Appellate Court Decisions - Week of 8/10/15

First Appellate District of Ohio

State v. Evans, 2015-Ohio-3208

Postconviction: Postrelease Control: Clerical Error

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2015/2015-Ohio-3208.pdf

Summary from the First District:

"The common pleas court properly overruled defendant's postconviction motions: the postconviction statutes, R.C. 2953.21 et seq., provided the standard for reviewing the motions, but did not confer jurisdiction to entertain the motions, because the motions did not satisfy the statutes' time or jurisdictional requirements.

"The common pleas court did not have jurisdiction to correct defendant's judgment of conviction as void on grounds that the judgment lacked finality or improperly sentenced him for murder: the judgment satisfied the requirements for a final appealable order; and defendant was properly sentenced for murder to an indefinite term of imprisonment of 15 years to life.

"Defendant's sentences were subject to correction as void to the extent that they did not conform with the statutory mandates concerning postrelease control: the mandatory five-year period imposed was not authorized for the special felony of murder, the third-degree felony of having weapons under a disability, or the fourth-degree felony of carrying a concealed weapon.

"The clerical mistake contained in defendant's judgment of conviction, misstating the sum of his prison sentences, was subject to correction under Crim.R. 36."

State v. Bennett, 2015-Ohio-3246

Solicitation: Appellate Review: Jurisdiction: Court Costs

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2015/2015-Ohio-3246.pdf

Summary from the First District:

"The trial court did not err in convicting defendant of solicitation where the evidence showed that the defendant approached an undercover officer posing as a prostitute and

asked the officer if she was 'working,' stated that he was looking for a 'regular,' indicated that he was interested in engaging in sexual activities with the officer, asked the officer what she charged, and informed her that he was not expecting any 'freebies.'

"Under R.C. 2505.02, a criminal judgment is a final appealable order when the judgment entry sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 14.

"Because costs are not punishment or a 'sanction' as defined by R.C. 2929.01(DD), a judgment entry that orders the payment of costs, only, does not set forth a sentence, and therefore, does not constitute a final appealable order.

"Defendant's appeal from the trial court's judgment, finding him guilty of loitering to engage in solicitation and imposing only costs, must be dismissed: the judgment does not constitute a final appealable order, because it does not set forth a 'sentence' as that term has been described by the legislature."

Second Appellate District of Ohio

Nothing new.

Third Appellate District of Ohio

Nothing new.

Fourth Appellate District of Ohio

Nothing new.

Fifth Appellate District of Ohio

***State v. Deemer*, 2015-Ohio-3199**

Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2015/2015-Ohio-3199.pdf

The trial court did not err in granting appellee's motion to suppress the search of her vehicle. Appellee was observed crossing the double yellow lines of a roadway with all four tires and was stopped. The officer noticed appellee appeared nervous, had shaky hands and constricted pupils (which he believed from his training an experience were indicators of being under the influence of narcotics). The officer then requested appellee's ID and

went back to the cruiser to issue a citation and check for outstanding warrants. The officer also knew the vehicle had come from a known heroin house.

Two officers then arrived as backup. A third additional officer showed up soon after. One of the second two officers approached the vehicle to ask for permission to search for narcotics. Appellee said it wasn't her vehicle, then looked at the passenger who gave the officer permission to search. Appellee then concurred with the passenger. That officer also said appellee appeared more nervous than a person in a normal traffic stop. After getting permission to search, that officer had appellee and the passenger exit the vehicle.

When appellee gave initial "consent" to search, there were four police cruisers present with flashing lights. While appellee was standing at the rear of the vehicle, the original officer engaged her in conversation. A video of the conversation reveals that the officer tells appellee that if she has anything on her, it would be a felony. This was before she consented to the search. The video also shows four officers with shining flashlights surrounded appellee at the time. Finally, when police searched the vehicle, they found a purse on the driver's seat and a syringe in the purse.

The Fifth District said the trial court did not err in granting the motion to suppress the evidence found while searching the vehicle because, under those circumstances, the trial court's determination that appellee's consent was not voluntarily given was not clearly erroneous.

***State v. Keen*, 2015-Ohio-3200**

Sentencing: Other-Acts Evidence

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2015/2015-Ohio-3200.pdf

Appellant's sentence after a guilty plea to felonious assault was contrary to law because the trial court relied on unsubstantiated facts outside of the record in determining the sentence. The trial court considered evidence in the PSI that there was evidence the victim had healed injuries from a previous incident. However, there was no evidence those prior injuries were caused by appellant. The trial court erred in considering those allegations of previous wrongdoings.

Sixth Appellate District of Ohio

Nothing new.

Seventh Appellate District of Ohio

Nothing new.

Eighth Appellate District of Ohio

***State v. Dixon*, 2015-Ohio-3144**

Due Process: Preindictment Delay

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-3144.pdf

The trial court did not err in granting appellee's motion to dismiss the rape and kidnapping indictment against him based on preindictment delay. Appellee was indicted on May 1, 2013 based on charges that allegedly occurred on or about April 20, 1993. Back in 1993, appellee had sex with the alleged victim. The alleged victim called police and stated the incident was a rape. A rape kit was taken and appellee was arrested a few days later. The alleged victim signed a "no prosecution" form and appellee was released from jail. As a result of the allegations, parole revocation hearings were instituted against appellee and he was sent back to prison for 2 years. Then, in April 10, 2013, Cleveland Police received a CODIS hit from the FBI that made a preliminary association between a submitted rape kit and appellee. Based on the "new" evidence, appellee was indicted. The trial court held there was no justifiable reason for the 20-year delay and the delay had caused actual and substantial prejudice to Appellee because of lost testimony, the unavailability of certain witnesses and that his own memory of the events had diminished (he provided specific details of evidence lost).

***State v. Stearns*, 2015-Ohio-3239**

Sentencing: H.B. 86: Senate Bill 2

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-3239.pdf

Summary from the Eighth District:

"Where defendant pled to 1994 offense but was sentenced in 2014, the trial court properly imposed a definite sentence pursuant to H.B. 86, which was in effect at the time of sentencing."

***S. Euclid v. Bautista-Avila*, 2015-Ohio-3236**

OVI: Motion to Suppress

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-3236.pdf

Summary from the Eighth District:

"The trial court did not err in suppressing the results from a standardized field sobriety tests because the officer did not administer them with substantial compliance. In addition, the officer did not have probable cause to arrest the appellee for operating a motor vehicle while impaired because he did not have any evidence that the appellee was impaired with alcohol."

Details: On the HGN test, the officer held the flashlight stimulus at eye level, not above the eye. The video also showed the HGN basically also showed the officer's testimony did not match what he actually did, which was make a few cursory movements up and down, left and right before ending the test. The officer also listed incorrect clues to look for during the HGN. Basically, it was a complete mess. The walk and turn was less of a mess, but still of a mess. Basically, the officer could only recount three of the clues he looked for on the walk and turn. Finally, on the one-leg stand, the officer created his own clue – looking at your toe while performing the test – that he used as an indicator of impairment.

Regarding probable cause to arrest, appellee was stopped at a sobriety checkpoint, so there was no erratic driving. The officer did note a moderate odor of alcohol and open bottles in the back seat. Appellee also stumbled as he got out of the vehicle to do the field sobriety tests. The video did not start until the field sobriety tests started, and they showed no "loss of balance or other characteristics common to an impaired individual."

***State v. English*, 2015-Ohio-3227**

Sentencing: Merger

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-3227.pdf

The trial court erred in failing to merge appellant's felonious assault convictions regarding one victim where there was no separate animus in the less than one second between appellant striking the victim with her car and running over his body when he fell beneath the vehicle.

Ninth Appellate District of Ohio

Nothing new.

Tenth Appellate District of Ohio

***State v. Clemens*, 2015-Ohio-3153**

Expungement: Attempted Robbery

Full Decision:
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2015/2015-Ohio-3153.pdf

Attempted robbery is an offence of violence that precluded appellant from sealing the record of his conviction. This case is in direct conflict with *State v. V.M.D.*, 2014-Ohio-1844, from the Eighth District Court of Appeals. We anticipate the Supreme Court of Ohio deciding the issue in the future.

Eleventh Appellate District of Ohio

Nothing new.

Twelfth Appellate District of Ohio

Nothing new.

Supreme Court of Ohio

Nothing new.

Sixth Circuit Court of Appeals

***United States v. Simmons*, No. 13-6273**

Sixth Amendment: Public Trial

Full Decision: http://www.ca6.uscourts.gov/opinions.pdf/15a0188p-06.pdf

The trial court violated appellant's Sixth Amendment right to a public trial by having three co-defendants in the audience removed from the courtroom during the testimony of a fourth co-defendant against Simmons. Although the trial court identified a substantial reason to grant a partial closure of the courtroom – that the presence of the three co-defendants could cause the fourth co-defendant who was testifying to feel threatened or

intimidated – it "mistakenly stated that it had discretion to exclude persons from the courtroom 'if there is *any possibility* that [their presence] would be intimidating or possibly if it would influence a witness's testimony.'" The trial court also made no findings "adequate to support the closure" and "specific enough that a reviewing court can determine whether the closure order was properly entered." In fact, the trial court made no findings at all. Therefore, the Sixth Circuit reversed and remanded for a new trial.

Supreme Court of the United States

Nothing new.