks before and after Boss’s breath test were conducted more than 192 hours apart. After a hearing was held, the trial court granted Boss’s motion to suppress, based on the preceding RFI check taking place at 12:01 a.m. on December 9, 2012, and the subsequent check not completed until 2:09 a.m. on December 17, 2012. The Fifth District agreed with the trial court, and affirmed the grant of the motion to suppress.

State v. Coyle, 2013-Ohio-4017

Search: OVI: Reasonable Articulate Suspicion

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2013/2013-ohio-4017.pdf>

The trial court erred in denying the defendant’s motion to suppress for lack of reasonable suspicion of criminal activity to justify the stop where it was not clear the defendant committed any marked lanes violations, it was reasonable for the defendant to pull over to the left instead of the right, and the defendant had his turn signal on for 10 seconds.

An Ohio State Highway Patrol Trooper observed Coyle’s vehicle weaving in the opposite lane of travel. The trooper also saw that Coyle’s left turn signal was activated, but Coyle did not turn left. The trooper stopped Coyle, and the encounter resulting in

Coyle being charged with OVI, an expired driver's license, and failure to control. Coyle filed a motion to suppress, claiming an illegal stop. The trial court denied the motion. Coyle then entered a no contest plea to the OVI and was sentenced to 90 days in jail, 75 days suspended.

On appeal, Coyle argued that the trial court erred in denying his motion to suppress because the trooper lacked reasonable suspicion of criminal behavior to initiate the traffic stop. The Fifth District agreed.

In its judgment entry denying Coyle's motion to suppress, the trial court found the following:

Further, the Court FINDS that the officer observed that the Defendant was having trouble operating the vehicle within his own lane. While the officer could not say that the vehicle was outside the right line or the left line, it was clear that the vehicle was certainly unsteady. Also, the turn signal was on for unusually long period of time in an area where there did not seem to be anything to turn into. This turn signal also was on before the cruiser lights were activated. Furthermore, Defendant was tapping his breaks and slowing his speed.

Coyle testified at the hearing on the motion to suppress that he saw the trooper's lights, slowed his vehicle and put on his left turn signal to stop. The Fifth District found plausible Coyle's explanation for turning left instead of pulling over to the right – that there was a narrow berm with a guardrail on the right, as opposed to parking lot of the Workman Home Improvement & Supply store on the left. Also, the video shows the turn signal was only on for 10 seconds. There was no testimony whether, under R.C. 4511.39(A), the turn signal was on for more or less than one hundred feet from the turn.

Based on the foregoing, the Fifth District held that the trooper lacked reasonable suspicion of criminal activity to justify the stop, and the trial court erred in denying the motion to suppress.

Sixth Appellate District of Ohio

Here's one that got past me back in June:

State v. Babcock, 2013-Ohio-2366

Traffic Stop: Mistake of Law: Suppression

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/6/2013/2013-ohio-2366.pdf>

Summary from Lexis:

“A police officer observed defendant make a U-turn at an area that was just in front of a red light. The officer pulled over defendant’s vehicle and eventually charged him with operating a vehicle under the influence of alcohol. The court held that the trial court erred in denying defendant’s motion to suppress as the underlying traffic stop was conducted without reasonable suspicion of criminal activity, in violation of *U.S. Const. amend. IV*. Although the officer believed that defendant violated the red light law when he performed his U-turn without waiting for the light to change, the officer’s mistake was one of law and, thus, could not support a reasonable suspicion to conduct a traffic stop.”

Ninth Appellate District of Ohio

State v. Chisolm, 2013-Ohio-3965

Speedy Trial

Full Decision: <http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2013/2013-ohio-3965.pdf>

The trial court erred in denying the defendant’s motion to dismiss for violating his right to a speedy trial where it should not have tolled the time prior to pretrial during which the defendant tried to contact his court-appointed attorney but his attorney was unaware of his incarceration and had not contacted him back.

Chisolm was indicted on five counts of forgery. He was arrested and released on an OR bond. However, he failed to appear for his arraignment, so his bond was revoked and a warrant issued for his arrest. He was re-arrested on December 19, 2011, and appeared at his arraignment on December 20, 2011. He pleaded not guilty, was appointed a public defender, and bond was set at \$5,000.

Chisolm did not post bond and remained in the Wayne County Jail. A pretrial was held on February 29, 2012, where Chisolm met his attorney for the first time. The two had not communicated prior to that date because the attorney was not aware of his incarceration, and her office did not accept collect calls from the jail.

On January 5, 2012, Chisolm demanded discovery from the State and the State responded on January 24, 2012. On January 25, the State demanded reciprocal discovery, and he answered five days later on January 30. On April 10, 2012, Chisolm filed a motion to dismiss alleging that his right to a speedy trial was violated because more than 90 days had elapsed since his arrest. He calculated that his adjusted time in jail at that point was 94 days.

The State filed a memorandum in opposition arguing that Chisolm’s speedy trial rights were tolled from December 20, 2011 to February 29, 2012, because of his own neglect in failing to communicate with his appointed counsel prior to the pretrial. The

State calculated, then, that only 44 days had elapsed. The trial court denied Chisolm's motion to suppress. Chisolm subsequently changed his plea to "no contest" and was sentenced to seven months of imprisonment on each count of forgery, to run concurrent.

On appeal, Chisolm argues that the trial court should have granted his motion to suppress because his right to a speedy trial was violated. The Ninth District agreed. The attorney sent Chisolm a letter, dated January 11, 2012, indicating she would meet with him in approximately two weeks and explaining that her office doesn't accept collect calls. Apparently, Chisolm sent a letter, dated January 17, 2012, to his attorney through another client. The letter ended up in that client's file and the attorney was unaware of its contents until the day of the plea hearing. Chisolm also never signed a speedy trial waiver, and when the State became aware of the speedy trial issue, it made no attempt to urge the trial court to set the matter within the requisite time limits.

The Ninth District said it cannot find that Chisolm's actions between December 20, 2011, and February 29, 2012, were neglectful or improper. Therefore, it held that the trial court erred in tolling Chisolm's speedy trial time

Supreme Court of Ohio

State v. Pariag, Slip Opinion No. 2013-Ohio-4010

R.C. 2953.61: Sealing of Records

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2013/2013-ohio-4010.pdf>

A trial court is precluded, pursuant to R.C. 2953.61, from sealing the record of a dismissed charge if the dismissed charge arises "as the result of or in connection with the same act" that supports a conviction, when the records of the conviction are not sealable under R.C. 2953.36, regardless of whether the charges are filed under separate case numbers.

Pariag was charged with a traffic offense, possession of drugs of abuse, and possession of drug paraphernalia. The traffic offenses and drug charges were assigned separate case numbers. The drug charges were dismissed when Pariag entered a plea in the traffic case.

Pariag later applied to seal the records pertaining to the drug charges that had been dismissed. The state objected and argued that because the record of a traffic conviction could not be sealed under R.C. 2953.36, the record of the companion case – the drug charges – could not be sealed because they arose from the same incident. Nevertheless, the trial court ordered the records of the dismissed drug charges sealed, concluding that the conviction in the traffic case did not prevent sealing of records in the criminal case involving dismissed drug offenses.

The state appealed, and the Tenth District Court of appeals held that R.C. 2953.61 does not prohibit courts from sealing records of dismissed charges in one case when the record of conviction in another case may not be sealed, even if the charges arose out of the same act, because the statute governs merely the timing of the application to seal.

The Supreme Court of Ohio reversed (with three justices dissenting) the Tenth District, holding “that a trial court is precluded, pursuant to R.C. 2953.61, from sealing a record of a dismissed charge if the dismissed charge arises ‘as a result of or in connection with the same act’ that supports a conviction when the records are not sealable under R.C. 2953.36, regardless of whether the dismissed charge and conviction are filed under separate case numbers.”

State v. Kareski, Slip Opinion No. 2013-Ohio-4008

Evidence: Judicial Notice of Essential Fact: Appellate Review: Double Jeopardy

Full Decision: <http://www.sconet.state.oh.us/rod/docs/pdf/o/2013/2013-ohio-4008.pdf>

When erroneous judicial notice fills a gap created by the prosecution’s failure to prove an essential element, the judicially noticed fact may not be considered to determine whether sufficient evidence exists to permit retrial.

Mychael Kimbel, 19, was a confidential informant for the Ohio Department of Public Safety (“ODPS”). He approached the bar where Kareski was bartending and asked for a Bud Light. Kareski told Kimbel the price, grabbed a bottle of Bud Light, opened it, and put it in front from Kimbel. Kareski then noticed Kimbel’s hands didn’t have the stamp showing that he showed proof of age at the door. He told Kimbel that he couldn’t give him the beer until he showed ID. Kimbel then pretended to get a call on his cell phone, gave money to to Kareski, said he would return with ID, and walked away from the bar without the beer.

Kareski was charged with selling beer to an underage person. OPDS Agent Keenan Resse had watched the transaction and retrieved the opened Bud Light as evidence. He sent a sample of the contents of the bottle to a state lab to be analyzed, and a report was generated.

At trial, Kareski objected to the admission of the lab report regarding the contents of the bottle on the basis that no foundational witness testified as to its contents and that the report was hearsay and not properly authenticated. The court, after researching the issue, concluded, “I don’t think the report comes in. I think that I can take judicial notice that beer is an intoxicating liquor.” After more discussion, the state asked, “Is the court taking judicial notice that Bud Lite [sic] is beer?” The judge responded, “I’ll do that, but it seems to me that the argument is going to be was there

any testimony about what percentage of alcohol it contained.” When the jury returned, the judge told it, “I will take judicial notice that Bud Light is in fact beer.”

The jury found Kareski guilty and he appealed the issue of the judicial notice. The Ninth District reversed his conviction and remanded for a new trial. The issue that made it to the Supreme Court was “whether, given the trial court’s error, the appellate court properly ordered a new trial.”

The Supreme Court said “the sole evidence offered by the state on the issue of the alcohol content of the beer of in question was never admitted. Instead, the trial court saved the state’s case by taking judicial notice that the contents of the Bud Light bottle met the statutory definition of ‘beer.’ We thus find unavailing any claim by the state that it relied on the trial court’s taking of judicial notice Therefore, we conclude that the appellate court erred when it relied upon the trial court’s taking of judicial notice of the alcohol content of Bud Light in its review of the sufficiency of the evidence against Kareski and when it remanded the case for retrial. Since there was no evidence admitted on the statutory element of the alcohol content of the substance sold by Kareski to the informant, there was insufficient evidence for a conviction, and the Double Jeopardy Clauses of the Ohio Constitution and the United States Constitution bar a retrial. Accordingly, we vacate Kareski’s conviction.”

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.