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**A review of the most significant decisions issued by  
the Supreme Court of Ohio in 2015-2016.**

Attorney John Martin

Cuyahoga County Office of the Public Defender

**A review of the most significant decisions issued by  
the United States Supreme Court in 2015-2016.**

Attorney Jacquenette S. Corgan & Attorney Andrea L.  
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# Summary of Ohio Supreme Court Cases October 1, 2015 through October 4, 2016<sup>1</sup>

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## I. Elements of Crimes

### **Sexual offenses: Child pornography, definition of "nudity"**

*State v. Martin, Slip Opinion 2016-Ohio-7196*: R.C. 2907.323(A)(1) prohibits creation or production of nudity-oriented material depicting minors. Statutory definition of nudity set forth in R.C. 2907.01(H) applies. "Nudity" in this context does not require "lewd depiction" nor "graphic focus" on genitalia.

### **Tampering with evidence -- defendant's knowledge of likelihood of proceeding or investigation**

*State v. Barry, 145 Ohio St.3d 354, 2015-Ohio-5449*. Syllabus:

Ohio does not recognize the "unmistakable crime" doctrine in connection with the offense of tampering with evidence because that doctrine erroneously imputes to the perpetrator constructive knowledge of a pending or likely investigation into a crime; merely establishing that the crime committed is an unmistakable crime is insufficient to prove that the accused knew at the time the evidence was altered, destroyed, concealed, or removed that an official proceeding or investigation into that crime was ongoing or likely to be instituted.

## II. OVI: Evidence Preservation

### **Refrigeration of blood, compliance with Ohio Administrative Code**

*State v. Baker, 146 Ohio St.3d 456, 2016-Ohio-45*.] Where State substantially complies with refrigeration requirement regarding blood (OAC 3701-53-05),, burden shifts to defendant to show prejudice due to lack of strict compliance. Motor vehicles—Driving while intoxicated—Admissibility of blood-alcohol test results—State substantially complied with Ohio Adm.Code 3701-53-05's requirement that blood be refrigerated—Burden shifts to defendant to demonstrate prejudice from lack of strict compliance with administrative code.

**OVI: Not allied with aggravated vehicular assault, see Allied Offenses, *infra*.**

## III. Search and Seizure (U.S. Const. Amend. IV, Ohio Const. Art. I, Sec. 14)

### **Vehicle seizure**

*State v. Leak, 145 Ohio St.3d 165, 2016-Ohio-154*. Police do not act reasonably when seizing lawfully parked vehicle solely because arrest has been made of recent occupant.

#### **IV. Self-Incrimination (U.S. Const. Amend. V, Ohio Const. Art. I, Sec. 10)**

##### **R.C. 2933.81 presumption of voluntariness -- interaction with State's *Miranda* burden**

##### **R.C. 2933.81 inapplicability to juveniles**

**State v. Barker, Slip Opinion No. 2016-Ohio-2708.**

{¶ 30} Contrary to the First District, we hold that the statutory presumption of voluntariness created by R.C. 2933.81(B) does not affect a reviewing court's analysis of whether a defendant waived his *Miranda* rights. The state retains the burden of proving a knowing, intelligent, and voluntary waiver by a preponderance of the evidence. *Miranda*, 384 U.S. at 475, 86 S.Ct. 1602, 16 L.Ed.2d 694; *Connelly*, 479 U.S. at 169, 107 S.Ct. 515, 93 L.Ed.2d. 473.

{¶ 43} . . . R.C. 2933.81(B) impermissibly eliminates the state's burden of proving the voluntariness of a custodial statement when the statement was electronically recorded and, instead, places the burden on the SUPREME COURT OF OHIO 18 defendant to prove that the statement was involuntary. For these reasons, we conclude that R.C. 2933.81(B), as applied to juveniles, is unconstitutional. Accordingly, we adopt Barker's first proposition of law.

##### **Witness' right against self-incrimination -- standing to assert**

##### **Court's duty to inquire about witness' assertion of privilege**

**State v. Arnold, Slip Opinion No. 2016-Ohio-1595.** Defendant lacks standing to assert witness' Fifth Amendment rights. [ **Practice tip:** Can still suggest to trial court that Fifth Amendment problem exists and that witness needs independent counsel.] When witness asserts right against self-incrimination, court must determine if assertion is valid (i.e., that "direct answer might tend to incriminate") without causing witness to reveal incriminating information in the process.

#### **V. Double Jeopardy (U.S. Const. Amend. V, Ohio Const. Art. I, Sec. 10)**

##### **Successive trials as a result of mistrials and/or reversals on appeal.**

**State v. Anderson, Slip Opinion 2016-Ohio-5791.** "While we are deeply troubled that a final resolution in this case has not been reached, there is no prohibition in the federal or Ohio Double Jeopardy Clauses that bars a defendant's retrial after several mistrials have been declared." Moreover, due process analysis does not apply in light of more specific double jeopardy protections.

## **VI. Confrontation (U.S. Const. Amend. VI, Ohio Const. Art. I, Sec. 10)**

*State v. Arnold*, Slip Opinion No. 2016-Ohio-1595. No plain error where witness testifies that witness is unable to remember and is allowed to read prior statement at trial. Sixth Amendment requires opportunity to cross, and cross regarding inability to remember can suffice. [**Practice tip:** Object at trial, and claim violation of both confrontation and specific hearsay rules).

## **VII. Pre-Indictment Delay (U.S. Const. Amend. VI, Ohio Const. Art. I, Sec. 10)**

### **Test for determining**

### **Meaning of "prejudice"**

*State v. Jones*, Slip Opinion 2016-Ohio-5105. The Court affirmed its previously established test for pre-indictment delay:

{¶ 13} And we have firmly established a burden-shifting framework for analyzing a due-process claim based on preindictment delay. Once a defendant presents evidence of actual prejudice, the burden shifts to the state to produce evidence of a justifiable reason for the delay.

The Court recognized that "actual prejudice" is more than the mere possibility of faded memories or lost evidence. At the same time, demonstrated unavailability of witness testimony (due to death or faded memory) and/or demonstrated loss of evidence can constitute actual prejudice. In this regard, the possible prejudice of a fading memory. With respect to deceased potential witnesses, "a defendant need not know what the exact substance of an unavailable witness's testimony would have been in order to establish actual prejudice based on the witness's unavailability." ¶ 28.

## **VIII. Equal Protection (U.S. Const. Amend. XIV, Ohio Const. Art. I, Sec. 2)**

### **Rationality of imposing strict liability regarding sexual conduct with minor when defendant is off-duty police officer charged with sexual battery**

*State v. Mole*, Slip Opinion 2016-Ohio-5124. Irrational to treat police officers differently than others when sexual conduct with minor (who is also more than two years younger than defendant) occurs under circumstances unrelated to official duties. Police officers cannot be treated as a special class of offenders always subject to strict liability under R.C.2907.03(A)(13).

## **Equal Protection (cont'd)**

**Rationality of enhanced OVI penalties when specification carrying enhancement (five priors in 20 years) does not require additional evidence beyond that required to prove lower-penalty base offense (five priors in 20 years).**

*State v. Klembus*, 146 Ohio St.3d 84, 2016-Ohio-1092.

{¶ 2} We hold that the two statutes are part of a logical, graduated system of penalties for recidivist OVI offenders. They are rationally related to the protection of the public and punishment of offenders and therefore do not violate equal protection.

## **IX. Allied Offenses**

### **OVI -- Aggravated Vehicular Assault**

*State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615. OVI and aggravated vehicular assault predicated upon OVI are offenses of different import and thus not allied.

## **X. Sentencing**

### **Applicability of HB 86 sentencing reforms to pre-S.B.2 offenses**

*State v. Thomas*, Slip Opinion 2016-Ohio-5567. Pre-S.B. 2 offenders sentenced after effective date of H.B. 86 receive lesser of current potential sentence or sentence available at time of offense. R.C. 1.58.

### **Enhancement of level of offense/potential punishment due to prior juvenile adjudication.**

*State v. Hand*, 2016-Ohio-5504. Fundamentally unfair to use juvenile adjudications as basis to exceed offense level or statutory maximum penalty otherwise available for the offense, *i.e.* juvenile adjudications are not "priors" for enhancement purposes. [They may still be relevant to sentence imposed within normal range].

### **Consecutive sentences: Felony and Misdemeanor sentences**

*State v. Polus*, 145 Ohio St.3d 266, 2016-Ohio-655. Felony and misdemeanor sentences may not run consecutively to one another.

### **Consecutive sentences: Agreed sentences and whether trial court must make findings**

*State v. Sergeant*, Slip Opinion No. 2016-Ohio-2696. Where consecutive sentences are jointly recommended, findings in support of consecutive sentences are not required.

## **Sentencing (cont'd)**

### **Appellate review of sentence**

#### ***State v. Marcum*, 2016-1002:**

{¶ 1} In this appeal that focuses on a certified-conflict issue, we address the standard of review that appellate courts must apply when reviewing felony sentences. Applying the plain language of R.C. 2953.08(G)(2), we hold that an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law. In other words, an appellate court need not apply the test set out by the plurality in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

## **XI. Community Control Sanctions Violations**

### **Prosecutor's right to be present**

***State v. Heinz*, 146 Ohio St.3d 374, 2016-Ohio-2814.** Trial court may not condition prosecutor's right to be present as State's representative at community control sanctions violation hearing by requiring prosecutor to seek leave to appear. Prosecutor must be given notice and opportunity to participate.

## **XII. Sex Offender Registration: Adult and Juvenile**

### **Tier II requirements -- analysis regarding "cruel and unusual"**

***State v. Blankenship*, 145 Ohio St.3d 221, 2015-Ohio-4624.** Tier II registration requirements are not violative of constitutional prohibition against cruel and unusual punishment. U.S. Const. Amend. VIII, Ohio Const. Art. I, Sec. 9.

### **Juvenile sex offender -- ability of pre-Adam Walsh Act registrants to remove classification**

***In re Von*, 146 Ohio St.3d 448, 2016-Ohio-3020.** "The registration termination procedure delineated in R.C. 2950.15 does not apply to sex offenders who committed their offenses prior to January 1, 2008."¶24.

## **Sex Offender Registration (cont'd)**

**Juvenile sex offender -- when classification determination can be made**

**Juvenile sex offender -- constitutionality of reporting requirements**

*In re D.S.*, 146 Ohio St.3d 182, 2016-Ohio-1027. Syllabus:

1. When a delinquent child disputes that he or she was at least 14 years old at the time the offenses were committed and age cannot be established from the undisputed allegations in the complaint, the juvenile court must make a determination of age eligibility before or during the sex-offender classification hearing and prior to subjecting the child offender to registration and notification requirements under R.C. 2152.82 through 2152.86 and Chapter 2950.
2. Conducting a sex-offender-classification hearing under R.C. 2152.83 upon a delinquent child's release from a secure facility does not violate the prohibition against double jeopardy.
3. The imposition of juvenile-offender-registrant status under R.C. 2152.82 or 2152.83(B) with corresponding registration and notification requirements that continue beyond the offender's reaching age 18 or 21 does not violate the offender's due-process rights.

## **XIII. Appellate Procedure**

### **State's Appeal**

*State ex rel. T.L.M. v. Judges of the First Dist. Court of Appeals*, Slip Opinion No. 2016-Ohio-1601. When State does not have a right to appeal and is seeking leave to appeal instead, motion for leave must be filed within 30 days in the court of appeals and, concurrently, a notice of appeal must be filed in the trial court. App. R. 5. These are jurisdictional prerequisites and strict compliance is required.

## **XIV. Jail Time Credit**

**Ability to seek credit at "any time."**

**Appeal from denial of credit**

*State v. Thompson*, Slip Opinion No. 2016-Ohio-2769.



{¶ 12} Pursuant to R.C. 2929.19(B)(2)(g)(iii), an offender can file a motion to correct an error in determining jail-time credit “at any time after sentencing” and the sentencing court has authority to correct any error in determining jail-time credit that was “not previously raised at sentencing.”

Moreover, the denial of jail time credit is a final appealable order that may be appealed by filing a notice of appeal within 30 days of the denial.

## **XV. Sealing Criminal Records (Expungement)**

**Vehicle offenses: M-4 failing to register motor vehicle as prior offense**

**Offense that was a higher-level offense at time of conviction but is now a minor misdemeanor -- effect on number of prior convictions.**

*State v. J.M., Slip Opinion No. 2016-Ohio-2803.* M-4 violation of R.C. 4503.11 for not registering motor vehicle is counted as a prior offense for purposes of expungement, even though offense is now a minor misdemeanor.

## **XVI. Capital Cases (partial mention of issues presented)**

*State v. Adams, 144 Ohio St.3d 429, 2015-Ohio-3954* (when specification involves commission of predicate offense, jury need not be unanimous as to which of several predicates alleged in the indictment were committed, so long as each juror finds the existence of one or more predicates. However, in absence of specific jury finding showing unanimous agreement as to one or more predicate offenses were committed, insufficiency of evidence regarding any of the alleged predicates vacates death, and requires resentencing for non-death option).

*State v. Dean, 146 Ohio St.3d 106, 2015-Ohio-4347* (sufficiency, merger of offenses)

*State v. Belton, 2016-Ohio-1581* (jury waiver at trial phase waives jury for sentencing phase).

*State v. Johnson, 144 Ohio St.3d 518, 2015-Ohio-4903* (independent review determines death inappropriate: aggravating circumstances do not outweigh mitigating factors).

*State v. Obermiller, Slip Opinion 2016-Ohio-1594* (validity of colloquy regarding self-representation).

*State v. Montgomery, Slip Opinion 2016-Ohio-5487* (proof of aggravating circumstances).

*State v. Jackson, Slip Opinion 2016-Ohio-5488* (death affirmed after resentencing hearing).

*State v. Broom, 146 Ohio St.3d 60, 2016-Ohio-1028* (subsequent execution attempt).