



Ohio Prosecuting Attorneys Association

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Private Citizen cannot appeal Dismissal of Complaint

In *State v. Carlson*, 6th Dist. No. WD-09-044, 2009-Ohio-4591, an attorney filed a private-citizen complaint under R.C. 2935.09, claiming that a police officer had committed perjury. The trial court later sua sponte dismissed the complaint based on the absence of probable cause. The attorney sought to appeal, but the appeal was dismissed.

In denying the attorney's motion for reconsideration, the 6th District ruled that the attorney/private citizen could not appeal, as R.C. 2945.67(A) limits the ability to appeal to the "prosecuting attorney, village solicitor, city director of law, or the attorney general." A private citizen is not one of these designated prosecuting officials and will not be considered as such, even when the citizen filed the complaint.

It made no difference that the dismissal was by the court sua sponte. See *State v. Craig*, 116 Ohio St.3d 135, 2007-Ohio-5752, ¶ 15. A dismissal sua sponte is just as appealable as a dismissal pursuant to defense motion, but, still, only one of the prosecuting officials designated in R.C. 2945.67(A) is allowed to appeal.

Rape – Slightest Insertion into Labia Sufficient

R.C. 2907.01(A) defines "sexual conduct" as including vaginal intercourse and including the insertion of a body part or other thing into the vaginal opening. Penetration or insertion, "however slight," is sufficient. In *State v. Melendez*, 9th Dist. No. 08CA009477, 2009-Ohio-4425, which involved digital penetration of a seven-year-old girl, the 9th District discussed in anatomical terms what is sufficient penetration or insertion in the vagina.

{¶9} Whether the insertion of an object inside a female's vulva or labia, without penetration into the vaginal cavity itself, constitutes sexual conduct is an issue of first impression for this Court. Many of our sister districts, however, have considered the issue and have concluded that such activity constitutes penetration sufficient to establish rape.

{¶10} The Second District Court of Appeals held:

"The vagina is the hollow passage leading from the uterus of the female body outward

to the exterior genitalia, or vulva, which is comprised of lip-like folds of skin called the labia majora. The term ‘vaginal cavity’ refers to that entire anatomical process and any part of it.

“Penetration of the vaginal cavity requires introduction of an object from without, which necessarily implies some forceful spreading of the labia majora. The penetration need only be ‘slight.’ R.C. 2907.01(A). Therefore, if the object is introduced with sufficient force to cause the labia majora to spread, penetration has occurred.” *State v. Grant*, 2d Dist. No. 19824, 2003-Ohio-7240, at ¶29-30.

{¶11} The Tenth District Court of Appeals acknowledged that “the overwhelming majority of the appellate courts in this state” which have addressed the issue have declined to categorize the touching of the interior realm of the vulva as mere “sexual contact” as defined in R.C. 2907.01(B). *State v. Gilbert*, 10th Dist. No. 04AP-933, 2005-Ohio-5536, at ¶27. R.C. 2907.01(B) defines “sexual contact,” in relevant part, as “any touching of an erogenous zone of another, including without limitation the *** genitals *** [or] pubic region, *** for the purpose of sexually arousing or gratifying either person.” The *Gilbert* court recognized, with some concern, that “[a]s it stands now, touching a single labia on the side away from the vaginal cavity is sexual contact, touching the opposite side would be sexual conduct.” *Id.* at ¶37. However, the *Gilbert* court declined to deviate from its prior precedent or the established case law from throughout the state. *Id.*

The 9th District rejected the defendant’s contention that the standard for anal penetration set forth in *State v. Wells* (2001), 91 Ohio St.3d 32, should govern vaginal penetration or insertion. The distinction mainly flows from the fact that the buttocks is not part of the anal cavity, but the labia is a part of the vaginal cavity. The 9th District cited other courts that had rejected the analogy to anal rape. “This Court now joins in the reasoning of our sister districts and holds that insertion, however slight, of a part of the body or other object within the vulva or labia is sufficient to prove vaginal penetration for purposes of proving sexual conduct as defined in R.C. 2907.01(A) and rape in violation of R.C. 2907.02.”

Tampering with Evidence – Missing Gun not Enough

In *State v. Beard*, 6th Dist. No. WD-08-037, 2009-Ohio-4412, the defendant had shot and wounded one victim, shot at and missed another victim, and then fled in his car with the gun. About forty minutes after the 911 call, the defendant voluntarily went to the sheriff’s department and consented to a search of his car; no gun was found. The jury convicted the defendant of one of the felonious assault counts and of tampering with evidence.

The 6th District upheld the felonious assault conviction but reversed the tampering conviction because of insufficient evidence. The court held that “[t]he inability of law enforcement to find the gun used in a shooting, by itself, does not show that the defendant ‘altered, destroyed, concealed, or removed’ it.” *State v. Wooden* (1993), 86 Ohio App.3d 23, 27; *State v. Spears*, 178 Ohio App.3d 580, 2008-Ohio-5181; *State v. Like*, 2d Dist. No. 21991, 2008-Ohio-1873. “The gun used in the shooting was not found, but that fact alone cannot lead to an inference that Beard tampered with it.” It is a “faulty syllogism” to infer tampering from the mere inability to find the gun.

Suppression, not Dismissal

In *State v. Lassiter*, 8th Dist. No. 92278, 2009-Ohio-3893, the common pleas court granted a motion to suppress. When the State asked for a continuance of the trial so that it could appeal, the court denied the continuance, and, upon motion of the defense, the court immediately dismissed the case with prejudice.

Upon State's appeal from the dismissal, the 8th District reversed. "If a trial court finds a Fourth Amendment violation, the remedy is suppression of the wrongfully obtained evidence, not dismissal."

[T]hree of our sister courts of appeals have found that the trial court erred by dismissing the charges after granting a motion to suppress. *State v. Marcum*, Butler App. Nos. CA2005-10-431 and CA2005-20-446, 2006-Ohio-2514; *State v. Malone*, Erie App. No. E-03-060, 2004-Ohio-3794; *State v. Couch* (June 25, 1999), Montgomery App. No. 17520. "While the State may have a tougher row to hoe without the availability of the suppressed evidence, it does not necessarily follow that, as a matter of law, the defendant is entitled to dismissal of the charge." *Couch*, supra, at 14.

The 8th District also relied on language from *State v. Fraternal Order of Eagles, Aerie 0337* (1991), 58 Ohio St.3d 166, 169, and *State v. Bertram* (1997), 80 Ohio St.3d 281, 284.

Deliberate Ignorance Instruction

In *State v. McNeal*, 8th Dist. No. 91507, 2009-Ohio-3888, the defendant was convicted of two counts of drug possession and two counts of drug trafficking. Her theory of defense was that she had no idea that she was delivering drugs; she thought she was delivering other items.

On appeal, the defendant complained about the trial court's "deliberate ignorance" instruction. The trial court instructed the jury that "You can further find that the defendant acted knowingly if she deliberately closed her eyes to what she had reason to believe were the facts."

Based on *U.S. v. Jewell* (C.A. 9, 1976), 532 F.2d 697, the defendant contended that the instruction should have included additional language, "[y]ou may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless."

The 8th District concluded that the additional language was unnecessary in this particular case. "In *State v. Smith* (June 15, 1995), Cuyahoga App. No. 67524, this court found that the identical jury instruction does not 'relieve[] the State of its burden to prove that appellant knowingly possessed the [drugs] beyond a reasonable doubt. The instruction as stated does not create a presumption of knowledge. The State must present the facts and circumstances surrounding the delivery of the box to prove that one in appellant's shoes must have known that the box contained an illegal substance."

Although approving the instruction in this particular case, the 8th District emphasized that instructions on deliberate ignorance should not be given in every case in which a defendant claims lack of guilty knowledge, but should only be given when there is evidence that the defendant has his suspicions aroused but then deliberately omits making inquiry in order to avoid having actual knowledge.

The 8th District quoted *State v. McKoy* (Feb. 17, 2000), Cuyahoga App. No. 74763, for the proposition that “willful blindness” applies only when “it can almost be said that the defendant actually knew,” i.e., the defendant knew of the probable existence of the fact but refrained from getting a final confirmation because he wanted to have deniability.

Criminal Child Enticement

In *State v. Brown*, 2nd Dist. No. 22894, 2009-Ohio-4314, the defendant was convicted of criminal child enticement under R.C. 2905.05(B) for having solicited an eleven-year-old child to accompany him by any means, without privilege to do so, and with a sexual motivation. The defendant complained that he had not done enough to solicit the child to accompany, having only asked her to please help him search for a ring. (On an earlier uncharged occasion, he had asked her to help him find his dog) The defendant had previous convictions for gross sexual imposition and rape, both involving a minor.

The 2nd District upheld the conviction. The offender need not be “aggressive” toward the child, and “solicit” encompasses merely asking. It was not essential that the offender expressly ask the child to accompany him; “under the circumstances, the trial court could infer that Brown wanted the child to ‘accompany’ him to another location.” “[V]iewing the evidence in the light most favorable to the state, it would be reasonable to infer from his request for help that accompaniment was what Brown had in mind,” as he was not then presently looking for the “ring” at the location where he asked for the help.

Note: the Cleveland child enticement ordinance was found facially unconstitutional in *Cleveland v. Cieslak*, 8th Dist. No. 92017, 2009-Ohio-4035, based on the claim that it reached too many potentially-innocent acts of asking a young person to accompany the person soliciting the child. See, also, *State v. Chapple*, 175 Ohio App.3d 658, 2008-Ohio-1157 (addressing R.C. 2905.05(A)). A prosecution under R.C. 2905.05(B) does not have this problem, given its “sexual motivation” requirement.

Plea Bargains and Judicial Release

The great care that is needed in plea bargaining over possible judicial release is highlighted in *State v. Jimenez*, 9th Dist. No. 24609, 2009-Ohio-4337. At the time of the defendant’s pleas for charges including menacing, stalking, and violating protective orders, the prosecutor said that “I’m not going to oppose judicial release in two years unless there’s a problem” and that “if there are no other issues with Mr. Jimenez in the two years in prison, the State would support judicial release at that time.” Unfortunately, the court then summarized the prosecutor’s commitment to be that “if you don’t get in any trouble down in prison and you have a good record, that after two years the State would recommend that you be granted judicial release” and that the prosecutor “will support that in two years if you enter this plea and if you don’t get into any trouble while you’re [in] prison.”

Two years later, when the defendant sought judicial release, the court denied such release. The victim had supported the plea bargain at the time of the plea but was now opposing judicial release. The detective was opposing release too. And, ominously, the defendant had written a letter to the victim’s mother, and an evaluation of the defendant concluded that he posed a danger to the victim.

Although orders denying judicial release are not generally appealable, the 9th District concluded that such orders can be appealed when the defendant is claiming a breach of the plea agreement.

The 9th District then concluded that the State had breached its agreement to support release. The letter sent to the victim's mother was rejected as a ground for opposing release, as the plea agreement had not expressly precluded the defendant from contacting relatives of the victim. Moreover, the 9th District placed special emphasis on how the trial court had summarized the prosecutor's commitment, which summary seemed to make the prosecutor's commitment hinge on whether there was a violation of prison rules.

Given the "breach," the 9th District remanded for further consideration of judicial release, noting that, in cases of breach, the court has discretion as to whether it will order rescission/withdrawal of the plea or specific performance of the agreement.

A fair reading of the case is that the prosecutor did not breach, as the prosecutor had sufficiently qualified the commitment regarding judicial release, committing to support release "unless there's a problem" and "if there are no other issues." The finding of dangerousness and contacting the victim's mother should have been deemed sufficient "problems" and "issues" to allow the prosecutor to oppose judicial release. It was the trial court's apparently garbled summary of the prosecutor's commitment, not the prosecutor's commitment itself, that caused the appellate court to find a breach.

As this case suggests, much caution is called for in bargaining over judicial release. No one can fully predict what will happen, and attempting to hedge/qualify/condition the prosecutor's commitment to take into account all possible grounds for future opposition to release can be difficult. In addition, judges should never make a commitment, as they may leave the bench in the meantime, and their successor may not agree with release. In addition, judges especially need to retain flexibility in assessing the defendant at the time when judicial release is being considered.