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Steve Taylor

Chief Counsel, Appeals Division, Franklin County

Saving a Now-Invalid *Belton* Search

In *State v. Swinderman*, 5th Dist. No. 2009-AP-100050, 2010-Ohio-2659, the state highway trooper had arrested the driver for driving with a suspended license and had placed the driver in the patrol car. The trooper then conducted what he characterized as a search incident to arrest, immediately discovering drugs when he opened the car door. In a further search incident to arrest, he found more drugs. Pursuant to standard policy, he then conducted an inventory search because the car was being impounded, but all of the incriminating items had already been discovered during the previous “search incident to arrest.”

At the time the trooper acted, the search of the passenger compartment was justified as “incident to arrest” under *New York v. Belton* (1981), 453 U.S. 454, even though the arrested driver was secured in the patrol car. *State v. Murrell*, 94 Ohio St.3d 489, 2002-Ohio-1483. But, three months afterward, in *Arizona v. Gant* (2009), 129 S.Ct. 1710, the Court substantially limited searches of passenger compartments incident to arrest. The new rule under *Gant* is that the search is not justified unless the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that evidence of the offense justifying arrest will be found.

In *Swinderman*, the 5th District rejected further reliance on the search-incident-to-arrest doctrine in light of *Gant*. However, even though a search incident to arrest was not justified, the 5th District recognized that other established exceptions to the warrant requirement might apply depending on the circumstances. Citing *Gant*, 129 S.Ct. at 1721.

The 5th District concluded that the trooper would have entered the car anyway pursuant to the required inventory search, and such entry would have lead to the discovery of some of the drugs in plain view, at which point the trooper would have had probable cause to continue a warrantless search for drugs under the automobile exception to the warrant requirement.

This case is helpful on multiple levels. It recognizes that a search no longer permitted under *Belton* can be justified on other potential grounds, such as inventory or the automobile exception. It also recognizes that the subjective theory or intent of the searching officer is not controlling. If the search was justifiable on one ground based on the information then known, the search will not be thrown out because the officer was subjectively relying on a different (and incorrect) legal theory.

An officer's subjective reasoning need not match up with the legal reasoning that later provides the legal grounds for a court to uphold his actions. *Ohio v. Robinette* (1996), 519 U.S. 33, 38; *Scott v. United States* (1978), 436 U.S. 128, 138; see, also, *Whren v. United States* (1996), 517 U.S. 806; *Devenpeck v. Alford* (2004) 543 U.S. 146. In fact, the information providing probable cause need not even be known to the searching/arresting officer. "So long as 'the law enforcement system as a whole has complied with the Fourth Amendment' and possesses facts adding up to probable cause, the arrest will be valid even though the arresting officer alone does not possess these facts." *State v. Henderson* (1990), 51 Ohio St.3d 54, 57 (quoting 1 LaFave & Israel, *Criminal Procedure* (1984) 208, Section 3.3(c)). "[P]robable cause may be based on the knowledge of more than one officer. Thus, it is irrelevant which officer had a particular bit of information." *State v. Waddy* (1992), 63 Ohio St.3d 424, 441-42, citing *State v. Benner* (1988), 40 Ohio St.3d 301, 308. Probable cause is evaluated based on the collective information of officers engaged in particular investigation. *Id.* at 308. This is especially so when an officer is acting at the behest of another officer or agency. *United States v. Hensley* (1985), 469 U.S. 221, 230-33.

Thus, if theory A used by the officer proves invalid, the prosecutor can think creatively and resort to theory B if that theory was supported by the information known to the searching/arresting officer or known to other officers participating in the investigation.

Another possibility unexplored in *Swinderman* is the good faith of the officer in relying on the then-extant *Belton* doctrine. Some federal courts have refused to suppress evidence from pre-*Gant* searches that were justifiable under *Belton*, since officers should be able to reasonably rely on extant law.

The Court's decision in *Herring v. United States* (2009), 129 S.Ct. 695, would support this approach. *Herring* recognizes that suppression is justified only when the search was made in deliberate, reckless, or gross-negligent disregard of Fourth Amendment rights or the search resulted from systemic or recurring negligence in that regard.

No Summary Judgment

In *State v. Hoskins*, 1st Dist. No. C-090710, 2010-Ohio-2454, the officer investigating a "shots fired" call attempted to enter a residence he believed might have victim(s). He was resisted by the defendant, and she was charged with obstructing official business. The defense filed a motion to suppress, contending that the officer's warrantless entry was unlawful and that the obstructing charge could not succeed because the officer was not doing an "authorized act" within his "lawful duties." The trial court sustained the motion to suppress.

The 1st District reversed. There was no "evidence" to suppress, and the sole purpose of the motion had been to determine the provability of the "authorized act" and "lawful duties" elements. In effect, it was a motion for summary judgment on an element, which the Criminal Rules do not allow:

{¶9} The state's assignment of error is well taken. Crim.R. 12(C) states, in part, that "[p]rior to trial, any party may raise by motion any defense, objection, evidentiary issue,

or request that is *capable of determination without the trial of the general issue.*” (Emphasis added.)

{¶10} Although styled as a motion to suppress, Hoskins’s motion was in essence a motion to dismiss. Hoskins did not ask the court to suppress any evidence that had been obtained as a result of the allegedly illegal entry. Instead, she sought a determination that the state could not prove an element of the offense due to the alleged misconduct. The trial court, in turn, did not suppress any evidence; it merely held that there were no exigent circumstances to justify the attempted entry into Hoskins’s residence.

{¶11} But a motion to dismiss can raise only matters that are capable of determination without a trial of the general issue. If a motion to dismiss requires the examination of evidence beyond the face of the charging instrument, the issue must be presented in a motion for acquittal at the close of the state’s case. Therefore, even where the state and the defendant have stipulated the facts that form the basis of the charges, a motion to dismiss is premature because there is no equivalent of a motion for summary judgment in a criminal proceeding. Because the motion in this case required evidence beyond the face of the complaint, it was improperly decided prior to the trial of the general issue. (Footnotes omitted)

The 1st District agreed that the claimed illegality of the entry was a potential defense to the charge, but “[a] motion challenging the proof of those elements would have been proper only at the close of the state’s case.”

This ruling correctly cuts off the defense gambit for “summary judgment.” *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493; *State v. Palmer*, 10th Dist. No. 09AP-956, 2010-Ohio-2421. While the Criminal Rules do not allow for summary judgment, neither do pertinent statutes, which only allow a judge to try the element(s) if there has been a jury waiver.

In tactical terms, the downside of the “no summary judgment” rule of law is that the defense could waive jury and try the case to the same judge who ruled on the “motion to suppress,” or the defense could seek a Crim.R. 29 acquittal from the same judge at a jury trial. Either way, the presumed ruling of acquittal would bar further prosecution and would prevent any effective appellate relief because the acquittal would be a “final verdict” that cannot be appealed under R.C. 2945.67. On the whole, though, prosecutors are benefited by the “no summary judgment” principle, as they are saved the time and expense of litigating the merits of hundreds and possibly thousands of cases pretrial.

Challenge to Judicial Release Statute not Ripe

In *State v. Rizzi*, 3rd Dist. No. 2-10-04, 2010-Ohio-2519, the defendant was sentenced to five years for third-degree felony OVI. On direct appeal, he complained that he would be precluded from seeking judicial release because of a provision (R.C. 2929.20(C)(3)) requiring that he wait five years before seeking judicial release from his five-year sentence. The same waiting period had been found unconstitutional as violative of equal protection in *State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923.

The 3rd District found the constitutional challenge to be premature. The trial court had not yet denied a motion for judicial release based on R.C. 2929.20(C)(3). “[U]ntil Rizzi files a motion for judicial release and the trial court denies it pursuant to R.C. 2929.20(C)(3), Rizzi has not suffered a concrete injury and lacks standing to challenge the constitutionality of the statute.”

Given this ruling, the defendant’s remedy would be to seek judicial review at a time consistent with the five-year waiting period being invalid. The defendant could then contend that the provision is unconstitutional and that he should receive the benefit of a shorter waiting period. Given the defendant’s extensive criminal record, however, the problem for this defendant would be that the court could deny any and all motions for judicial release based on his bad record, in which case the defendant’s complaint about the waiting period would be a non-issue.

SORN Failure-to-Verify Offense is Strict Liability

In *State v. Ramsey*, 1st Dist. No. C-090076, 2010-Ohio-2456, the 1st District held that the offense of failure to periodically verify address remains a strict liability offense:

{¶10} Ramsey acknowledges that a number of Ohio appellate districts have held that a sexual offender’s failure to provide a change of address and a sexual offender’s failure to verify a current address are strict-liability offenses. [See *State v. Beasley* (Sept. 27, 2001), 8th Dist. No. 77761; *State v. Robinson*, 6th Dist. No. E-07-020, 2009-Ohio-2921, at ¶¶8-17; *State v. Blanton*, 10th Dist. No. 08AP-844, 2009-Ohio-5334, at ¶¶12-27; *State v. Hardy*, 9th Dist. No. 21015, 2002-Ohio-6457, at ¶¶7-24] But those decisions concern the reporting requirements under former R.C. 2950.05 and 2950.06. Ramsey, however, was convicted under the Am.Sub.S.B. No. 10 version of R.C. 2950.06. After examining the language in former R.C. 2950.06 and its legislative history, as well as the language in the current version of R.C. 2950.06 and its legislative history, we find no substantive differences between the two statutes. As a result, we agree with Ramsey that a violation of R.C. 2950.06 is a strict-liability offense based upon the reasoning articulated in the cited decisions.

{¶11} Ramsey argues that imposing strict liability for a violation of R.C. 2950.06 violates his due-process rights. But the Ohio Supreme Court has held that “the failure to require mens rea, standing alone, does not violate due process.” [See *State v. Schlosser* (1997), 79 Ohio St.3d 329, 332] The record, moreover, reveals that the Hamilton County Sheriff’s office provided Ramsey with the statutorily required notifications, including the seven-day warning letter, prior to his prosecution under R.C. 2950.06. Ramsey simply chose to ignore them. * * *

No Merger for Multiple Acts of Rape

In *State v. Logsdon*, 7th Dist. No. 09 CO 8, 2010-Ohio-2536, the defendant held the victim at knifepoint and raped her four times. The defendant pleaded guilty to four counts but then complained that all counts should merge into a single count. The 7th District rejected this “free rape” argument:

{¶9} Appellant contends that the various acts of rape in which he engaged constituted a single course of criminal conduct, there was only one criminal animus for the course of

conduct, and that the conduct took place at one location during one period of time. Appellant concludes that the entire series of events was, thus, one crime and that he can only be sentenced for one count of first degree rape. Appellant does not cite any particular caselaw or other authority indicating that a court might be prohibited or limited in imposing separate punishments for distinct acts of fellatio, cunnilingus, digital anal rape or digital vaginal rape.

* * *

{¶11} The state correctly relies on *State v. Barnes*, [(1981), 68 Ohio St.2d 13] which held that an act of fellatio followed immediately by vaginal intercourse constituted two separate crimes within the meaning of R.C. 2941.25(B) and that each act of rape could be punished separately. *Barnes*, supra, 68 Ohio St.2d. at 14, 427 N.E.2d 517.

{¶12} *Barnes* also held that:

{¶13} “If this court were to identify only one rape offense for each defendant, we would, in effect, be issuing a license to rape. The appellate court’s philosophy, enables a rapist, after the first penetration, to commit two or three rapes for the penal price of one. To affirm the decision of the lower court in this case would be to sanction a total disregard for the safety of the victim. As the court so graphically stated in the analogous case of *Harrell v. State*, supra, 88 Wis.2d at 565, 277 N.W.2d 462:

{¶14} “* * * Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim’s integrity and a further danger to the victim.” Id. at 18-19.

{¶15} We have similarly held that oral, anal and vaginal rape, occurring over a short period of time, are offenses committed with separate animus and may be punished separately. *State v. Bunch*, 7th Dist. No. 02 CA 196, 2005-Ohio-3309, ¶196.

{¶16} In the instant case, the record shows that Appellant was accused of committing separate acts of fellatio, cunnilingus, digital vaginal rape, and digital anal rape, over a period of time during the afternoon of December 24, 2008. This in itself would satisfy the requirements of *Barnes*. The record further shows that the crimes did not take place in rapid succession, but rather, over a period of some time. * * * Thus, the record contains references to at least four distinct acts of rape along with various events intervening between each crime.

See, also, *State v. Nicholas* (1993), 66 Ohio St.3d 431, 435.

Circumstantial Proof of Shaken-Baby Injuries

One of the ways of circumstantially proving that the defendant caused injuries to a child is to show that the child was in the defendant’s sole custody at the time of the sudden onset of the

injuries. This method of proof was discussed in *State v. Hendrex*, 11th Dist. No. 2009-T-0091, 2010-Ohio-2820:

[A]s the Eighth Appellate District held in *State v. Woodson*, 8th Dist. No. 85727, 2005-Ohio-5691:

{¶41} “*** [I]t is not unusual that evidence of shaken baby syndrome may be primarily circumstantial, especially where a child is in the sole custody of one adult at the time the injuries are sustained. See [*State v.*] *Gulertekin*, [(Dec. 3, 1998), 10th Dist. No. 97APA12-1607, 1998 Ohio App. LEXIS 5641] (sufficient circumstantial evidence to support conviction of child endangering where an infant suffered injuries consistent with shaken baby syndrome while entrusted to the defendant’s care); *State v. Williams*, (1992) Ohio App. LEXIS 1010 (Mar. 5, 1992), Franklin App. No. 91AP-653, unreported (sufficient circumstantial evidence to support conviction of child endangering where there was medical expert testimony that an infant was injured as the result of abuse and where the defendant was the primary caretaker of the infant immediately [preceding] the manifestation of the infant’s injuries) ***.” *Woodson*, supra, at ¶53, quoting *State v. Brooks*, 10th Dist. No. 00AP-1440, 2001 Ohio App. LEXIS 4310,*18-*19.

* * *

{¶47} In summary, the state offered the testimony of two Cleveland Clinic physicians, each of whom testified that [the victim’s] injuries were the result of an inflicted head injury or shaken baby syndrome and not an accident. Further, the jury was entitled to infer that appellant, as the sole caregiver at the time [the victim] became symptomatic, was the person responsible for inflicting the injuries to her head. Finally, the state presented sufficient evidence to establish that appellant acted knowingly and recklessly when he injured his daughter. Appellant admitted that he intentionally, i.e., purposely, threw [the victim] three feet toward a couch that, according to his admission, he knew had its wood frame exposed and thus would have been dangerous to the baby. When recklessness or knowledge suffice to establish an element of an offense, then purpose is also sufficient culpability for such element. R.C. 2901.22(E).

{¶48} Accordingly, in construing the evidence in a light most favorable to the prosecution, we hold that sufficient evidence was presented for the jury to conclude beyond a reasonable doubt that appellant was guilty of child endangering and felonious assault.