

## **Appellate Court Decisions - Week of 9/28/20**

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

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

Have to give a shout out to my appellate division; the first four winning cases out of the First District were by my attorneys!

#### **State v. Ulmer, C-190304, 305, 306**

**Suppression**

**Full Decision: (No web cite as of yet).**

**Trial court erred in overruling his motion to suppress the search of the trunk of his car, where the smell of burnt marijuana does not provide sufficient probable cause for such a search. Conviction for improperly handling firearms in a motor vehicle vacated.**

#### **State v. Rike, C-190401**

**Improper amendment of charge**

**Full Decision: (No web cite as of yet).**

**In convictions for attempted murder and improperly handling firearms in a motor vehicle, trial court erred in amending the charge from R.C. 2923.16(B) to R.C. 2923.16(A) where the amendment changed the identity of the offense because the two sections required proof of different elements; prejudice to a defendant is irrelevant. Conviction and 18-month sentence vacated and appellant discharged as to that offense.**

#### **State v. Lyle, C-190447**

**Insufficient evidence; CCW**

**Full Decision: (No web cite as of yet).**

**Trial court erred in overruling appellant's Crim.R. 29 motion for acquittal where the state presented insufficient evidence that appellant failed to promptly notify police officers of his carrying concealed license ("CHL") after being stopped for law enforcement purposes. Initial encounter was consensual; it did not evolve into a stop of the driver until appellant was ordered to face the car, patted down, and placed in handcuffs. By that time,**

he had already informed other deputy of his CHL. Conviction vacated and appellant discharged; revocation of CHL and forfeiture of firearm also reversed.

***State v. Hamm, C-190562***

Insufficient evidence; aggravated menacing

Full Decision: (No web cite as of yet).

Conviction for aggravated menacing was not supported by sufficient evidence where appellant, who was lawfully carrying a firearm, “did not brandish the firearm, wave the firearm in the air, or threaten to use the firearm. [Appellant] ‘made no threat which would cause a fear of serious physical harm.’” *State v. Fields*, 84 Ohio App.3d 423, 616 N.E.2d 1185 (12<sup>th</sup> Dist.1992). Conviction reversed and appellant discharged.

***State v. McNear, C-190643***

Restitution

Full Decision: (No web cite as of yet).

Trial court erred in ordering appellant to pay restitution; court was only permitted to award restitution for the losses resulting from appellant’s forgery conviction. Victim’s economic losses resulted from damage to her car, missing personal items, insurance deductible, and other fees, and there was no evidence that appellant was involved in stealing her vehicle. Therefore, “the criminal act for which [appellant] was convicted was not a direct and proximate result of the victim’s economic losses. . . .” Order of restitution is reversed and remanded for trial court to vacate.

***State v. English, C-180697***

Facebook postings - prejudice under Evid.R. 403(A)

Full Decision: (No web cite as of yet).

Although the COA affirmed appellant’s convictions, it did rule that two Facebook postings of appellant with firearms should not have been admitted under Evid.R. 403(A), as any value they had was substantially outweighed by the risk of unfair prejudice; also, witness’ testimony other-acts and negative character testimony should not have been admitted.

## **Second Appellate District of Ohio**

**State v. S.D., 2020-Ohio-4597**

Sealing of record

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2020/2020-Ohio-4597.pdf>

**Trial court erred in denying appellant's application for record sealing without a hearing as required by R.C. 2953.32(B).**

## **Third Appellate District of Ohio**

*Nothing to report.*

## **Fourth Appellate District of Ohio**

*Nothing to report.*

## **Fifth Appellate District of Ohio**

*Nothing to report.*

## **Sixth Appellate District of Ohio**

**State v. Brown, 2020-Ohio-4534**

Sentencing

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-4534.pdf>

**Trial court erred in by sentencing appellant at community control violation hearing without allowing for allocution; case remanded for resentencing.**

**State v. Bey, 2020-Ohio-4601**

Insufficient evidence; GSI

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-4601.pdf>

**Appellant’s conviction for gross sexual imposition was not supported by sufficient evidence; the state failed to present sufficient evidence that appellant “purposely compelled [the victim] to submit by force or threat of force. . . At no point was [the victim’s] will overcome by force or threat of force, and at no point did [the victim] submit to the sexual contact by force or threat of force. Likewise, although [the victim] was rightfully disturbed, scared, and upset after appellant grabbed her buttocks, her fear and distress did not cause her to submit to the initial sexual contact or any further contact.”**

***State v. Sipperley, 2020-Ohio-4609***

**Sentencing**

**Full Decision:**

**<https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-4609.pdf>**

**Trial court erred in running appellant’s concurrent sentences in this case consecutively with prison sentence he was already serving without making the consecutive sentence findings at the sentencing hearing which are required by R.C. 2929.14(C)(4); it also erred in ordering appellant to serve a sentence of 96 months, when such sentence must be stated in terms of years.**

***State v. Sanders, 2020-Ohio-4608***

**Sentencing**

**Full Decision:**

**<https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-4608.pdf>**

**Trial court erred in running appellant’s consecutively without making the consecutive sentence findings which are required by R.C. 2929.14(C)(4); it also erred in ordering appellant to pay the costs of appointed counsel without determining if he had the ability to pay and by ordering appellant to pay costs without notifying him of that at the sentencing hearing.**

***State v. Richey, 2020-Ohio-4610***

**Ineffective assistance of counsel**

**Full Decision:**

**<https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-4610.pdf>**

**In conviction for a drug offense with mandatory fine, trial counsel was ineffective for failing to file an affidavit of indigency.**

**State v. Burley, 2020-Ohio-4603**

**Insufficient evidence/jurisdiction; engaging in pattern of corrupt activity/forgery**

**Full Decision:**

**<https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-4603.pdf>**

**Appellant's convictions for forgery were not supported sufficient evidence where trial court lacked subject-matter jurisdiction, as no element of the charged offenses occurred in Ohio; the state also failed to present any evidence of a second corrupt activity necessary for a "pattern." All 14 convictions are vacated.**

**Seventh Appellate District of Ohio**

*Nothing to report.*

**Eighth Appellate District of Ohio**

*Nothing to report.*

**Ninth Appellate District of Ohio**

*Nothing to report.*

**Tenth Appellate District of Ohio**

**State v. Dumas, 2020-Ohio-4554**

**Vehicular homicide; enhancement**

**Full Decision:**

**<https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2020/2020-Ohio-4554.pdf>**

**Trial court erred by finding appellant guilty of vehicular homicide as a fourth degree felony, as opposed to a first degree misdemeanor; facts read into record during no contest plea failed to establish the essential enhancing element of driving without a valid temporary instruction permit.**

**Appellant's temporary permit was valid at the time of the accident; the failure to have a licensed operator in the vehicle, as required by R.C. 4507.05(A)(2), did not invalidate the permit. Driving in violation of the restrictions on the temporary permit is not the same as driving without a valid permit.**

### **Eleventh Appellate District of Ohio**

*Nothing to report.*

### **Twelfth Appellate District of Ohio**

*Nothing to report.*

### **Supreme Court of Ohio**

#### **State v. Owens, 2020-Ohio-4616**

Lesser included offense

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4616.pdf>

***“Because felony murder, R.C. 2903.02(B), has no mens rea requirement in regard to the death of a victim and reckless homicide, R.C. 2903.041, has a mens rea of recklessness, reckless homicide is not a lesser included offense of felony murder.”***

#### **State v. Brown, 2020-Ohio-4623**

Child support

Full Decision:

<https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4623.pdf>

***“A defendant may be charged with nonpayment of support under R.C. 2919.21(B) when conduct underlying charge occurred while a support order was in effect, even if defendant's child is emancipated at time charge is brought, so long as statute of limitations has not run and statute's other elements are met—Trial court erred in dismissing the charges simply because appellant's child had been emancipated at time appellant was charged” for his conduct of failing to pay child support before child was emancipated.***

### **Sixth Circuit Court of Appeals**

*Nothing to report.*

**Supreme Court of the United States**

*Nothing to report.*