

## **Appellate Court Decisions - Week of 9/23/13**

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

***State v. Lopez*, Appeal Nos. C-120436, C-120555; Trial No. B-0402530-B**

**Appellate Review: Postconviction: Postrelease Control**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120436\\_09252013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120436_09252013.pdf)

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

The appeal taken from the second of two identical final orders was subject to dismissal because it was superfluous to the appeal taken from the first order.

The common pleas court had no jurisdiction under the postconviction statutes, R.C. 2953.21 et seq., to entertain defendant's postconviction motion seeking an order terminating his postrelease control: the motion was reviewable under the postconviction statutes, 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 motion was subject to dismissal for lack of jurisdiction, because it did not satisfy R.C. 2953.21(A)(2)'s time restrictions or R.C. 2953.23's jurisdictional requirements.

The common pleas court had jurisdiction to review and to set aside defendant's sentences to the extent that they were void for inadequate 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.

***State v. Webster*, Appeal No. C-120452, Trial No. B-1103023**

**Sex Offenses: Evidence: Indictment: Sentencing**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120452\\_09252013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120452_09252013.pdf)

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

The state presented sufficient evidence to support defendant's convictions for three counts of unlawful sexual conduct with a minor: the state did not try defendant in an "all or nothing fashion" where it had sufficiently distinguished each charge in its indictment, the bill of particulars, and in its evidence presented at trial so as to afford defendant the opportunity to separately defend against each charge and so as to afford the jury the ability to consider each charge on its own.

The state failed to present sufficient evidence to support one of four charges of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) where there was no evidence that defendant and the alleged victim had engaged in sexual intercourse on the date alleged in that one count.

The trial court properly weighed the multiple state interests advanced by the rape shield law against the minimal probative value of defendant's proffered evidence in excluding evidence of the victim's alleged affairs with other men.

There was no error in the admission of a detective's testimony that he believed that the victim had been truthful concerning her allegations of criminal conduct by the defendant because the testimony was adduced after defendant had "opened the door" during cross-examination by asking the detective multiple questions concerning the victim's truthfulness about the pending charges.

The trial court properly ordered as part of defendant's sentence restitution for medical expenses incurred by the victim as a result of defendant's crimes.

**State v. Ruberg, Appeal Nos. C-120619, C-120620; Trial No. 11TRC-36309**

### **OVI: Motion to Suppress**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120619\\_09252013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120619_09252013.pdf)

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

The trial court did not err in granting the defendant's motion to suppress in a prosecution for driving while impaired and driving with a prohibited breath-alcohol concentration: the officer did not have probable cause to arrest the defendant where there was no evidence of erratic driving, the defendant's speech was clear and coherent, she had no difficulty in producing her driver's license or in following the officer's instructions, and she exhibited at most only two clues of impairment on the field-sobriety tests that had been properly administered. [*But see* DISSENT: Because the arresting officer was an experienced state trooper who had made numerous stops for OVI, his opinion that the defendant was appreciably impaired was entitled to deference where the defendant had been traveling nearly 30 m.p.h. over the posted speed limit, she admitted to drinking alcohol hours earlier, she smelled of alcohol, her eyes were red and there were "indicators" in her performance of the field-sobriety tests that led the officer to conclude that her ability to operate her vehicle was impaired.]

**State v. White, Appeal No. C-130114, Trial No. B-1205509**

### **Appellate Review: Sentencing**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-130114\\_09272013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-130114_09272013.pdf)

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

After the enactment of 2011 Am.Sub.H.B. 86, the standard for appellate review of felony sentences is governed by R.C. 2953.08(G)(2), and the two-step approach in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, no longer applies: under R.C. 2953.08(G)(2), the standard of review is not an abuse of discretion; a reviewing court may only modify or vacate a sentence if it clearly and convincingly finds either that the record does not support the mandatory sentencing findings or that the sentence is otherwise contrary to law.

Where defendant's sentence was within the permissible statutory range and the trial court properly considered the other applicable sentencing provisions, the sentence was not clearly and convincingly contrary to law.

### **State v. Lowe, Appeal No. C-130048, Trial No. B-1207156**

#### **Appellate Review: Sentencing: Restitution**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-130048\\_09272013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-130048_09272013.pdf)

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

Defendant's judgment of conviction, which included an order of restitution, but ordered that the amount of restitution be determined by the probation department, was a final appealable order, because the judgment contained no suggestion that the court had contemplated further proceedings to determine the restitution amount.

The trial court erred in including in defendant's felony sentence an order of restitution in an amount to be determined by the probation department, because R.C. 2929.18(A)(1) required the court to determine the amount of restitution.

### **State v. Watkins, Appeal No. C-120567, Trial No. B-1105308**

#### **Sentencing: R.C. 2941.25**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120567\\_09272013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120567_09272013.pdf)

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

Under R.C. 2953.08(G)(2), an appellate court may vacate a sentence and remand for a new sentencing hearing if the sentence is contrary to law; a sentence that contains an allied-offense error is contrary to law.

When an offense is defined in terms of conduct towards “another,” there is a dissimilar import for each person affected by the conduct; when there is a dissimilar import for each person affected by the conduct, multiple convictions are allowed under R.C. 2941.25.

The import of R.C. 2903.08, which punishes a person for operating a motor vehicle and causing serious physical harm to another person, and the import of R.C. 2903.06, which punishes a person for operating a motor vehicle and causing the death of another, is the harm the operator of the motor vehicle caused a specific person: where the operator of a vehicle in a single accident causes serious physical harm to three persons and one person dies, the harm the operator caused to each victim has its own unique import and, therefore, the crimes perpetrated against different victims are crimes of dissimilar import.

R.C. 2929.11(B) provides that a felony sentence must be “consistent with sentences imposed for similar crimes committed by similar offenders,” but consistency does not necessarily mean uniformity; rather, consistency accepts divergence within a range of sentences and takes into consideration the trial court’s discretion to weigh relevant statutory factors.

### **State v. Kennedy, Appeal No. C-120337, Trial No. B-1104558**

#### **Joinder: Evidence: Constitutional Law: Allied Offenses: Sentencing**

**Full Decision:** [http://www.hamilton-co.org/appealscourt/docs/decisions/C-120337\\_09272013.pdf](http://www.hamilton-co.org/appealscourt/docs/decisions/C-120337_09272013.pdf)

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

The trial court did not err in overruling a motion to sever offenses arising out of two unrelated shooting events: Crim.R. 8(A) allowed joinder of the offenses in one indictment; and the evidence of the offenses from the separate events was simple, direct, and sufficient to sustain the verdicts related to each event, whether or not the offenses were tried together.

A murder victim’s statements to a police officer identifying his assailant were admissible as dying declarations under Evid.R. 804(B)(2) and under the common law: although the victim lived for another 12 hours, the evidence demonstrated that his statements had been made under a belief of impending death with no hope of recovery.

The trial court’s admission of a testimonial statement that qualified as a dying declaration under the common law did not violate defendant’s right of confrontation, secured by the Sixth Amendment to the United States Constitution.

The trial court did not abuse its discretion when it admitted other-acts testimony pursuant to Evid.R. 404(B), when the testimony was both relevant and presented for the

legitimate purpose of establishing defendant's intent to kill, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Defendant's convictions for two aggravated felony murders, robbery, felonious assault, and having weapons under a disability were supported by sufficient evidence and were not against the manifest weight of the evidence: defendant had confessed his crimes to others; and his intent to kill could be inferred from the manner of each murder and from his boasting to others that he was a serial killer.

Defendant's convictions for murder, felonious assault, and having weapons under a disability were supported by sufficient evidence and were not against the manifest weight of the evidence: the murder victim had identified defendant as his shooter in a dying declaration; defendant had admitted to others that he had committed the offenses; and the medical records demonstrated that a bystander had suffered serious physical harm when struck by a stray bullet.

The trial court did not err by failing to merge defendant's convictions under R.C. 2925.41, because the offenses, committed against separate victims, had been committed with a separate animus as to each.

Defendant's sentences were contrary to law, and his case must be remanded for resentencing, because he was sentenced after the effective date of 2011 Am.Sub.H.B. 86, and the trial court had failed to make the requisite findings before imposing consecutive sentences.

## **Fifth Appellate District of Ohio**

***State v. Bays, 2013-Ohio-4177***

**Drug Offenses: Expert Testimony: Funding**

**Full Decision:** <http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2013/2013-ohio-4177.pdf>

**The trial court erred in refusing to appropriate funds for the defendant to hire an expert. The defendant was charged with five counts of aggravated trafficking in drugs, three counts of aggravated possession of drugs, three counts of possessing criminal tools, and one count of tampering with evidence, in relation to his sale of AM-2201, apparently a synthetic marijuana. The trial court denied the defendant's motion for appropriation of funds for consulting defense experts because it believed the question of whether AM-2201 was a "controlled substance analog" was one that was objective and scientific at error. At trial, the State's expert testified about AM-2201, how it's made, its similarity to marijuana, and its comparative potency. The Fifth District reversed the defendant's conviction because it held it was error not to appropriate funds for him to obtain an expert. It said, "[w]hile the chemistry may be scientific, the conclusion of what is or is**

not ‘substantially similar’ involves a subjective analysis/conclusion; one which laymen are unqualified to make and may be subject to dispute among experts.”

## **Seventh Appellate District of Ohio**

### ***State v. McGee, 2013-Ohio-4165***

**Search and Seizure: Motion to Suppress**

**Full Decision:** <http://www.supremecourt.ohio.gov/rod/docs/pdf/7/2013/2013-ohio-4165.pdf>

The trial court did not err in granting the defendant’s motion to suppress. There was a shooting in Youngstown – resulting in two victims being shot and one dying. The defendant and his co-defendant were also shot and went to the hospital. The defendant in this case was determined to be a suspect because he said he was shot on the other side of town, but there were no reported shootings there that night. When he was released from the hospital, he was immediately transported to the police department for an interview. (His clothes and shoes were taken while he was in the hospital as well.) The defendant eventually implicated himself and his co-defendant. A gunshot residue test was also done on the defendant. The trial court granted the defendant’s motion to suppress, and the Seventh District affirmed, because it said transporting the defendant to the police station was an arrest, and at that point, there was only reasonable suspicion to investigate further, not probable cause to arrest.

## **Tenth Appellate District of Ohio**

### ***State v. Tabb, 2013-Ohio-4059***

**Sentencing: Failure to Pay Court Costs**

**Full Decision:** <http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2013/2013-ohio-4059.pdf>

The trial court erred in imposing a prison sentence on appellant because he failed to pay court costs.

### ***Columbus v. Hickman, 2013-Ohio-4154***

**Sentencing: Restitution**

**Full Decision:** <http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2013/2013-ohio-4154.pdf>

**The trial court erred in granting an amount of restitution for repair of damage of a car where the only evidence presented was an invoice for the cost to repair a different car.**

## **Eleventh Appellate District of Ohio**

**State v. Vitantonio, 2013-Ohio-4100**

**Obstructing Official Business**

**Full Decision:** <http://www.supremecourt.ohio.gov/rod/docs/pdf/11/2013/2013-ohio-4100.pdf>

**Appellant's conviction of obstructing official business was based on insufficient evidence. There was no affirmative act where appellant failed to open his apartment door for police.**

## **Supreme Court of Ohio**

*Nothing new.*

## **Sixth Circuit Court of Appeals**

*Nothing new.*

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

*Nothing new.*