Criminal Standards of Review

Judge Timothy P. Cannon

I. De Novo

- General Principles
  - De novo review is appropriate when asked to determine whether the trial court used an erroneous legal standard, misconstrued the law, or incorrectly applied the law to the facts of the case.

  - In reviewing questions of law, an appellate court reviews the judgment independently and without deference to the trial court's determination, and it may properly substitute its judgment for that of the trial court.

  - *See, e.g., State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶16; *State v. Romeo*, 11th Dist. Portage No. 2007-P-0066, 2008-Ohio-1499, ¶9.

- Examples
  - Res Judicata: "Res judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal. The applicability of res judicata is a question of law, which an appellate court reviews de novo." *State v. Small*, 10th Dist. Franklin No. 16AP-497, 2018-Ohio-757, ¶20.

  - Statutory Interpretation: When an appellate court must interpret and apply statutory provisions, its standard of review is de novo." *State v. Donaldson*, 11th Dist. Geauga No. 2015-G-0022, 2015-Ohio-5064, ¶11.

- Caution
  - Jail Time Credit: Prior to the enactment of R.C. 2929.19(B)(2)(g)(iii), motions to correct errors made in calculating jail-time credit filed outside the time allowed for direct appeal were barred by the doctrine of res judicata. Now, even if no appeal is pursued, a defendant may contest the trial court's calculation in a post-judgment motion. *See, e.g., State v. Weideman*, 11th Dist. Portage No. 2017-P-0059, 2018-Ohio-3108, ¶15.

  - Expungement: Generally, a decision on a motion to expunge is reviewed for an abuse of discretion. *State v. Talameh*, 11th Dist. Portage No. 2011-P-0074, 2012-Ohio-4205, ¶20. However, the preliminary determination as to whether the statutory eligibility requirements for expungement apply is a question of law reviewed de novo. *State v. Potts*, 11th Dist. Trumbull No. 2017-T-0089, 2018-Ohio-2074, ¶15, citing *State v. Futrall*, 123 Ohio St.3d 498, 2009-Ohio-5590, ¶6.

II. Abuse of Discretion

- General Principles
  - An abuse of discretion is the trial court's failure to exercise sound, reasonable, and legal decision-making. *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary*.

  - "A reviewing court must be deferential in considering whether a lower court abused its discretion: 'It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments.'" *Westlake Civ. Serv. Comm. v. Pietrick*, 142 Ohio St.3d 495, 2015-Ohio-961, ¶36, quoting *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶14.

- Example - Continuance
  - Granting or denying a motion to continue is a matter entrusted to the broad, sound discretion of the trial judge, and the decision must not be reversed absent an abuse of that discretion. *State v. Unger*, 67 Ohio St.2d 65, 67 (1981).

- Caution – Definition of "Abuse of Discretion"
  - "My purpose in writing separately is frankly to declare war against one of the most unfortunate formulations—if not the most unfortunate formulation—to appear in Ohio appellate jurisprudence: 'The term "abuse of discretion" connotes more than an error of law or of judgment.' * * * I am not aware of any Ohio appellate decisions, and I hope I never become aware of any, in which it is declared, as part of the *holding*, that a trial court may, in the exercise of its discretion, commit an error of law." *EnQuipTech. Group, Inc. v. Tycon Technoglass, S.R.L.*, 2d Dist. Greene No. 2009 CA 42, 2010-Ohio-28, ¶123-124, ¶132 (Fain, J., concurring) (critiquing *State v. Adams*, 62 Ohio St.2d 151, 157 (1980) and *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983)).

- Caution - Hearsay

  - "Although we apply an abuse of discretion standard to evidentiary rulings on matters such as relevancy and the admission of expert testimony, the trial court does not have discretion to admit hearsay 'except as otherwise provided by the Constitution of The United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with the rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.' Evid. R. 802. Therefore, we

apply a de novo review to determine whether the testimony here constitutes hearsay or non-hearsay." *Jack F. Neff Sand & Gravel, Inc. v. Great Lakes Crushing, Ltd.*, 11th Dist. Lake No. 2012-L-145, 2014-Ohio-2875, ¶23.

- But see the discrepancy found in *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, ¶97, where the Ohio Supreme Court states: "Ordinarily, we review a trial court's hearsay ruling for an abuse of discretion." The *McKelton* Court relies on *State v. Hymore*, 9 Ohio St.2d 122, 128 (1967) for this proposition. *Hymore*, however, does not specifically address hearsay evidence and states generally that "[t]he trial court has broad discretion in the admission and exclusion of evidence[.]"

III. Sufficiency vs. Manifest Weight

- General Principle: "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

- Sufficiency
  - "Sufficiency" is a" term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. * * * In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Id.*, quoting *Black's Law Dictionary*.

- Manifest Weight
  - "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" *Id.* at 387, quoting *Black's Law Dictionary*.

  - "In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶21.

IV. Miscellaneous

- Plain Error

  - Crim.R. 52(B): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

    - To constitute plain error, an error must be an obvious deviation from a legal rule that affected substantial rights, i.e., affected the outcome. The defendant has the burden of demonstrating plain error by proving the outcome would have been different absent the error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, ¶22; *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶17.

  - Merger: When a defendant fails to seek merger of his convictions as allied offenses of similar import, appellate review is limited to correcting plain error. A defendant will always be prejudiced by a failure to merge allied offenses, even when the sentences are ordered to be served concurrently, by having more convictions than are authorized by law. To establish plain error, therefore, the appellant must demonstrate a reasonable probability that he has, in fact, been convicted of allied offenses of similar import. *Rogers* at ¶22, ¶25; *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

- Constitutional Challenges

  - The court of appeals has discretion whether to entertain a constitutional challenge for the first time on appeal. *State v. Weaver*, 11th Dist. Trumbull No. 2013-T-0066, 2014-Ohio-1371, ¶11; *State v. Awan*, 22 Ohio St.3d 120 (1986).

  - "Even where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *In re M.D.*, 38 Ohio St.3d 149, 151 (1988).

- Felony Sentencing: "the record" vs. "the evidence"

  - R.C. 2953.08(G)(2): "The appellate court may increase, reduce, or otherwise modify a [felony sentence] or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is *not* whether the sentencing court abused its

discretion. The appellate court may take any action authorized by this division if it *clearly and convincingly finds* either of the following:

> (a) That *the record* does not support the sentencing court's findings under [R.C. 2929.13(B) or (D); R.C. 2929.14(B)(2)(e) or (C)(4); or R.C. 2929.20(I)], whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

- Note, however, the discrepancy in the following paraphrase from the Ohio Supreme Court: "[A]n 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." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶1 (emphasis added).

- See also the following issue currently pending before the Ohio Supreme Court: "Does R.C. 2953.08(G)(2) allow a Court of Appeals to review the trial court's findings made pursuant to R.C. 2929.11 and 2929.12?" *State v. Gwynne*, 2017-1506; *State v. Jones*, 2018-0444.

- <u>Lesser-Included Offenses</u>: in need of clarification

  - At the outset of *State v. Wine*, the Ohio Supreme Court states that whether to include lesser-included offense jury instructions "lies within the discretion of the trial court and depends on whether the evidence presented could reasonably support a jury finding of guilt on a particular charge." 140 Ohio St.3d 409, 2014-Ohio-3948, ¶1.

  - The Court, later in the opinion, held that the trial court "*must* give an instruction on a lesser included offense if under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense." *Id.* at ¶34.

  - When the trial court "must," the decision is not discretionary. Further, when the issue is one of sufficiency, it is a matter of law and must be reviewed de novo. *See State v. Bolden*, 11th Dist. Lake No. 2014-L-121, 2016-Ohio-4727, ¶86-93 (Cannon, J., concurring in judgment only).