

April 2009 Case Digest
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Consecutive Misdemeanor and Felony Sentences

In the first sentence of R.C. 2929.41(A), the General Assembly set forth what some have called a presumption that felony sentences would be served concurrently. One of the stated exceptions was R.C. 2929.14(E)(4), which authorized the trial court to impose sentences consecutively upon making certain sentencing findings.

In the second sentence of R.C. 2929.41(A), the statute provides, "Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution." Paragraph (B)(3) in turn sets forth a handful of misdemeanor offenses, most notably OVI, that can be ordered to run consecutively to a handful of certain felonies, most notably aggravated vehicular homicide and felony OVI.

In *State v. Trainer*, 2nd Dist. No. 08-CA-04, 2009-Ohio-906, the court concluded that the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, had severed not just the presumption of concurrency for felony sentences in R.C. 2929.41(A). The *Trainer* court concluded that the second sentence regarding misdemeanor-felony concurrency had been severed as well, with the end result being that misdemeanor sentences can now run consecutively to any felony sentence, not just the handful listed in R.C. 2929.41(B)(3).

The court stated, "Because R.C. 2929.41(A) no longer exists, * * * we are left with R.C. 2929.41(B)(1), which allows consecutive misdemeanor and felony sentences in all cases, as recognized by the Twelfth District in *Terry*, supra, and the Fifth District in *Elkins*, supra." See *State v. Terry*, 171 Ohio App.3d 473, 2007-Ohio-1096; *State v. Elkins*, Morrow App. No. 05 CA 0008, 2006-Ohio-3997.

This issue should be closely followed. Many would contend that *Foster* severed the first sentence in R.C. 2929.41(A), but not the second.

No Sentencing Merger When Multiple Victims

In *State v. Williams*, 12th Dist. No. CA2007-12-136, 2009-Ohio-435, the defendant had held police at bay for over three hours, firing over 100 shots at several of the 20 officers who surrounded his home during the standoff. He pleaded guilty to, inter alia, 12 counts of felonious assault on a police officer, with a different officer named as the victim in each count. On appeal, the defendant complained that the trial court had refused to merge the counts. According to defendant, he had merely been attempting to ward off the police generally, rather than taking aim at individual officers.

The 12th District rejected that argument, concluding that defendant had been well aware of the multiple officers at the scene. The court also cited the line of cases allowing multiple convictions for victim-oriented crimes against different victims. See, e.g., *State v. Gregory* (1993), 90 Ohio App.3d 124; see, also, *State v. Jones* (1985), 18 Ohio St.3d 116.

Standard of Appellate Review on Selective Prosecution Claims

In *State v. Michel*, 9th Dist. No. 24072, 2009-Ohio-450, the trial court dismissed the indictment, including counts for RICO, money laundering, and gambling. The court based the dismissal on “selective prosecution.” The State appealed.

In reversing the order of dismissal, the 9th District held that such claims on appeal present a mixed question of law and fact. As in the review of suppression issues, the appellate court reviews the trial court’s factual findings to determine whether they are supported by competent, credible evidence. The court then reviews the application of the law to those facts on a de novo basis.

This recognition of a partly-deferential standard of review could be significant in some cases. A defendant claiming selective prosecution must show, inter alia, that others similarly situated were not prosecuted, that he was therefore singled out, and that the government’s discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. Such questions of motive would likely be treated as findings of fact requiring deferential review under *Michel*.

On the other hand, the standard for showing selective prosecution is so high that the prosecutor often will be able to argue that there was a lack of competent, credible evidence. And even on the motive issue, the prosecutor can argue on a de novo basis that the purported “discrimination” was really the proper exercise of prosecutorial discretion. See, e.g., *Wayte v. United States* (1985), 470 U.S. 598.

Michel pointed out that the Ohio Supreme Court has previously referred to an abuse-of-discretion standard. *State v. Freeman* (1985), 20 Ohio St.3d 55, 58. *Michel* also noted that many cases had merely reviewed the case without stating any standard of review at all. See, e.g., *Wayte; United States v. Armstrong* (1996), 517 U.S. 456; *State v. Flynt* (1980), 63 Ohio St.2d 132; *Cleveland v. Trzebuckowski* (1999), 85 Ohio St.3d 524.

Felony Murder; Valid and Invalid Predicates; Conviction Upheld

In *State v. Gray*, 5th Dist. No. 2007-CA-0064, 2009-Ohio-455, the defendant was convicted on counts of felony murder, felonious assault, and “physical harm” robbery, all regarding the victim decedent. On appeal, the court reversed the robbery conviction because of *Colon* error in the failure to instruct on reckless. The defendant argued that the problem with the robbery instructions meant that the felony murder conviction must be thrown out as well.

The 5th District disagreed. Because felonious assault remained an available predicate for felony murder, the felony murder conviction could still be upheld. The court relied heavily on *Hedgpeth v. Pulido* (2008), 129 S.Ct. 530, which allows instructional error as to one predicate to be found harmless as to the other predicate and as to the compound homicide offense. Since the jury had found the defendant guilty of felonious assault, that offense by itself was a sufficient predicate to support the felony murder conviction, regardless of the error in the robbery charge.

The conviction on the felonious assault also should have been sufficient to find the *Colon* error harmless as to robbery as well. The defendant had been convicted of knowingly causing serious physical harm, and so the lack of reckless vis-à-vis physical-harm robbery really made no difference.

Intervention in Lieu of Conviction

R.C. 2951.041(B)(1) provides that a defendant will not be eligible for intervention in lieu of conviction unless the court finds, inter alia, that “[t]he offender previously has not been convicted of or pleaded guilty to a felony, * * *.” In *State v. Casto*, 12th Dist. No. CA2008-08-033, 2009-Ohio-791, the trial court had granted intervention despite the State’s contention that the defendant had a conviction in a military court for a drug offense equivalent to a felony.

After concluding that the order granting intervention was a final appealable order, the 12th District concluded that R.C. 2951.041 had no “equivalence” provision that would allow the court to consider the military conviction to be equivalent to a felony. “If we were to construe the statute as providing that a military conviction is ‘equivalent’ to a felony, we would be inserting words into the statute. This we cannot do.”

It is unclear why such equivalence language would be necessary in determining whether an out-of-state conviction was a “felony.” The felony-misdemeanor distinction is very likely followed in every state’s criminal code, and Ohio law recognizes that an offense can be treated as a generic “felony” if it provides for imprisonment greater than one year. R.C. 2901.02(E).

When addressing whether an out-of-state conviction qualifies as a cognizable prior conviction, readers should keep in mind R.C. 2901.04(C), which sets forth a “substantially equivalent” standard that will apply in most situations. R.C. 2901.04(C) provides that “[a]ny provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.”

And, contrary to the usual view that a juvenile adjudication would not be a “conviction,” the law now expressly provides that a prior juvenile adjudication can qualify as a “prior conviction.” R.C. 2901.08(A).

Concurrent Sentencing

Although concurrent sentences often run side-by-side, so that a day served toward one sentence operates as service toward both sentences, that is not always the case.

In *State v. Bellamy*, 2nd Dist. No. 2008 CA 5, 2009-Ohio-888, the defendant had been sentenced to one year in prison, and then, seven months later, another court imposed a three-year concurrent sentence. He later sought credit toward the three-year sentence for the previous time he had served toward the earlier one-year sentence.

The 2nd District recognized that concurrent sentencing does not mean every day served on an initial sentence will count toward a later-imposed concurrent sentence. Quoting another case, the 2nd District held that “the imposition of a concurrent sentence normally means that the sentence being imposed is to run concurrently with the *undischarged* portion of the previously imposed sentence.” Concurrent sentencing does not mean that the sentences have the same start date. A second sentence can only run concurrently in futuro after it is imposed.

Imposition of Costs and Notification of Possible Community Service

In *State v. Burns*, 4th Dist. No. 08CA1, 2009-Ohio-878, the court addressed a notification requirement regarding the imposition of costs. The court is required under R.C. 2947.23(A)(1) to impose costs as part of the judgment. At the same time, the court is required by R.C. 2947.23(A)(1)(a) and (b) to notify the defendant that the failure to pay costs could result in the imposition of community service to work off the costs at a specified hourly rate. The *Burns* court vacated the order imposing costs and remanded for further proceedings.

Birthdays & Juvenile Status

When a person engages in vandalism at 2:00 a.m. on the morning of his eighteenth birthday, and when that person's actual time of birth was 10:15 a.m., is the person a "child" who should be prosecuted in the juvenile system or an adult prosecutable in adult court?

In *State v. Yarger*, 3rd Dist. 7-08-05, 2009-Ohio-543, the court engaged in a wide-ranging survey of the case law throughout the country. It also reviewed Ohio case law adopting the common-law principle that fractions of a day are not considered in computing time and that the day on which an act is done or an event occurs must be wholly included or excluded. The court concluded:

After considering the existence of the common-law no fractions of a day rule in Ohio, the principle that the common-law is presumed to exist unless a statute clearly states otherwise, and the current state of law in other jurisdictions, this Court believes that the law is clear and not ambiguous: a person attains the age of eighteen at 12:01 a.m. on the day of his/her birth.

Passing Bad Checks, Aggregation of Checks, & Venue

In *State v. O'Bryan*, 10th Dist. 08AP-518, 2009-Ohio-753, the defendant had written multiple bad checks in multiple counties. An indictment was brought in Franklin County, which included a fourth-degree felony count for passing bad checks based on all of the checks in the various counties. After a motion to dismiss was denied, the defendant pleaded no contest to the fourth-degree felony, and the court ordered restitution totaling over \$15,000, which represented the total for all of the bad checks.

The Tenth District rejected the defendant's challenge to venue, concluding that the "course of conduct" provision in R.C. 2901.12(H) allowed prosecution in Franklin County for all of the bad-check offenses, since some of the offenses in the same course of conduct had occurred in Franklin County.

The Tenth District also upheld the aggregation of all of the bad-check amounts to reach a fourth-degree felony level. R.C. 2913.11(E) allowed aggregation of all of the checks that had been written within a 180-day period.

In response to the defense contention that the aggregation provision in paragraph (E) referred only to violations of "division (A)" and that the defendant was charged with violating division (B), the court noted that a statutory amendment in 2005 had added definitional provisions in division (A) and that the singular prohibition formerly contained in (A) had been moved to (B). But the language in paragraph (E) referring to "(A)" had not been amended accordingly. The Tenth District held that the obvious clerical error in statutory reference to "(A)" could be disregarded. "When the terms of a statute as written would never be applicable, but may be rendered applicable by the substitution of one character, it is appropriate for a court to correct the error in order to give effect to the obvious intent of the statute. *State v. Virasayachack* (2000), 138 Ohio App.3d 570, 741 N.E.2d 943."