Appellate Court Decisions - Week of 9/30/13

First Appellate District of Ohio

Nothing new.

Seventh Appellate District of Ohio

***State v. Boafor*, 2013-Ohio-4255**

Traffic Violation: Speeding: Reckless Operation

Full Decision: http://www.supremecourt.ohio.gov/rod/docs/pdf/7/2013/2013-ohio-4255.pdf

The trial court erred in suspending defendant's license for 90 days where driving 12 mph over the speed limit was not reckless operation. The trial court also erred in convicting defendant on a third-degree misdemeanor where the facts in the complaint only alleged a minor misdemeanor.

This is a complicated fact pattern for a simple issue, so I'm just going to have to quote it verbatim:

"On May 13, 2012, defendant-appellant Timothy Boafor was stopped by the Ohio State Highway Patrol for speeding on Interstate 680 in Austintown, Ohio. He was clocked at 77 mph in a 65 mph zone and cited for violating R.C. 4511.21(D)(2), which provides that no person shall operate a motor vehicle at speeds exceeding 65 mph on a freeway.

"After a clerk noted on the dust jacket that the violation was a misdemeanor of the third degree, defense counsel filed a motion to exclude prior traffic violations derived from uncounseled guilty pleas, urging that although an uncounseled plea can be used to enhance a sentence, it cannot be used to enhance the degree of the offense. The court was thus asked to refrain from proceeding under R.C. 4511.21(P)(1)(b) which raises a minor misdemeanor speeding violation to a fourth degree misdemeanor if the defendant has been convicted of two violations of R.C. 4511.21 within the past year or (c) which raises it to a third degree misdemeanor if the defendant has been convicted of three or more violations of R.C. 4511.21 within the past year. This motion was implicitly overruled. (The particular issue regarding uncounseled priors is not raised on appeal, but the motion is utilized by the state on appeal in support of one of its arguments.)

"A hearing was held on August 27, 2012. A plea agreement was contemplated but rejected by the defendant due to the court's statement that it would impose a license suspension. When the case was then called for trial on September 19, 2012, defense counsel stated that the prosecution and the defense are both of the opinion that a license suspension was not available on this offense and that the ticket charges only a minor misdemeanor. (Tr. 2). After the court refused to adopt a prepared judgment entry

reflecting these statements, defense counsel asked if the court would accept a no contest plea. (Tr. 2-3). The court stated that it would.

" Counsel again urged that the offense was a minor misdemeanor because the charging instrument lists no prior offenses that would give rise to a different level of misdemeanor. (Tr. 3). Thus, he concluded that the speeding offense was charged as a minor misdemeanor, noting that the only item showing it was a third degree misdemeanor in the clerk's notation on the dust jacket. Counsel also reiterated that the prosecutor concurred that this is not an offense for which a license suspension could be attached. (Tr. 4).

"Regarding the first argument, the court replied that the prosecutor can amend the charge anytime he wants, up to and including the trial. As to the second argument, the court stated that regardless of how many priors are on a defendant's record, "the court has discretion at any time to suspend a license if they deem it's appropriate." (Tr. 4).

" The prosecutor then placed the facts on the record, including that it was 12:45 p.m., the pavement was dry, the visibility was clear, the weather was not adverse, there was moderate traffic in a rural area, and there was no near-crash. (Tr. 4-5). The court accepted the no contest plea to speeding and found appellant guilty.

" The court stated that this was appellant's fifth conviction in the past year, imposed a $150 fine plus court costs, and suspended appellant's license for 90 days. (Tr. 6-7). appellant filed a timely notice of appeal from the September 19, 2012 judgment entry imposing this sentence."

The Ninth District held that the facts in this case were "not sufficient to support a finding that the conduct constituting the speeding violation were related to reckless operation." It thus vacated the license suspension. This case has quite a bit of analysis of similar cases, so it can be a useful reference for case law on cases like this one.

The Ninth District also said, "[c]ontrary to the trial court's suggestion here, a sentencing court does not have carte blanche discretionary authority to suspend a license for a traffic violation. … Rather, there must be something in the operation of the vehicle that indicates recklessness." It also said, "… contrary to the state's suggestion, the driving record of the defendant is not relevant to an evaluation under the plain language of R.C. 4510.15, which refers to the violation at issue relating to reckless operation." One more important statement: "Past traffic tickets do not make a current violation more reckless; in other words, the existence of a prior moving violation does not make a current act more threatening to the other motorists."

The Ninth District also modified Boafor's conviction to a minor misdemeanor for the following reasons: "Appellant pled no contest, which is an admission to the truth of the facts alleged in the complaint. *See* Traf.R. 10(B)(2). The complaint here does not contain facts about prior offenses within a year and does not mention an third degree misdemeanor or cite subsection (P)(1)(b) or (c) related to degree enhancing. And, the trial court did not specifically ask him to plead to a third degree misdemeanor or

specifically find him guilty of a third degree misdemeanor either in open court or in a judgment entry. A defendant cannot be tried for an elevated degree of a misdemeanor based merely upon a clerk saying so on a dust jacket."

Twelfth Appellate District of Ohio

***State v. Thomas*, Butler CA2012-11-223**

R.C. 2907.323(A)(3): Mens Rea: Evid.R. 403, Evid.R. 404(B)

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/12/2013/2013-ohio-4327.pdf

Summary from Judge Rodenberg:

FACTS:

– Defendant-appellant appeals his conviction for voyeurism, disseminating matter harmful to juveniles, and the illegal use of a minor in a nudity-oriented material or performance.

R.C. 2907.323(A)(3); ILLEGAL USE OF A MINOR IN NUDITY-ORIENTED MATERIAL OR PERFORMANCE; MENS REA

– Trial court erred when it refused to allow appellant to argue that he was unaware of, or reckless in his knowledge of, victim's age of minority. The mental standard of recklessness in the illegal use of a minor in a nudity-oriented material or performance applies not only to the possession of the material, but also to the knowledge of the victim's age. State v. Underwood, 9th Dist. Medina No. 09-CR-0394, 2011-Ohio-5703, ¶ 29.

EVID.R. 403; EVID.R. 404(B)

– Trial court erred when it allowed the jury to hear "other acts" statements regarding appellant's arrest for voyeurism at his trial for illegal use of a minor in a nudity-oriented material or performance. Despite a limiting jury instruction, the probative value of the statements substantially outweighed their unfairly prejudicial effect.

INEFFECTIVE ASSISTANCE OF COUNSEL; OUTSIDE THE RECORD

– An appellate court will not address accusations regarding ineffective assistance of counsel based on claims that are not part of the record.

***State v. Thomas*, 2013-Ohio-4327**

Illegal Use of a Minor in a Nudity-Oriented Material or Performance: Mental State: Other Acts Evidence

Full Decision: http://www.sconet.state.oh.us/rod/docs/pdf/12/2013/2013-ohio-4327.pdf

The mental state in R.C. 2907.323(A)(3) (Illegal use of a minor in a nudity-oriented material or performance) is recklessness, and applies to both the possession of the material and to the defendant's knowledge of the victim's age. The trial court erred in not allowing the defendant to argue that he was reckless as to the victim's age. Furthermore, it was error for the trial court to allow the State to mention in its opening statement, and to prevent testimony about, the defendant's unrelated arrest for voyeurism.

Thomas was indicted on 14 counts of voyeurism, one count of disseminating matter harmful to juveniles, and one count of illegal use of a minor in a nudity-oriented material or performance. He pleaded guilty to all 14 counts of voyeurism and the disseminating matter harmful to juveniles charge, but proceeded to a jury trial on the illegal use of a minor in a nudity-oriented material or performance charge. He was convicted.

In his first assignment of error, Thomas argued that because R.C. 2907.323(A)(3) (Illegal use of a minor in a nudity-oriented material or performance) does not contain a mental state, the mental state is recklessness. He argued the reckless mens rea applies to both the possession of the material and the knowledge of the victim's age. Therefore, he argued, it was error for the trial court to prevent him from arguing that he was reckless as to the victim's age. The State argued that the mens rea only applies to the possession of the material. The Twelfth District agreed with Thomas the trial court erred because "the mental standard of recklessness in the illegal use of a minor in a nudity-oriented material or performance applies not only to the possession of the material, but also to the knowledge of the victim's age."

In his second assignment of error, Thomas argued that the trial court erred to his prejudice when it admitted "other acts" testimony into evidence. During its opening, the State told the jury that the case began because the police were investigating Thomas for taking pictures of women at a tanning salon. Thomas objected, but the objection was overruled with the trial court finding the testimony admissible as background information under Evid.R. 404(B). Testimony about Thomas' arrest for taking photographs of nude women in the tanning salon arose once again later. Thomas again objected and was again overruled. Notably, the illegal use of a minor in a nudity-oriented material or performance charge was based on the exchange of photographs with a girl from Facebook, and had nothing to do with the tanning salon photographs.

The Twelfth District found that the statements about the tanning salon arrest did not fit under any of the purposes enumerated in Evid.R. 404(B), and even if they did, their probative value was substantially outweighed by their unfairly prejudicial effect.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

Nothing new.

Supreme Court of the United States

Nothing new.