Appellate Court Decisions –Week of 12/9/24

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

***Thacker* is an important *Bruen* decision – please take note, especially if you have a case with a WUD based upon a juvenile adjudication for a drug offense. I, of course, expect an appeal, especially since Winkler dissented.**

First Appellate District of Ohio

***State v. Thacker*, C-240299**

Second Amendment/*Bruen*; WUD based upon a juvenile adjudication for a felony drug offense

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

"R.C. 2923.13(A)(3) (WUD) is unconstitutional as applied to an individual who, like [appellant], was (1) adjudicated delinquent as a minor (2) for nonviolent conduct, thus (3) disarming him, presumptively for life, (4) subject only to a trial court's discretionary determination whether to lift his disability.

. . .

The State has not provided evidence of a compelling, relevantly similar tradition of imposing presumptively permanent disarmament upon persons who have been found to have engaged in unlawful, nonviolent conduct but who are presumed to have reformed. Even assuming that felons may be categorically disarmed, juvenile adjudications under Ohio law could not fall within that tradition because they do not include the crucial safeguard of the jury trial. And, while the State may disarm categories of persons deemed dangerous, those categories must be reasonably limited to dangerous persons, and the duration of disarmament reasonably tailored to the period in which the disarmed party poses a danger. Even assuming Thacker's juvenile delinquency adjudication for complicity to trafficking in marijuana could support an adequate inference of dangerousness, history, tradition, and Ohio law suggest that such a disability cannot last forever. We therefore overrule the State's sole assignment of error and affirm the trial court's judgment dismissing counts eight and nine of Thacker's indictment."

***State v. Sims*, C-230274**

Jury verdict forms

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

In appellant's first appeal, First District held that "R.C. 2945.75(A)(2) requires the verdict form to either contain a factual finding of a previous felony DUI conviction or to specify that the defendant is guilty of a third-degree felony to elevate the offense from a first-degree misdemeanor . . . Because the verdict form . . . lacked that language," appellant's conviction for a felony OVI was reversed. However, the OSC remanded the case for the COA to reconsider its decision in light of the holding in *State v. Mays*, 2024-Ohio-4616 which held that "a verdict form may comply with R.C. 2945.75(A)(2) by referencing a statutory section that enhances a misdemeanor to a felony, even if the verdict form does not itself include the felony level in its terms." Further, "the defendant has the burden to object to an error on a verdict form that results in a greater punishment, whereas errors resulting in a lesser punishment are the State's burden to correct."

Upon remand, the First District again reverses the felony OVI conviction, holding "that the verdict forms in [appellant's] case lack the requisite language to elevate his DUI offenses from first-degree misdemeanors to felonies. This is so because the verdict forms referenced statutory sections that solely describe criminal conduct, rather than an offense level. [COA] also conclude[s] that the State, rather than [appellant], bore the burden of objecting to the error, as the lack of felony reference in the verdict forms prejudiced the State rather than [appellant]." Case remanded for trial court to enter a judgment of conviction for a first-degree misdemeanor OVI as opposed to a felony OVI.

***State v. Rodriguez*, C-240159**

Sufficiency; sexual imposition

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

Conviction for slow-speed violation while riding a scooter under R.C. 4511.22(A) was not supported by sufficient evidence where the police officer's dash-cam video of the incident did not show that appellant "'impede[d] or block[ed] the normal and reasonable movement of traffic'" as required by the statute. Conviction vacated, and appellant discharged from further prosecution.

***State v. Stephens*, C-240340**

Restitution

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

In conviction for third-degree felony robbery, trial court erred in awarding restitution in the amount of $4,595.85 without an evidentiary hearing after appellant "questioned the restitution amount. State concedes error. Case remanded to hold such a hearing.

Second Appellate District of Ohio

Nothing to report.

Third Appellate District of Ohio

Nothing to report.

Fourth Appellate District of Ohio

***State v. Lewis*, 2024-Ohio-5490**

Consecutive sentences

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2024/2024-Ohio-5490.pdf

Trial court plainly erred in ordering appellant's misdemeanor sentence for violating a protection order to run consecutively to his felony sentences. "A violation of R.C. 2919.27(A)(1) is not an offense for which the trial court must impose a consecutive sentence under R.C. 2929.41(B)(1), and it is not an offense for which the trial court may impose a consecutive sentence under R.C. 2929.41(B)(3). Therefore, the general rule in R.C. 2929.41(A) requiring a concurrent sentence applies to [appellant's] sentence for violating a protection order offense."

Fifth Appellate District of Ohio

Nothing to report.

Sixth Appellate District of Ohio

***State v. Kemp*, 2024-Ohio-5733**

Consecutive sentence findings

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2024/2024-Ohio-5733.pdf

Although the trial court made the proper consecutive sentence findings pursuant to R.C. 2929.14(C)(4) at the sentencing hearing, it failed to incorporate those findings in one of its sentencing entries. Case remanded for court to issue a nunc pro tunc entry with the proper findings.

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. White*, 2024-Ohio-5789**

Motion for leave to file a motion for a new trial

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2024/2024-Ohio-5789.pdf

Trial court erred when it denied appellant's motion for leave to file a motion for a new trial on the basis of newly discovered evidence without determining if appellant had established "by clear and convincing evidence that he was unavoidably prevented from discovering the evidence during the 120-day period . . . In this case, the trial court sidestepped the sole question before it: whether [appellant] had presented the court with clear and convincing evidence that he was unavoidably prevented from discovering evidence of the detective's misconduct and his plea. The trial court instead jumped to the merits question and decided that the newly discovered evidence that [appellant] relied upon did not disclose a strong probability of a different outcome if a new trial was granted. However, because the trial court had yet to grant [appellant's] motion for leave to file a motion for a new trial, that question was not before the trial court." Case remanded.

***State v. Donegan-Lawson*, 2024-Ohio-5494**

Allied offenses

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2024/2024-Ohio-5494.pdf

Trial court erred when it failed to merge appellant's convictions for Medicaid fraud and theft as allied offenses of a similar import. State concedes error. Case remanded.

Eleventh Appellate District of Ohio

Nothing to report.

Twelfth Appellate District of Ohio

Nothing to report.

Supreme Court of Ohio

***State v. Grad*, 2024-Ohio-5710**

Motion for leave to file a motion for a new trial

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5710.pdf

Newly discovered evidence—Crim.R. 33(A)(6)—Standards for granting a hearing on a motion for leave to file a motion for new trial—Abuse of discretion.

OSC determines that new scientific evidence can constitute newly discovered evidence. In this case, that evidence involved new studies on infant bone fractures. Therefore, the trial court erred by denying appellant's motion for leave to file a motion for a new trial without a hearing. Case remanded for such hearing.

***State v. Beatty*, 2024-Ohio-5684**

Sentencing; firearm specifications

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-

5684.pdf

Criminal law—R.C. 2929.41(A) and 2929.14(B) and (C)—Prison terms for multiple firearm specifications—Judgment reversed and cause remanded to trial court with instructions that it amend its sentence to run the two discretionary prison terms imposed for the firearm specifications concurrently with each other and with the other prison terms imposed.

OSC holds that the exceptions to concurrent sentences found in the statutes only allow a court to impose a maximum of two consecutive prison terms for firearm specifications attached to sentences for violent offenses.

***State v. Riley*, 2024-Ohio-5712**

Postconviction relief; DNA testing

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5712.pdf

Criminal law—R.C. 2953.73—Postconviction DNA testing—Trial court did not comport with the requirements of R.C. 2953.73(D) when, after summarily denying an application for postconviction DNA testing, it adopted verbatim proposed findings of fact and conclusions of law [of the State of Ohio] without engaging in the analysis required by R.C. 2953.73(D).

Case reversed and remanded.

***State v. Wilcox*, 2024-Ohio-5719**

Confrontation Clause

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5719.pdf

Criminal law—Confrontation Clause of Sixth Amendment to United States Constitution—Absent witness's statements to law-enforcement officers captured on body-camera video that were given before defendant's apprehension were nontestimonial because officers were responding to an ongoing emergency—Absent witness's statements captured on body-camera video after defendant's apprehension were testimonial, and admission of those statements violated defendant's right to confrontation.

Case reversed and remanded to the First District Court of Appeals "for it to determine whether the nontestimonial statements were admissible under the Ohio Rules of Evidence and to conduct a harmless-error analysis."

***State v. Smith*, 2024-Ohio-5745**

Confrontation Clause

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5745.pdf

Criminal law—Confrontation Clause of the Sixth Amendment to the United States Constitution—Absent witness's statements to police officer captured on officer's body-camera video were testimonial because officer was not responding to an ongoing emergency when those statements were made, and admission of those statements at trial violated defendant's right to confrontation—Absent witness's statements to EMTs captured on the same body-camera video were nontestimonial because those statements were made for the purpose of receiving medical care, and admission of those statements at trial did not violate the Confrontation Clause.

Case reversed and remanded for COA "to determine whether any of the statements B.B. made in response to the EMTs' questions (i.e., the nontestimonial statements) were inadmissible hearsay, to conduct a harmless-error analysis," and to address appellant's other AOEs.

***State v. Miree*, 2024-Ohio-5714**

Self-defense; retroactivity of Stand Your Ground law

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5714.pdf

Criminal law—Self-defense—R.C. 2901.09—Retroactive application—Trial court correctly applied former version of self-defense statute to crimes committed before amended statute's effective date.

***State v. Kennedy*, 2024-Ohio-5728**

Judicial release eligibility

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5728.pdf

Criminal law—Judicial release—R.C. 2929.20—Judicial-release eligibility is determined separately for each stated prison term, informed by the aggregate of all nonmandatory prison terms imposed.

COA "conclude[s] that the Tenth District correctly determined that former R.C. 2929.20(C)(5) , 2018 Am.Sub.S.B. No. 201, applies to [appellant] based on the aggregate of the nonmandatory prison terms to which she was subject. However, because the appellate court did not conduct a complete inquiry regarding whether [appellant] had served the requisite amount of her stated prison terms before she filed her motion for judicial release, as set forth in R.C. 2929.20(C)(4) and (5), we reverse the court of appeals' judgment affirming the trial court's entry granting judicial release and remand this case to the trial court for further proceedings to determine whether [appellant] completed the prescribed waiting period.

***State v. Hickman*, 2024-Ohio-5747**

NGRI

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5747.pdf

R.C. 2945.401—Changes to commitment conditions following finding of not guilty by reason of insanity—Trial court's review of recommendation for change to nonsecured status or termination of commitment—A trial court must use its discretion to "approve, disapprove, or modify the recommendation," R.C. 2945.401(I), after considering all relevant factors, including those listed in R.C. 2945.401(E)(1) through (6).

OSC determines that "the recommendation in this case is that [appellant] status be changed to nonsecured, and under R.C. 2945.401(E) and *Stutler* [2022-Ohio-2792] at ¶ 14, when nonsecured status is recommended, the additional factors in R.C. 2945.401(E) are applicable, meaning that the trial court has discretion to disapprove a recommendation even if the State does not meet its burden of proof. *See* R.C. 2945.401(I); *Stutler* at ¶ 15. Whether the State carries its burden to show that 'the proposed change represents a threat to public safety or a threat to the safety of any person,' R.C. 2945.401(G)(2), may be considered by the trial court, but it retains discretion to approve, modify, or disapprove the facility's recommendation after considering all the relevant factors, including those listed in R.C. 2945.401(E)."

***State v. Dunn*, 2024-Ohio-5742**

Trafficking enhancement; in the vicinity of a juvenile

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5742.pdf

Criminal law—Sufficiency of the evidence—Drug trafficking—R.C. 2925.03—Sufficient evidence was presented at trial concerning the "in the vicinity of a juvenile" enhancement in R.C. 2925.03(C)(1)(b).

***Reese v. Davis*, 2024-Ohio-5755**

Habeas corpus

Full Decision:
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-Ohio-5755.pdf

Habeas corpus—Petitioner has served maximum prison sentence of 23 years and is entitled to immediate release—Writ granted.

OSC finds that "the trial court's entry purported to impose a 25-year aggregate sentence even though the individual consecutive sentences making up the aggregate sentence added up to only 23 years. The only sentences that matter in this case are the individual ones imposed on counts 1, 2, and 3; the trial court's statement that it imposed an aggregate sentence of 25 years is irrelevant."

Sixth Circuit Court of Appeals

Nothing to report.

Supreme Court of the United States

Nothing to report.