

2026 Winter LPBA Conference
The Historic Lakeside Inn, Mount Dora, Florida
February 18 – 22, 2026 – Day 2

Presentation 3 – Jason Lorenzon

Biography, Slide Presentation, and Research Paper

Jason Lorenzon: Jason Lorenzon, J.D. is lead faculty for the Unmanned Aircraft Systems Flight Operations program and is an FAA Certificated Airline Transport Pilot with multi-engine and instrument ratings. He also is an FAA Certified Flight Instructor, Instruments and Multi-Engine. He was one of the first pilot/lawyers to receive the Remote Pilot In Command sUAV FAA Certificate in Ohio. Mr. Lorenzon is a Board-Certified Specialist in Aviation Law, awarded by the Florida Bar in June 2021. He was also the recipient of the Outstanding Faculty Award from the Kent State College of Aeronautics and Engineering in 2021. Mr. Lorenzon serves as a Safety Lead for the FAA Safety Team program. The National Association of Flight Instructors has designated Mr. Lorenzon as a Master Certified Flight Instructor for the second time in February 2023.

Mr. Lorenzon's first passion was always aviation. When his parents would not let him achieve his dream of becoming a pilot, he would sneak to the Windsor Airport as a teenager and by the age of eighteen he received his Canadian Private Pilot's "License." As only one college in Canada offered an aviation degree, Mr. Lorenzon followed his other passion of Political Science and Music at the University of Western Ontario. While there, he even petitioned unsuccessfully, for an Aviation Program. During his undergraduate years, he interned with the Ontario Minister of Transportation, the Honorable Bill Wrye. He was awarded two degrees in 1995, a Bachelor of Arts in Political Science and a Bachelor of Music (with distinction). Mr. Lorenzon continued his graduate studies at the Cleveland Institute of Music.

Mr. Lorenzon is a graduate of the Cleveland State University Marshall College of Law and his Bar admissions include the State of Ohio, State of Florida, and the United States District Court for the Northern District of Ohio, Southern District of Ohio, Middle District of Florida, Southern District of Florida, and the Sixth Circuit Court Circuit of Appeals. While he attended Cleveland State, he worked full time and was managing editor of the Journal of Law and Health.

When he can, Mr. Lorenzon generously volunteers his services to the community, and was honored for his work in foreclosure defense, when he received the "Volunteer of the Year for the Community Legal Services of Akron Award." Additionally, in 2010, he was awarded the Community Service Award for Attorneys 40 & Under for District 11 by the Ohio State Bar Foundation and he was named a Rising Star by Ohio Super Lawyers for the area of immigration for 2011. He serves on the Aviation Law Committee and the Aviation Law Certification Committee of the Florida Bar. Mr. Lorenzon served as chair of the Aviation Law Committee of Ohio State Bar Association from 2016-2018 and then from 2021-2023.

Currently, Mr. Lorenzon is currently an Associate Professor of Aeronautics. He recently served as Coordinator of the Aeronautics Program for the College of Aeronautics and Engineering at Kent State University until he was promoted to tenure track faculty position. He oversaw six undergraduate degree programs, and six minors. He teaches Aviation Law, Aviation Security, and Policy and regularly instructs as a Multi Engine Instructor for PROP majors at the Kent State Airport. He serves as Senior Attorney at Gertsburg Licata, LPA in Cleveland Ohio where he focuses his law practice on aviation law. He regularly flies a Diamond 40NG aircraft with his wife and his children who are all FAA Certificated Pilots.

Navigating the Skies: Drone Law

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Assistant Professor Aeronautics, Kent State University
Senior Attorney, Gertsburg Licata LPA



LPBA Winter Conference
Mt. Dora, Florida
Friday February 20, 2026



Interactive Questions

WHAT IS A DRONE?

WHAT IS A UAS?

WHAT IS A UAV?





Sources of Law

14 CFR 107 (ecfr.gov)

Hobbyists - The Recreational UAS Safety Test (TRUST)

AC-107-2A (Most Current Advisory Circular) (02/01/21 - *Editorial Version Update 05/25/22*)

Administrator v. Pirker, Docket No. CP-217(FAA March 6, 2014)
(paper airplane is not an aircraft)

Huerta v. Pirker, 2014 WL 8095629 (NTSB 2014)
(Drone for personal use is an aircraft, see 14 CFR 1.1 definition of aircraft)

Huerta v. Haughwout, No. 3:16-cv-358 (JAM), 2016 WL 3919799 (D. Conn. July 18, 2016)

Sources of Law Continued

FAA Modernization and Reform Act of 2012, P.L. 112-95 §§ 331-336 (codified at 49 U.S.C. § 40101 note)

49 U.S.C. § 44807 authorizes the FAA to permit the development, testing, and limited operational deployment of unmanned aircraft systems through discretionary approvals when the Administrator determines such activities can be conducted safely and are consistent with the public interest.

Part 108- almost 800 pages: In development (NPRM) *only law before December 31, 2025 can be tested on this exam.

14 CFR 1.1, 43, 47, 48, 71, 73, 89, 91, 93, 99, 107

14 CFR 1.1 Commercial Operator means a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375 of this title. Where it is doubtful that an operation is for "compensation or hire", the test applied is whether the carriage by air is merely incidental to the person's other business or is, in itself, a major enterprise for profit.

Comparison UAS Operational Authorities

49 U.S.C. § 44807 - FAA Discretionary Authority (Public Aircraft / R&D)
Applies to government entities, public universities, and other qualifying operators conducting UAS research, development, testing, or limited operational use. Operations are authorized through FAA discretion (often via COAs or similar approvals) and are evaluated case-by-case based on safety and public interest, with significant deference to the Administrator.

49 U.S.C. § 44809 - Recreational Operations Exception
Applies to hobbyists and model aircraft operators flying strictly for recreational purposes. Operations are permitted only if statutory conditions are met, including adherence to community-based organization safety guidelines, airspace authorization where required, and compliance with FAA rules such as Remote ID. This is a conditional statutory exception, not a right.

14 C.F.R. Part 107 - Small UAS Rule (Civil / Commercial Operations)
Applies to civil small UAS operations conducted for non-recreational purposes. Establishes a comprehensive regulatory framework including certification, operational limits, and waiver authority. Unlike §§ 44807 and 44809, Part 107 creates a standardized regulatory regime rather than discretionary or exception-based authority.

Definitions

- **14 CFR 1.1**
  - ***Aircraft*** means a device that is used or intended to be used for flight in the air.
  - ***Small unmanned aircraft*** means an unmanned aircraft weighing less than 55 pounds on takeoff, including everything that is on board or otherwise attached to the aircraft.
  - ***Small unmanned aircraft system (small UAS)*** means a small unmanned aircraft and its associated elements (including communication links and the components that control the small unmanned aircraft) that are required for the safe and efficient operation of the small unmanned aircraft in the national airspace system.

Confluence of Defense and Civil Stakeholders 2006-2010

Definitions Continued



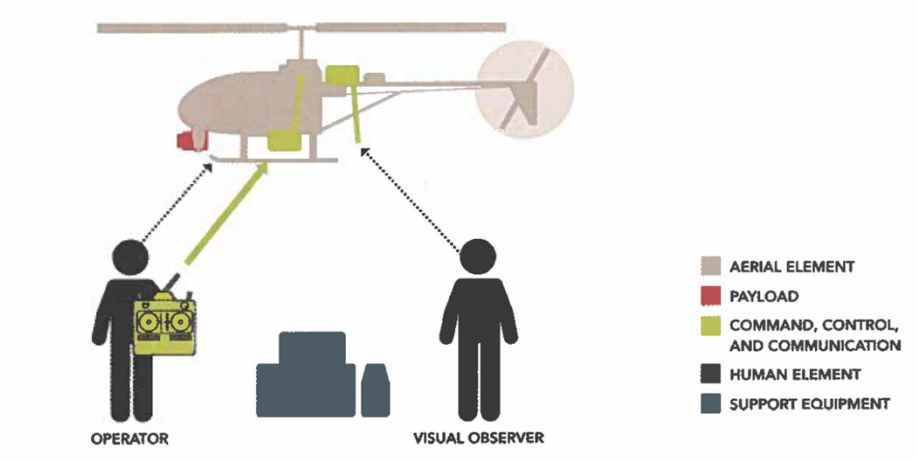
Industry and Regulatory

- COTS- "Commercial Off the Shelf"
  - Hobby; purpose is recreation
  - sUAS
  - MAV- Micro Aerial Vehicle

Popular Culture

- Drone- anything that flies without human intervention on board

UAS



Source: *Small Unmanned Aircraft Systems Guide*, Terwilliger et al., (2017)

Aerial Element

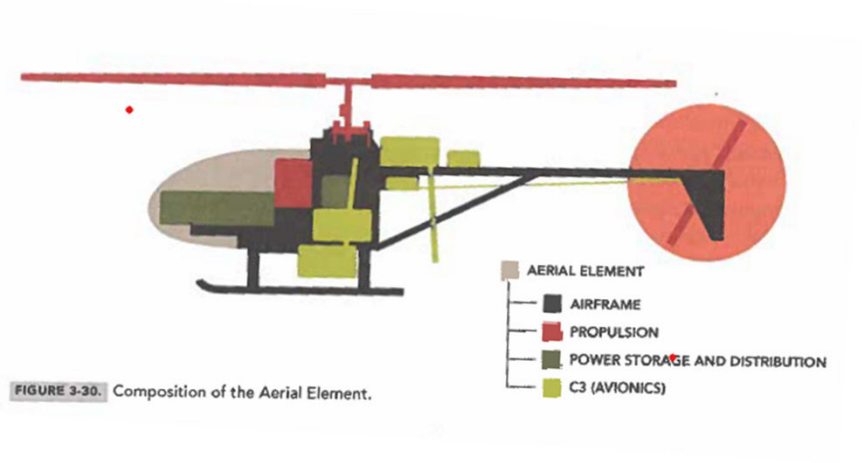


FIGURE 3-30. Composition of the Aerial Element.

Source: *Small Unmanned Aircraft Systems Guide*, Terwilliger et al., (2017)

14 CFR Part 107-sUAS Regulations

📌 Overview

✅ Governs commercial operations of drones weighing less than 55 lbs.

✅ Operators must follow FAA regulations to ensure safe and legal drone use.

📌 Key Requirements

✅ Remote Pilot Certificate – Pass FAA's Part 107 exam.

✅ Operational Limits:

Max altitude: 400 feet AGL (or within 400 feet of a structure).
Max speed: 100 mph (87 knots).



14 CFR Part 107 – sUAS Regulations

Daytime & night operations with anti-collision lights.

✅ Visual Line of Sight (VLOS) – Must maintain unaided VLOS.

✅ No operations over people or moving vehicles (unless under specific waivers).

✅ Airspace Authorization – Required for Class B, C, D, and E (surface) airspace.

✅ No careless or reckless operations – Endangering people/property is prohibited.

📌 Waivers & Exceptions

Some restrictions can be waived by applying to the FAA (e.g., night flying without lights, flights over people).



Remote ID 14 CFR Part 89

📌 **What is Remote ID?**

Remote Identification (Remote ID) is like a digital license plate for drones, allowing authorities and the public to identify drones in flight.

Required for most drones operating in U.S. airspace.

📌 **Key Requirements**

✅ **Standard Remote ID Drones – Must broadcast ID, location, altitude, velocity, and control station location.**

✅ **Broadcast Modules – Older drones can comply by attaching an FAA-approved module.**

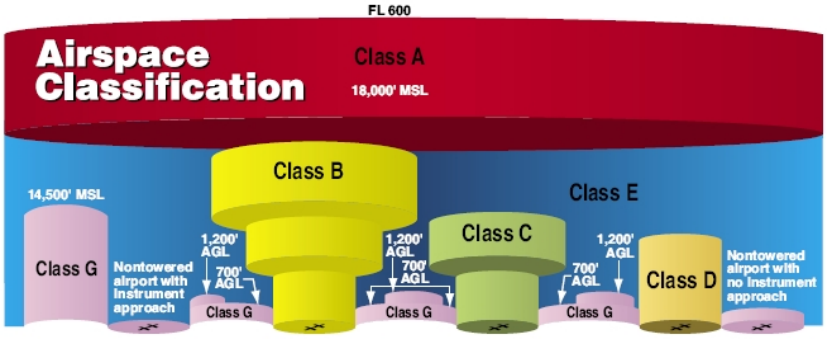
✅ **FAA-Recognized Identification Areas (FRIAs) – Drones without Remote ID can only fly in designated FRIAs.**

📌 **Who Must Comply?**

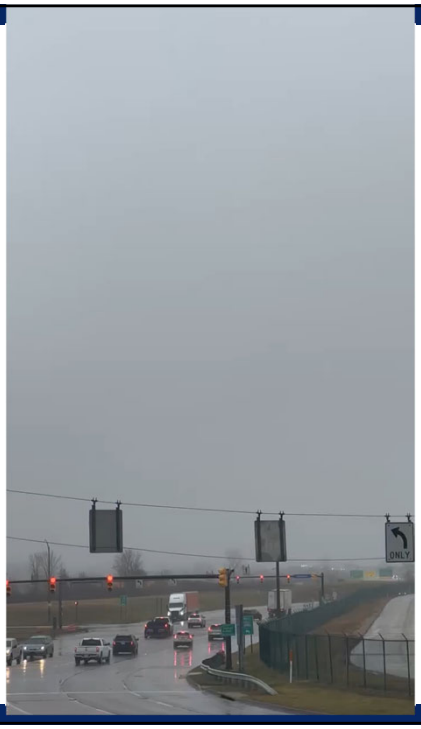
All drones required to be registered (0.55 lbs or more for recreational; all commercial drones).

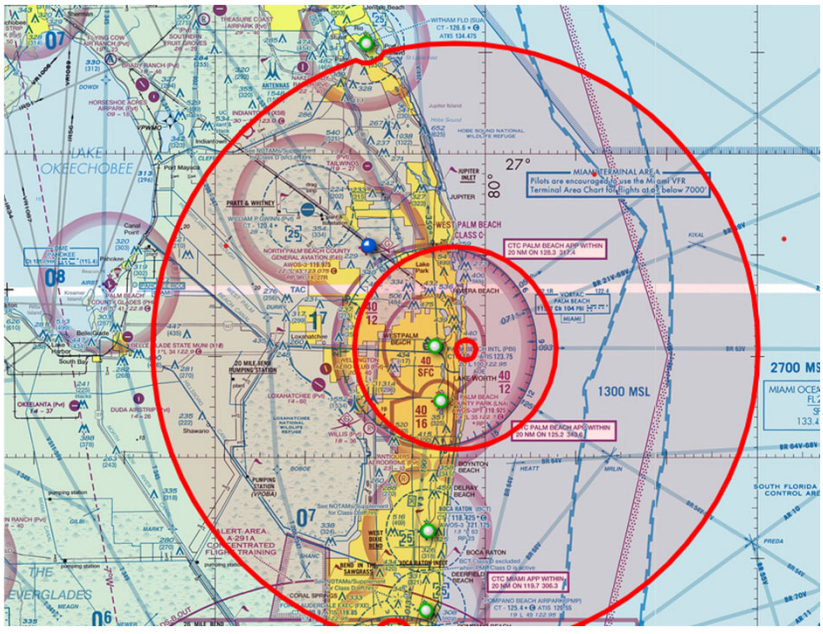
Recreational and commercial pilots unless flying in a FRIA.

Part 107 Airspace Requirements



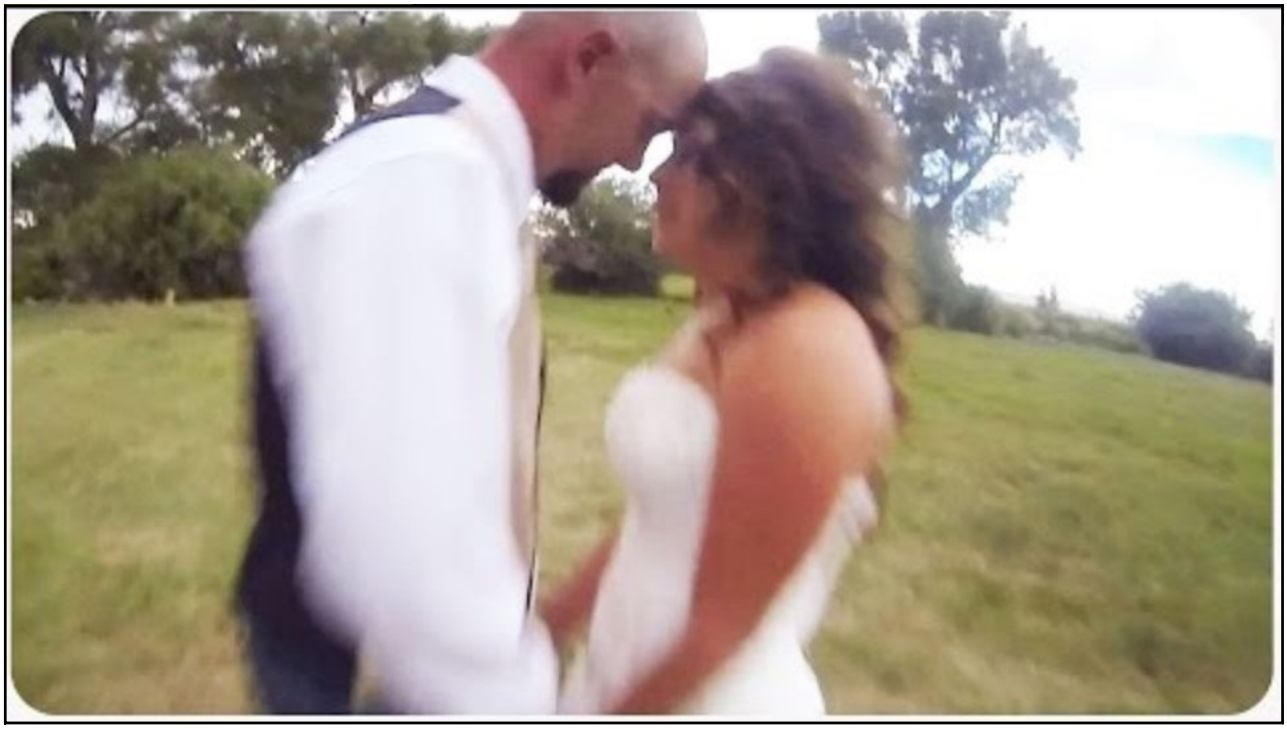
- **Operations in Class G are allowed without air traffic control authorization**
- **Operations in Class B, C, and D airspaces, and Class E airspace designated for airports, require authorization from ATC**
- **LAANC Low Altitude Authorization and Notification Capability**


ONLY


LAKE
OKEECHOBEE
THE
EVERGLADES
MIAMI TERMINAL AREA
Pilots are encouraged to use the Miami VFR
Terminal Area Chart for flights at or below 7000
CTC PALM BEACH APP WITHIN
20 NM ON 128.3
CTC PALM BEACH APP WITHIN
20 NM ON 125.2
CTC MIAMI APP WITHIN
20 NM ON 119.7
1300 MSL
2700 MS
TAC
07
08
06
25
17
27°
80°

Enforcement Actions

- **FAA Can Bring an Action under 49 USC 44709**
  - 49 USC 44703 “Certification” NOT LICENSURE
  - FAA ORDER 2150.3C – Compliance and Enforcement
  - CIVIL PENALTIES (NOTICE OF CIVIL PENALTY)
  - REVOCATION, MODIFICATION OR SUSPENSION (NPCA)
  - APPEAL TO THE NTSB
  - ALJ – 4 Judges
  - Appeal to the Full Board
  - District Court of Appeal
  - Dronavation 2024 (Heather Spangler)
  - https://youtu.be/vpPRGMOYNJs?si=ZASfjKKXZrLH9-TF





Florida Unmanned Aircraft Systems Act (2017) – *Fla. Stat. § 330.41*

State-level preemption of most local UAS regulation

- **Local ordinances allowed only for general conduct (nuisance, harassment, voyeurism)**
- **Prohibition on drone operations near critical infrastructure with escalating penalties**
- **Prohibition on drone operations over or in contact with K–12 schools**

Florida Unmanned Aircraft Systems Act (2017) – *Fla. Stat. § 330.41*

- Florida Unmanned Aircraft Systems Act, Fla. Stat. § 330.41 (2017)
- Broad state preemption of local UAS regulation (§ 330.41(3))
- Local ordinances allowed only for general conduct (not UAS-specific)
- Prohibited interference with critical infrastructure (§ 330.41(4)(a)–(c))
- Prohibited operations over or in contact with K–12 schools (§ 330.411)
- Absolute ban on weaponized drones (§ 330.41(4)(d))

Florida UAS Law – Surveillance, Privacy & Government Use

- Freedom from Unwarranted Surveillance Act, Fla. Stat. § 934.50
- Law enforcement drone use requires warrant or statutory exception (§ 934.50(3))
- Civilian drone surveillance barred where reasonable expectation of privacy exists (§ 934.50(3))
- Private right of action: injunctions, damages, fees, punitive damages (§ 934.50(5))
- Government procurement and security restrictions (§ 934.50(7))

Federal Preemption Overlay & Issue Spotting

- FAA retains exclusive authority over airspace and flight safety (49 U.S.C. § 40103)
- States regulate police powers: privacy, property, land use, criminal law
- Florida statute expressly preempts local UAS regulation (§ 330.41(3))
- Conflict analysis: state police power vs. federal operational control
- Exam tip: identify purpose of regulation before preemption analysis



Florida & Federal Drone Case Law – Selected Decisions

MS Leisure Co. v. Demers, 2024 WL 4485754 (S.D. Fla. 2024)

Drone flights over private property; claims for trespass, nuisance, defamation, and violation of Fla. Stat. § 934.50

Rosaly v. Konecny, 346 So. 3d 630 (Fla. 4th DCA 2022)

Injunction against stalking based on repeated drone surveillance

Drone Nerds Franchising, LLC v. Childress, 2020 WL 10698613 (S.D. Fla. 2020)

Franchise, deceptive trade practices, and drone training disputes

Carolina Casualty Ins. Co. v. Condor Aerial, LLC, 2019 WL 13198718 (N.D. Fla. 2019)

Contract and insurance coverage issues involving drone manufacturer

Source: Timothy M. Ravich, *Unmanned Aircraft Systems—A State-by-State Review of Drone Law* (December, 2025)



AAM and UAM

- **Advanced Air Mobility**
  - NASA, FAA and Industry Initiative
    1. Develop and Air Transportation System
    2. Moves People and Cargo between
    3. Local, Regional and urban places previously not served or underserved by aviation
    4. Using REVOLUTIONARY AIRCRAFT

AAM Supports a wide range of passenger, cargo, and other operations within and between urban and rural environments

Traffic and commute times are increasing on the ground thereby creating a need for alternative modes of transportation

Cost of air platforms such as a traditional helicopter were expensive; introduction of UAS, technology and electronic propulsion decrease the cost of entry and operations



- **Urban Air Mobility**



An electric air taxi under development by U.S. startup Joby Aviation | TOYOTA MOTOR CORP. / VIA KYODO

- Focuses on the transition from the traditional management of air traffic management to the future passenger or cargo-carrying air transportation services within an urban environment

AAM/UAM

- **Who owns the airspace?**
- **Who has jurisdiction under 400 feet?**
- **Certification of the Aerial Vehicle?**
  - Look to Industry (FAA Appropriations Bill of 2018, 2024)
- **BVLOS ARC- then PART 108**
  - "The UAS BVLOS ARC will provide recommendations to the FAA for performance-based regulatory requirements to normalize safe, scalable, economically viable, and environmentally advantageous UAS BVLOS operations that are not under positive air traffic control (ATC)."

- **Concept of Operations AAM/UTM V 1.0**
- **Concept of Operations UAM V 1.0**
- **Concept of Operations UTM V. 2.0**

Beta, Joby, Wisk: Revolutionary?





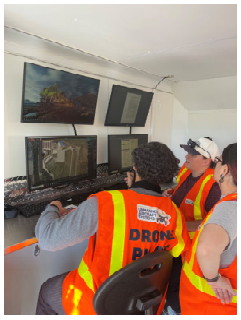


Pipistrel is the Lead: Evolutionary



First Certified Electric Aircraft



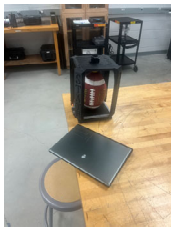



Center for Advanced Air Mobility
Command and Control Center


CENSYS








Center for Advanced Air Mobility
Command and Control Center



Thank You.





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QUESTIONS?

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Navigating the Skies: Legal Frontiers in Drone and Advanced Air Mobility Law

Support Materials

August 5, 2025

Ohio State Bar Association

Drone Dynamics: Unraveling the Legal Tapestry

JASON LORENZON

While cruising at an altitude of 8,000 feet above Cleveland Hopkins Airport in my single-engine aircraft, my wife suddenly alerted me, "Drone spotted at 11 o'clock!" We passed by a small, unmanned aircraft system (sUAS) resembling a Mavic Pro at our eye level. Fortunately, we didn't need to maneuver to avoid the drone. Nevertheless, it was alarming to witness an sUAS operating at such a high altitude, clearly violating multiple Federal Aviation Regulations. The incident left both pilots apprehensive, questioning why a drone was flying at 8,000 feet above a bustling airport. Upon reporting the sighting to Air Traffic Control (ATC), their nonchalant response was simply, "Lovely!"

The account I just shared is indeed real, occurring as my wife and I were returning from Detroit City Airport (KDET) on a Sunday afternoon following a family visit. Encountering a small drone at 8,000 feet within the National Airspace System (NAS) was certainly not what we expected for our leisurely Sunday travel excursion. What made the situation even more concerning was the inability to identify the drone in a pre-14 C.F.R. § 89 regulatory environment.[1]

Various terms like drone, UAS, unmanned, uncrewed, remotely piloted, aerial vehicle, platform, advanced air mobility (AAM), urban air mobility, model, personal air vehicle, air taxi, and toy have been employed to describe what many consider the most significant aviation revolution since the Jet Age.[2] AAM symbolizes the democratization of aviation. The policy objectives set by Congress in the 2012 FAA Modernization and Reform Act (FMRA) aimed to foster collaboration among NASA, the FAA, and industry to pioneer a groundbreaking initiative, developing an air transportation system capable of connecting people and goods across local, regional, and urban areas previously neglected or underserved by aviation by employing innovative aircraft.[3] AAM facilitates diverse passenger, cargo, and other operations within urban and rural settings.[4] Additionally, urban congestion stemming from automobile traffic has escalated commute times, underscoring the necessity and eventual demand for alternative transportation modes.[5] Moreover, traditional air platforms like helicopters or fixed-wing aircraft incur substantial costs.[6] The integration of UAS technology and electric propulsion mitigates entry and operational costs. Thus, understanding the overarching objective of advanced air mobility and its potential future outcomes is crucial. However, to gain a comprehensive understanding, let's first explore a brief historical overview of drone development.

A Concise Historical Overview

The concept of drones or unmanned aerial vehicles isn't a recent innovation. Throughout history, humans have harbored a fascination with defying gravity and taking flight, akin to birds soaring through the sky.[7] Various inventions such as kites, balloons, and spinning propellers have captured the imaginations of individuals—particularly youngsters—aspiring to explore the heavens.[8] The Academy of Model Aeronautics (AMA), a non-profit organization based in the United States, has long provided enthusiasts—also known as hobbyists—with the opportunity to fly small-scale model aircraft. These aircraft typically feature simple designs and are operated using a radio controller.

Significant technological advancements in drone technology have largely stemmed from military developments, often driven by the exigencies of armed conflicts which tragically result in loss of life. The utilization of drones in military applications—notably during events like

Desert Storm in 1991 and the Afghanistan Conflict following 9/11—played a pivotal role in the evolution of remotely piloted aircraft. Many of the applications and technological strides in drone technology owe their origins to military research and development efforts.

The Pirker Cases: FAA Litigating New Law into Existence

However, between 2007 and 2010 these technological advancements became accessible and affordable to consumers. The integration of cameras onto model aircraft, coupled with advancements in radio controller technology, led to the creation of more sophisticated drones. With materials readily available in local hobby stores or online and the addition of sensors and cameras, individuals could easily construct and operate their drones.[9] The turning point in the civilian drone legal arena came when Raphael Pirker faced an FAA civil penalty enforcement action for allegedly flying his drone improperly on the University of Virginia campus in Charlottesville, Va.[10]

Laws can originate from litigation or legislation. The FAA decided to pursue litigation in the *Pirker* case to create new law and have jurisdiction over drones. Given the rapid pace of technological advancement contrasted with the often-slow process of legislation, parties may opt for litigation when faced with unclear legal frameworks. In this notable case, the FAA encountered ambiguity regarding whether a model aircraft falls within the definition of an aircraft as per 14 C.F.R. § 1.1.[11] Consequently, the FAA levied a civil penalty of $10,000 against Pirker in a Notice of Proposed Civil Penalty.[12]

The accusation centered on Pirker's operation of a Ritewing Zephyr power glider equipped with a camera—allegedly for commercial purposes.[13] The FAA contended that Pirker, commissioned by a company, conducted aerial photography flights at dangerously low altitudes over various locations, including vehicles, buildings, populated areas, streets, and structures.[14] The FAA's order of assessment provided detailed accounts, citing instances where Pirker reportedly flew towards individuals, navigated through tunnels with vehicular traffic, passed under a crane, and approached an active heliport.[15] Based on these incidents, the FAA asserted that Pirker had violated 14 C.F.R. 91.13(a),[16] which prohibits operating an aircraft in a careless or reckless manner that endangers the life or property of others.

In this case, Pirker had several legal options available to him. Initially, he could have chosen to pay the civil penalty. Alternatively, he had the option to engage in an informal conference with the FAA attorney. Lastly, he could exercise his right to appeal the order directly to the National Transportation Safety Board (NTSB), where the case would be assigned to one of the administrative law judges based on the geographical location of the drone flight. In this instance, Pirker appealed and NTSB Judge Patrick Geraghty presided over the case.

Pirker filed a motion to dismiss, contending that the law did not confer valid regulatory authority to the FAA over model aircraft. The crux of the legal issue revolved around the definition of an aircraft under the regulatory framework. According to 14 C.F.R. 1.1,[17] an "aircraft" is defined as a device used or intended for flight in the air. Pirker argued that a model aircraft did not fall under this definition.

Judge Geraghty reasoned that the FAA, through its internal document called "policy notes," had distinguished between model aircraft and aircraft, thereby implying a separate classification within the agency. Furthermore, after deliberating on FAA Notice 07-1 and Advisory Circular AC91-57,[18] which outlined safety guidelines for unmanned aircraft, Judge Geraghty concluded that there was no enforceable regulation applicable to model aircraft categorizing them as UAS. Consequently, he granted the motion to dismiss, thereby terminating the civil penalty proceeding against Pirker.

Both the FAA and Pirker had the right to appeal to the full board of the NTSB as per 49 C.F.R. 821.47.[19] Unsatisfied with Judge Geraghty's decision, the FAA appealed to the full board. On Nov. 17, 2014, the full board issued a decision contrary to Judge Geraghty's ruling. They asserted that according to 49 U.S.C. 40102 (a)(6)[20] supplemented by 14 C.F.R. 1.1,[21] an aircraft encompasses any device used for flight in the air—including both manned and unmanned aircraft, irrespective of size. Hence, the FAA possessed jurisdiction to enforce regulations over all aircraft operating within the NAS.

Interestingly, Judge Geraghty noted that the FMRA[22] mandated the FAA to develop a plan for integrating civil UAS into the NAS. The FMRA prohibited the FAA from promulgating rules or regulations regarding model aircraft and commissioned the development of 14 C.F.R. 107.[23] Additionally, the act outlined the necessary steps for developing AAM, UAM, and UTS. The FAA was given 18 months by Congress to develop Part 107,[24] yet it wasn't promulgated until August 2016—nearly three years after the deadline.

It's a common occurrence for the FAA to miss deadlines set by Congress. Congressional appropriations acts often provide insight into future law and policy goals. For instance, the 2018 act directed the FAA to create a process for accepting risk-based consensus safety standards related to small UAS. Manufacturers adhering to these standards could self-certify their UAS. Additionally, the act outlined seven standards for recreational aircraft, known as model aircraft.

Part 107[25] primarily addresses small UAS, whereas Advanced Air Mobility encompasses broader applications. UAS are increasingly utilized in agriculture and pharmaceutical transport and are anticipated to play a role in urban transportation, potentially alleviating traffic congestion. However, consumer confidence in autonomous drone travel remains low, inhibiting demand. To build trust, safety measures must be firmly established.

New Surveillance Technologies for Drones

Key elements of AAM include operational rules outlined in 49 U.S.C. Chapter 448,[26] supplemented by 14 C.F.R. 48,[27] 89,[28] and 107.[29] Another crucial aspect is the development of a UTM to ensure safe UAS operation in the national airspace. Remote ID (RID), akin to a digital license plate for UAS, is integral to this system, providing vital information to regulatory authorities and enhancing safety.[30]

While Part 107[31] sets parameters for UAS operation, the evolution of RID into a comprehensive air traffic control system for UAS operations is underway. Recreational UAS operations are permitted without RID within FAA-recognized identification areas—designated geographical zones for drone flight.

Federal Preemption, State Law, Private Property, Tort Law, and the Fourth Amendment

Despite being primarily regulatory, UAS law has been shaped significantly by case law. Federal courts generally provide clear interpretations when federal law is at issue.[32] However, when conflicts arise between federal and state law—particularly in areas such as private property rights and tort law—clarity diminishes.

When legal matters straddle federal and state jurisdictions—such as those involving private property, torts, particularly trespass and nuisance—the doctrine of preemption becomes notably intricate,

leading to fluid court decisions that fail to provide a clear legal framework. Take, for instance, the *Haughwout* case, where drone operators affixed a handgun to a drone for target shooting[33] and attached a flamethrower to cook a turkey,[34] posting videos of these activities online.[35] These videos gained widespread attention, prompting an FAA investigation. The FAA issued an administrative subpoena to three members of the Haughwout family, demanding their cooperation in providing documentation regarding the UAS used. However, the Haughwouts refused to comply, citing their actions were conducted on their private property.

In their ruling, the court acknowledged the authority of state and local authorities in regulating activities within private properties. However, concerning navigable airspace defined in 49 U.S.C. §40103(b)[36] and supplemented by 14 C.F.R. §91.119,[37] jurisdiction does not extend to the airspace immediately above someone's property. The court deliberated on whether the FAA has jurisdiction once an object is aloft above one's home. The court skillfully refrained from providing a definitive answer but acknowledging the FAA's authority to issue an administrative subpoena.

Cases concerning the blurred boundaries of trespass, nuisance, and property law—often left to state and local courts—pose challenges in legal interpretation. Legal practitioners and lawmakers must discern the applicable areas of federal and state law, recognizing the potential divergence in outcomes. While some drone operators may assume drones can fly at any altitude above private property, these issues are subject to local laws and are unlikely to find resolution in federal courts. Notably, even landmark cases like *Causby*[38] failed to resolve trespass issues, focusing solely on Fifth Amendment takings violations.[39] For example, in *Long Lake Township v. Maxon,*[40] the property owner was accused of several property zoning violations. To ensure that the property owner was in compliance with the zoning ordinance, the township employed a third-party drone operator to survey the property. In a civil proceeding brought by the township against the property owner, the township relied on aerial photographs taken from a drone to commence its action against owners. The photographic evidence from the drone demonstrated that the owners violated zoning ordinance by using their property as an illegal salvage or junk yard. The landowners applied the Fourth Amendment.[41]

The court considered the great historical importance placed on freedom to use one's own property and the fact that consequences of this action could entail far more than the imposition of money damages. The drone operator was acting as an agent for the township[42]—a governmental entity[43]—and the township sought admission of aerial images of the owners' property that were taken without the owners' permission or any other specific legal authorization.[44] The township's drone surveillance of the owners' property intruded into the owners' reasonable expectation of privacy, implicating the Fourth Amendment.[45] This drone invasion was illegal without a warrant or a traditional exception to warrant requirements. Any reasonable person—in this case the landowner—would have expected low-altitude drone overflight to be trespassory and exceptional. The trial court denied a motion to suppress the evidence of the drone photography and this issue was taken up at the appellate court level.

The appellate court found that drones are more intrusive into a person's private space than would be an airplane overflight, for purposes of determining whether drone surveillance intrudes into persons' reasonable expectations of privacy so as to constitute a search under the Fourth Amendment.[46] Drones are vastly smaller and operate within little more than a football field's distance from the ground, and—unlike airplanes, which routinely fly overhead for purposes unrelated to intentionally-targeted surveillance—drone overflights are not as commonplace, as inadvertent, or as costly and are intrinsically more targeted in nature than airplanes and intrinsically much easier to deploy. Landowners are entitled to ownership of some airspace above their properties, such that intrusions into that airspace will constitute a trespass no different from an intrusion upon the land itself. The appellate court concluded that persons have a reasonable expectation of privacy in their property against drone surveillance and therefore a governmental entity seeking to conduct drone surveillance must obtain a warrant or satisfy a traditional exception to the warrant requirement.

This matter was appealed to the Michigan Supreme Court[47] which remanded it back to the appellate court. The Michigan Supreme Court held that a zoning matter was civil and not criminal, and therefore the Fourth Amendment right was inapplicable.[48]

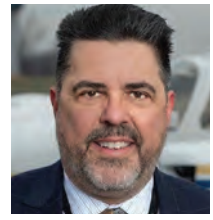
Other Influences of Drone Law

International law—particularly the influence of the International Civil Aviation Organization (ICAO)[49]—also impacts UAS regulation. European Union Aviation Safety Agency (EASA)[50] and other international civil aviation authorities have specifically called UAS operations remotely piloted aircraft systems. In Europe, technological advancements are being implemented rather quickly with air taxi services being promoted in Rome and Paris for the 2024 Olympics.

Conclusion: The Future

In the United States, the FAA appropriations acts of Congress, codified in the United States Code and supplemented by the FAA in the Federal Code of Regulations—to wit Chapter 14—are all happening quite rapidly. Sometimes even the U.S.C. may be in conflict with the C.F.R. largely due to the rapid technological advancement of the UAS domain. Other documents such as the Concept of Operations v 2.0 for Urban Air Mobility (2023),[51] the final report of the Unmanned Systems Beyond Visual Line of Site (BVLOS) Operations Aviation Rulemaking Committee,[52] and advisory circulars give us an idea of what the FAA is asking of the stakeholders. Yet these documents are advisory in nature and give a potential glimpse of where the law is heading, not where it is today. Today, technology is rapidly developing and as it gains public support and consumer demand, the laws and regulations will change—as they have since the Air Commerce Act of 1926.[53]

Ultimately, the trajectory of UAS law is influenced by technological advancements, public demand, and international developments. As UAS technology matures, establishes a record of demonstrated safety, and gains commercial viability, regulatory frameworks will evolve to support its integration into various sectors—including AAM, which will include flying taxis, cars, and a new transportation infrastructure that only science fiction has foretold. ⊙



Jason Lorenzon is an assistant professor teaching aeronautics at Kent State University. He is an FAA Part 107, ATP rated, certified flight instructor certificated pilot. He instructs multi-engine students and oversees the aviation law and policy minor. He practices law part-time with Gertsburg Licata LPA and is a Florida Bar board certified specialist in aviation law.

Endnotes

[1]See 14 C.F.R. § 89 – Remote Identification of Unmanned Aircraft.
[2]Elaine Chao, PRIORITIZING SAFETY IN THE DRONE REVOLUTION, https://www.elainechao.com/opinion-prioritizing-safety-in-the-drone-revolution/.
[3]FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95 (2012), available at https://www.govinfo.gov/app/details/PLAW-112publ95.
[4]*Id.*
[5]*Id.*
[6]*Id.*
[7]Brett Terwilliger et al, Small Unmanned Aircraft Systems Guide: Exploring Designs, Operations, Regulations and Economics (2017).
[8]Jason Lorenzon, Drone Law: Past, Present and Future (2023).
[9]*Id.*
[10]*Huerta v. Pirker*, 2014 WL 8095629 (NTSB 2014)
[11]14. C.F.R. § 1.1
[12]*Heurta v. Pirker.*
[13]*Id.*
[14]*Id.*
[15]*Id.*
[16]14 C.F.R. § 91.13(a). ***Aircraft operations for the purpose of air navigation.*** No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.
[17]See 14 C.F.R. § 1.1.
[18]Advisory circular 91-57C, https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_91-57C_FAA_Revised.pdf (last visited Feb 15, 2024).
[19]49 C.F.R. 821.47. Time within which to file notice of appeal. A party may appeal from a law judge's initial decision or appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 10 days after the date on which the oral initial decision was rendered or the written initial decision or appealable order was served (except as provided in § 821.57(a) with respect to emergency proceedings).
[20]49 U.S.C. § 40102 (a)(6) "aircraft" means any contrivance invented, used, or designed to navigate, or fly in, the air.
[21]14 C.F.R. § 1.1. *Unmanned aircraft* means an aircraft operated without the possibility of direct human intervention from within or on the aircraft
[22]FAA modernization and reform act of 2012 ..., https://www.govinfo.gov/content/pkg/CRPT-112hrpt381/pdf/CRPT-112hrpt381.pdf (last visited Feb 15, 2024).
[23]See 14 C.F.R. § 107.
[24]*Id.*
[25]*Id.*
[26]See 49 U.S.C. Ch. 448.
[27]See 14 C.F.R. § 48.
[28]See 14 C.F.R. § 89.
[29]See 14 C.F.R. § 107.
[30]*Brennan v. Dickson,* 45 F.4th (D.C. Cir. 2022). This case challenges the legality of Remote ID. Brennan challenged the validity of the Final Rule, and the petition for review was denied.
[31]*Id.*
[32]*Id.*
[33]Flying gun, YouTube (2015), https://www.youtube.com/watch?v=xqHrTtvFFIs (last visited Feb 15, 2024).
[34]Roasting the holiday Turkey, YouTube (2015), https://www.youtube.com/watch?v=lmD3rXUR1Tw&t=57s (last visited Feb 15, 2024).
[35]*Huerta v. Haughwout et al*, No. 3:16cv-358, 2016 WL 3919799 (D. Connecticut)
[36]See 49 U.S.C. §40103(b). Protecting individuals and property on the ground;
[37]See 14 C.F.R. § 91.119.
[38]*Causby v. United States,* 328 U.S. 256, 66 S. Ct. 1062, 90 L.Ed. 1206 (1946)
[39]*Id.*
[40]*Long Lake Twp. v. Maxon*, 336 Mich. App. 521, 970 N.W.2d 893 (2021), vacated and remanded, 509 Mich. 981, 973 N.W.2d 615 (2022)
[41]See U.S. Const. amend. IV.
[42]*Id.*
[43]Mich. Const. art. 1, § 11
[44]Mich. Comp. Laws Ann. § 259.322(3). A person shall not knowingly and intentionally operate an unmanned aircraft system to violate section 539j of the Michigan penal code, 1931 PA 328, MCL 750.539j, or to otherwise capture photographs, video, or audio recordings of an individual in a manner that would invade the individual's reasonable expectation of privacy.
[45]See U.S. Const. amend. IV.
[46]*Long Lake Twp. v. Maxon*, 336 Mich. App. 521, 970 N.W.2d 893 (2021), vacated and remanded, 509 Mich. 981, 973 N.W.2d 615 (2022)
[47]*Long Lake Twp. v. Maxon*, 509 Mich. 981, 973 N.W.2d 615, 616 (2022)
[48]*Id.*
[49]ICAO model UAS regulations, ICAO Model UAS Regulations, https://www.icao.int/safety/UA/Pages/ICAO-Model-UAS-Regulations.aspx (last visited Feb 15, 2024).
[50]Rules & standards, EASA (2022), https://www.easa.europa.eu/en/domains/drones-air-mobility/rules-standards (last visited Feb 15, 2024).
[51]Urban Air Mobility (UAM) concept of Operations 2.0, https://www.faa.gov/sites/faa.gov/files/Urban Air Mobility (UAM) Concept of Operations 2.0_0.pdf (last visited Feb 15, 2024).
[52]USA Banner, Advisory and Rulemaking Committees – Unmanned Aircraft Systems (UAS) Beyond Visual Line-of-Sight (BVLOS) Operations Aviation Rulemaking Committee (ARC) (2011), https://www.faa.gov/regulations_policies/rulemaking/committees/documents/index.cfm/committee/browse/committeeID/837 (last visited Feb 15, 2024).
[53]Air Commerce Act H. Rept. 69-1162 (May 1926). Interestingly this act came out specifically to instill consumer confidence in the new technologies. Barnstormers, Air Sports and Bessie Coleman, the first African-American Female Pilot who had to learn French and go to France to learn how to fly, was killed in an airplane accident as she was touring the United States in April 1926. The mechanic who was traveling with her left a tool that jammed one of the control surfaces. The Air Commerce Act provided that element of safety that was needed in the burgeoning aviation industry.

NAVIGATING FAA WAIVERS FOR OPERATIONS OVER PEOPLE AND MOVING VEHICLES: A CASE STUDY IN COMPLIANCE AND INNOVATION

Jason Lorenzon, Emily Lorenzon, Reilly Ferrie

Jason Lorenzon, Esq*. is a Board Certified Specialist in Aviation Law (Florida Bar) and a faculty member at Kent State University, where he focuses on aviation policy, UAS, and advanced air mobility (AAM) regulations. An ATP certificate holder and leader in the Advanced Air Mobility Policy and Regulation Initiative, he works to shape the legal frameworks for next-generation airspace management. Beyond his professional endeavors, he enjoys flying a Diamond DA40 NG and spending summers in Italy. He is a senior attorney at Gertsburg Licata LPA, Independence, Ohio.*

Emily Lorenzon *is a sophomore at Kent State University, majoring in Aerospace Engineering with a minor in Unmanned Aircraft Systems (UAS). She holds a Part 107 certificate and a student pilot certificate, with ambitions to contribute to the future of UAS technology as an engineer. Emily co-authors this article with her father, Jason Lorenzon, Esq., sharing a passion for innovation in aerospace.*

Reilly Ferrie *is a Certified Flight Instructor at Kent State University. He is an honors student working toward a Bachelor of Science in Aeronautics – Professional Pilot with minors in Aviation Law & Policy and Aviation Management. Reilly has been a part of award-winning research in Airport Environmental Interactions as well as UAS and AAM under Dr. I. Richmond Nettey and Dr. Jason Lorenzon, respectively. In his free time, Reilly volunteers at local events promoting aviation or study-abroad programs.*

A. The Role of Regulation in Advanced Air Mobility: Analyzing Steps Toward Safe Drone Integration

Drones are becoming a transformative element of global transportation infrastructure. Technological advancements now enable autonomous drone operations that serve critical functions such as disaster relief, medicine delivery, medical device transport to remote and inaccessible areas, logistics, and passenger transport. In the United States, the foundation for drone integration began with the FAA Modernization and Reform Act of 2012, P.L. 112-95. This legislation directed the Federal Aviation Administration (FAA) and NASA to collaborate on developing a framework for integrating unmanned aircraft systems (UAS) into the national airspace, paving the way for Advanced Air Mobility (AAM).

More than a decade later, progress includes the promulgation of 14 C.F.R. §89 (Remote Identification of Unmanned Aircraft), 14 C.F.R. §107 (Small Unmanned Aircraft Systems), and numerous advisory circulars. While these regulatory developments are significant, they represent incremental steps in addressing the complex challenges associated with democratizing aviation through AAM.

AAM is a dynamic concept involving innovative aircraft designed to transport people and goods, particularly in underserved regions. Proponents view it as a means to democratize aviation, offering new opportunities for mobility and commerce. However, the regulatory framework, along with tort and insurance law, aims to ensure that any transportation system developed adheres to the highest safety standards, protecting individuals and property from harm. Indeed, FAA regulations prioritize safeguarding the innocent bystander.

Industry leaders such as Joby, Archer, and Beta suggest that the era of flying taxis is imminent, heralding a future where these vehicles will proliferate in modern society. However, societal adoption of such transformative technology requires deliberate, staged progress. Much like human development, we must "crawl before we walk, and walk before we run." This article examines one critical regulatory step in this journey—enabling unmanned aircraft to operate safely over people and moving vehicles.

Currently, most drones are restricted to operations within the operator's visual line of sight (VLOS) and are generally prohibited from flying over individuals or moving vehicles. However, the FAA has introduced regulatory pathways to promote safe drone operations in these contexts. These pathways include specific rules outlined in 14 C.F.R. §107, Subpart D, which addresses operations over human beings, as well as the FAA's waiver process allowing for operational flexibility under controlled conditions.

Understanding the Regulatory Framework

The regulations under 14 C.F.R. §107, Subpart D, establish four categories of drone operations over people, each with its own requirements and risk mitigation strategies. The following chart provides an overview of these categories:

Category	Key Requirements	Aircraft Eligibility	Operational Limitations
Category 1	Aircraft weighs ≤ 0.55 pounds (including all attachments).	Not explicitly labeled for Category 1 but must meet weight and safety criteria.	Prohibited from sustained flight over open-air assemblies unless compliant with § 89.110 or § 89.115(a).
	No exposed rotating parts capable of causing lacerations.		
Category 2	Must use an aircraft listed in an FAA-accepted declaration of compliance for Category 2.	Designed to limit kinetic energy impact to ≤ 11 foot-pounds.	Prohibited from sustained flight over open-air assemblies unless compliant with § 89.110 or § 89.115(a).
	Aircraft must be labeled for Category 2.	No exposed rotating parts causing lacerations.	
		Free of safety defects.	
Category 3	Must use an aircraft listed in an FAA-accepted declaration of compliance for Category 3.	Designed to limit kinetic energy impact to ≤ 25 foot-pounds.	Prohibited over open-air assemblies.
	Aircraft must be labeled for Category 3.	No exposed rotating parts causing lacerations.	Allowed above humans only if: within closed/restricted-access areas with notice, or humans are protected by structures/vehicles.
		Free of safety defects.	
Category 4	Aircraft must have an airworthiness certificate issued under Part 21.	Airworthiness certificate under Part 21.	Prohibited from sustained flight over open-air assemblies unless compliant with § 89.110 or § 89.115(a).
	Operate per manufacturer's Flight Manual and Administrator rules.	Regular maintenance per manufacturer/FAA-approved instructions.	
		Records of maintenance and compliance must be kept and transferred with ownership.	

The FAA's regulatory requirements for UAS operations over people (OOP) and moving vehicles (OOMV) include filing a Declaration of Compliance, mitigating kinetic energy impacts, ensuring no exposed rotating parts, and, in some cases, obtaining an airworthiness certificate. While these measures prioritize safety, they also contribute to public confusion regarding UAS operations. Such regulations serve as pathways for permitting drone flights over people and vehicles but impose significant limitations to minimize risk to nonparticipating parties, primarily the general public.

Despite the potential for broader use, regulatory hurdles remain steep. To date, only one UAS, the senseFly eBee, has been approved under Category 3 of 14 C.F.R. §107, Subpart D, and no drones have been approved under Categories 2 or 4. This 2021 regulation was envisioned as a streamlined method for operators to conduct OOP without seeking individual waivers. However, compliance costs can range from hundreds of thousands to millions of dollars. For instance, many drones must be equipped with ASTM-certified parachutes, signifying adherence to rigorous standards set by ASTM International, a global organization that develops consensus standards for materials and systems. These costs, while promoting safety, are often prohibitive for smaller operators, leaving the waiver process as a practical alternative.

B. The Summer Project: Kent State's Team's Journey Through the Waiver Process

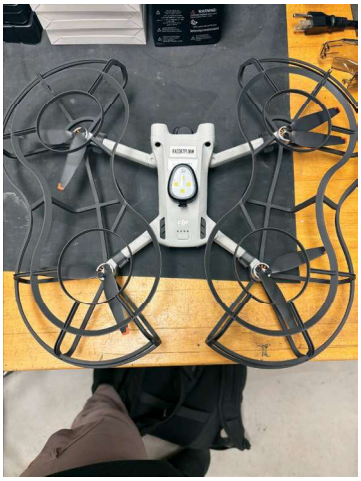
In Summer 2024, I led a research team composed of undergraduate and graduate students in an effort to secure FAA waivers for OOP and OOMV operations. This team, spearheaded by my youngest daughter, Emily Lorenzon, an aerospace engineering student, and supported by students like Reilly Ferrie, explored the intricacies of Part 107 regulations and unwritten guidelines critical to obtaining approvals. 14 C.F.R. §§107.39, 107.145. In 2019, 3329 waivers were filed but only 26 were approved.[1]

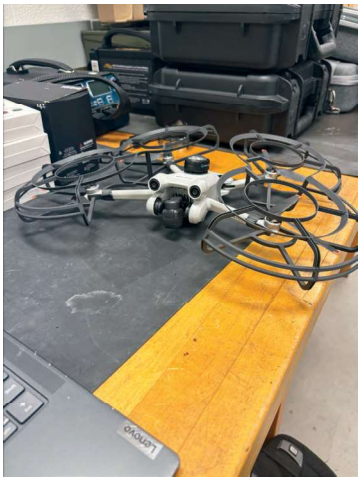
The waiver process required navigating detailed regulatory standards and aligning our application with FAA expectations. For example, drones exceeding 0.88 pounds must be equipped with ASTM-certified parachutes. However, by examining symposium discussions and waiver trend data, our team identified key strategies to enhance our application's success. [2]

Key Application Strategies

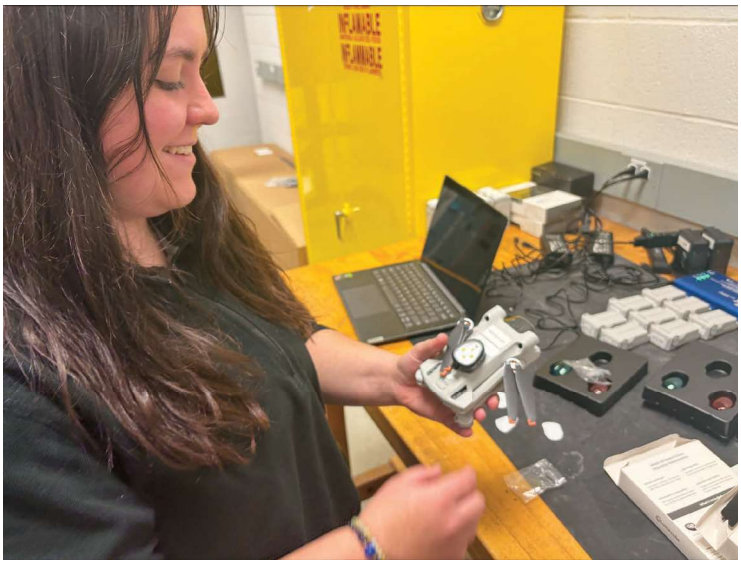
1. **Drone Specifications and Safety Equipment**

   Each waiver application detailed the specific drones used, such as





Drone with Anti Collision Light and Prop Guards.



Emily Lorenzon preparing the Drones for flight OOP and OOMV.



Emily working in the Drone Lab at Kent State University.

DJI Mini 3 Pro models. Because these drones weigh less than 0.88 pounds, parachutes were unnecessary, but we equipped them with propeller guards to mitigate risks. Anti-collision lighting was also installed to ensure visibility from at least three statute miles, meeting FAA standards for aircraft separation.

2. **Operational Parameters and Training**

   We outlined operational parameters, specifying that drones would not operate at their maximum or minimum speeds to reduce the risk of injury. Detailed training plans for personnel were included, along with descriptions of data collection methods and drone use cases.

3. **Lost-Link and Obstacle Avoidance**

   FAA guidelines emphasize robust lost-link procedures. Our application highlighted the Mini 3 Pro's return-to-home feature, ensuring controlled recovery in case of signal loss. Additionally, the drones' obstacle avoidance systems were configured for maximum sensitivity to minimize collision risks.

4. **Weather Minimums and Visibility Standards**

   Leveraging FAA trend data, we proposed conservative weather minimums, requiring five miles of visibility—two miles beyond Part 107 standards. Reliable weather data sources, including 1-800-WxBrief, were cited to demonstrate our commitment to safe operations.

5. **Comprehensive Documentation**

   The application included manufacturer handbooks and detailed safety protocols, showcasing our understanding of operational risks and mitigations. This level of documentation aligned with trends observed in successful FAA waiver approvals.

Achieving Approval

In mid-October, the FAA granted us waivers for OOP and OOMV operations across all drones under 55 pounds. While drones exceeding 0.88 pounds must be equipped with ASTM-certified parachutes, the approval applied as a "blanket waiver," allowing flexibility across our drone fleet. This success underscored the importance of thorough preparation and alignment with FAA priorities.

Conclusion

The complexities of FAA waiver processes highlight both the challenges and opportunities in advancing UAS operations. While compliance costs and regulatory hurdles may limit smaller operators, the waiver process offers a pathway for innovation within a safe and controlled framework. By leveraging data-driven insights and adhering to stringent safety standards, our team demonstrated how operators can successfully navigate these regulations, contributing to the broader integration of drones into the national airspace.

Endnotes

1 Federal Aviation Administration, *Get Your Drone Business Flying: Tips and Best Practices from FAA Insiders for Getting to YES for Your Part 107 Operational Approval* 4 (2019), https://www.faa.gov/sites/faa.gov/files/uas/resources/events_calendar/archive/Get_Your_Drone_Business_Flying_Tips_and_Best_Practices_from_FAA_Insiders_for_Getting_to_YES_for_Your_Part_107_Operational_Approv.pdf.

2 Federal Aviation Administration, *Trend Analysis: Operations Over People Waivers Under Part 107* (2023), https://www.faa.gov/sites/faa.gov/files/uas/commercial_operators/part_107_waivers/waiver_trend_analysis/Trend_Analysis_OOP.pdf.

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[Cite as *State v. Stevens*, 2023-Ohio-889.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MELANNIS L. STEVENS Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Andrew J. King, J. Case No. 2022CA0017 O P I N I O N
CHARACTER OF PROCEEDINGS:	Appeal from the Coshocton County Court of Common Pleas, Case No. 21-CR-0054
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 17, 2023
APPEARANCES:	
For Plaintiff-Appellee JASON GIVEN Coshocton County Prosecuting Attorney BENJAMIN E. HALL Assistant Prosecuting Attorney 318 Chestnut Street Coshocton, Ohio 43812	For Defendant-Appellant GEORGE URBAN 116 Cleveland Avenue, N.W. Suite #808 Canton, Ohio 44702

Hoffman, P.J.

{¶1} Defendant-appellant Melannis Stevens appeals the judgment entered by the Coshocton County Common Pleas Court convicting her following her pleas of no contest to two counts of failure to stop after an accident (R.C. 4549.02(A)(2),(B)(2)(a)), two counts of vehicular assault (R.C. 2903.08(A)(2)(b), (C)(2)), and one count of tampering with evidence (R.C. 2921.12(A)(2),(B)), and sentencing her to an aggregate prison term of eighty-four months. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 27, 2021, a motor vehicle accident occurred on State Route 751 in Coshocton County, near the intersection with Township Road 250. The victims were traveling northbound on State Route 751 when they were struck by a dark-colored sedan travelling southbound, which crossed the center line of travel. The victims suffered life-threatening injuries. The dark-colored sedan fled the scene of the accident.

{¶3} Police officers investigating the accident collected debris from the scene. After examining the paint transfer from the vehicles involved in the crash, they determined the dark-colored sedan was a black 2016-2018 Nissan Altima.

{¶4} A data base search of the Coshocton County Sheriff's Department revealed deputies had contact with a 2016-2018 Nissan Altima about a month prior to the accident. Appellant was the registered owner of the vehicle. Detective Seth Andrews learned Appellant lived at 7705 Euga Road in Guernsey County, near the scene of the accident.

{¶5} Det. Andrews decided to fly a drone over the property encompassing 7705 Euga Road out of concern the Nissan was being scrapped at the location in order to hide evidence. On March 30, 2021, Det. Andrews traveled to a location adjacent to the 7705

Euga Road address, approximately 200 yards north of the primary driveway to the property. The day was clear and sunny.

{¶6} Det. Andrews launched a DJI Mavic 2 Enterprise drone in an effort to find the black Nissan. The detective had two days of training and had logged approximately 1,600 minutes of flight time with the specific drone used on March 30. The drone had a camera similar to the type of camera found on a cell phone. The maximum altitude for the drone is 400 feet, or Class G airspace, as designated by the FAA.

{¶7} Det. Andrews preset the drone to a maximum altitude of 396 feet. He operated the drone over the property at altitudes between 300 and 396 feet, taking pictures of the property. The pictures showed several acres of property, partially wooded, with two driveways. The property included a two-story house, a garage, and a number of vehicles in various stages of disrepair near a fire pit. The photos showed a black Nissan Altima in the wooded area behind the home and behind the fire pit, approximately 280 feet from the residence and 80 feet from a neighboring parcel of real estate. A closeup shot of the vehicle showed it was missing a door, and other parts were on the ground near the vehicle and near a burn pile. The vehicle was not covered, and the trees were defoliated because it was still winter, providing no coverage for the vehicle from the air. The information obtained from the drone search was used to obtain a search warrant for the property.

{¶8} Appellant was indicted by the Coshocton County Grand Jury on two counts of failure to stop at the scene of an accident, two counts of vehicular assault, and one count of tampering with evidence. The two charges of failure to stop at the scene of an accident were indicted as felonies rather than misdemeanors because the indictment

included additional allegations the accident resulted in "serious physical harm to a person."

{¶9} Appellant filed a motion to suppress, arguing the warrantless drone search of the property was unconstitutional. Following a hearing, the trial court overruled the motion, finding the vehicle was not within the curtilage of the home and was therefore subject to the "open fields" doctrine, in which Appellant did not have a reasonable expectation of privacy. The trial court held even if the open fields doctrine did not apply in this case, the search was not unconstitutional because the officer was operating the drone in public navigable airspace in a nonintrusive manner, which does not violate the Fourth Amendment.

{¶10} Appellant entered pleas of no contest to all five counts of the indictment, and was convicted. The trial court sentenced Appellant to an aggregate term of incarceration of eighty-four months. It is from the May 24, 2022 judgment of the trial court Appellant prosecutes her appeal, assigning as error:

I. THE TRIAL COURT ERRED IN ACCEPTING A NO CONTEST PLEA WITHOUT A PROPER RECITATION OF THE FACTS WHEN THE INDICTMENT FAILED TO LIST THE SPECIFIC INJURIES THAT ELEVATED THEM TO "SERIOUS INJURIES."

II. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION TO SUPPRESS.

I.

{¶11} In her first assignment of error, Appellant argues the trial court erred in finding her guilty upon her pleas of no contest to failure to stop at the scene of an accident as felony offenses without an explanation of the evidence supporting the allegations in the indictment the victims suffered serious physical harm.

{¶12} Pursuant to Crim.R. 11(B)(2), "[t]he plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint * * *." The no contest plea constitutes a stipulation the judge may make a finding of guilty or not guilty from the explanation of circumstances. R.C. 2937.07. However, in order to convict a defendant who has entered a no contest plea, the State must provide an explanation of circumstances to maintain the offense. *State v. Puterbaugh*, 142 Ohio App.3d 185, 755 N.E.2d 359, 361–62 (2001) "[The] explanation is sufficient if it supports all the essential elements of the offense." *Id*. at 189. Therefore, a defendant who pleads no contest should be found not guilty where the State's explanation of the circumstances does not establish all of the elements of the offense. *Id*.

{¶13} In the instant case, Appellant entered a plea of no contest to each individual count of the indictment. Following the entry of the no contest pleas, the following colloquy occurred:

> THE COURT: Mr. Meranda, on behalf of your client, do you waive further presentation of any evidence with regard to Counts 1 through 5 in Case 21-CR-0054 and Count 1 in Case 21-CR-0085?
>
> MR. MERANDA: I would, Your Honor.

THE COURT: Thank you. And are you doing that with the consent of your client?

MR. MERANDA: Yes, Your Honor.

THE COURT: And, Ms. Stevens, is that correct? You consent to the waiver – the further presentation of evidence regarding all six charges?

THE DEFENDANT: Yes, sir.

{¶14} Tr. (Plea Hrg.) 16.

{¶15} We find Appellant, having waived the State's presentation of evidence, has waived any error in the failure of the State to present a detailed explanation of the circumstances supporting the allegation of serious physical harm to the victims. Appellant argues in her brief her waiver was insufficient, and the court erred when it did not require the State to proffer some support for the serious physical harm allegation. Appellant's Brief, p. 6. Appellant cites no legal authority for this proposition, and we decline to adopt a rule requiring the trial court to force the State to proffer an explanation of the circumstances after the defendant has waived such proffer. We find Appellant's plea of no contest to the indictment, which included allegations of serious physical harm, coupled with her waiver of further explanation of the evidence by the prosecutor, was sufficient to allow the trial court to convict her of all charges.

{¶16} The first assignment of error is overruled.

II.

{¶17} In her second assignment of error, Appellant argues the trial court erred in overruling her motion to suppress. She argues the warrantless search of the property by

the drone did not fall within any recognized exception to the requirement of a warrant, and she further argues Det. Andrews was not federally licensed to fly the drone.

{¶18} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. *See State v. Dunlap*, 73 Ohio St.3d 308,314, 1995-Ohio-243, 652 N.E.2d 988; *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. *See Burnside, supra; Dunlap, supra; State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1(4th Dist. 1998); *State v. Medcalf,* 111 Ohio App.3d 142, 675 N.E.2d 1268 (4th Dist. 1996). However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. *See Burnside, supra, citing State v. McNamara,* 124 Ohio App.3d 706, 707 N.E.2d 539(4th Dist. 1997); *See, generally, United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740(2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911(1996). That is, the application of the law to the trial court's findings of fact is subject to a de novo standard of review. *Ornelas, supra.*

{¶19} Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas, supra* at 698, 116 S.Ct. at 1663.

{¶20} Appellant did not raise the issue of Det. Andrew's lack of a license to fly the drone in her motion to suppress, nor did the trial court consider the issue. "It is well-

settled law that issues not raised in the trial court may not be raised for the first time on appeal because such issues are deemed waived." *Columbus v. Ridley,* 2015-Ohio-4968, 50 N.E.3d 934, ¶ 28 (10th Dist.), *quoting State v. Barrett*, 10th Dist. Franklin No. 11AP-375, 2011-Ohio-4986, 2011 WL 4489169, ¶ 13; *see State v. Comen*, 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990). This principle also applies to arguments not asserted either in a written motion to suppress or at the suppression hearing. *Id*. We find Appellant cannot assert her argument Det. Anderws was not properly licensed to fly the drone for the first time on appeal, as the State did not have the opportunity to demonstrate compliance with licensing requirements and the trial court did not have an opportunity to consider the issue.

{¶21} Appellant also argues contra to the trial court's findings, the warrantless search by the drone did not fall into any recognized exception to the requirement of a warrant.

{¶22} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The government may not intrude into areas where legitimate expectations of privacy exist. In determining whether the Fourth Amendment protects against a search, "the rule that has emerged * * * is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J., concurring). *See Rakas v. Illino*is, 439

U.S. 128, 143–144, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *State v. Williams*, 73 Ohio St.3d 153, 166–167, 652 N.E.2d 721 (1995).

{¶23} The trial court found the car was not located within the curtilage of the house, and thus the "open fields" doctrine applied; therefore, Appellant did not have a reasonable expectation of privacy in the area where the car was found. Accordingly, police were not required to have a warrant to search the wooded area where the car was located, whether such search was by drone or on foot.

{¶24} "The curtilage is an area around a person's home upon which he or she may reasonably expect the sanctity and privacy of the home. For Fourth Amendment purposes, the curtilage is considered part of the home itself." *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The only areas of the curtilage where officers may lawfully go are those impliedly open to the public, including walkways, driveways, or access routes to the house. *State v. Cook*, 5th Dist. Muskingum Nos.2010–CA–40, 2010–CA–41, 2011–Ohio–1776, ¶ 65, *citing State v. Birdsall*, 6th Dist. Williams No. WM–09–016, 2010–Ohio–2382, ¶ 13. Because the curtilage of a property is considered to be part of a person's home, the right of the police to come into the curtilage is highly circumscribed. *State v. Woljevach,* 160 Ohio App.3d 757, 2005–Ohio–2085, 828 N.E.2d 1015, at ¶ 29. "The extent of a home's curtilage is resolved by considering four main factors: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the use to which the area is put; and (4) the steps taken to protect the area from observation by passersby." *State v. Doyle*, 5th Dist. No. 16CA05, 2016-Ohio-5742, 70 N.E.3d 981, ¶ 15.

{¶25} However, in *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), the United States Supreme Court found even though there had been a trespass by police officers, no illegal search or seizure occurred because the Fourth Amendment protection afforded to people in their "persons, homes, papers, and effects" is not extended to "open fields." *Id*. at 59. Government intrusion upon open fields is not an "unreasonable search" as proscribed by the Fourth Amendment. *State v. Paxton*, 83 Ohio App.3d 818, 824, 615 N.E.2d 1086 (6th Dist.1992), citing Oliver v. U.S., 466 U.S. 170, 177, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984).

{¶26} In *State v. Wooley*, 5th Dist. Ashland No. 16-COA-003, 2017-Ohio-576, police initially spotted marijuana growing in both a wooded area away from a residence and in pots in the home's backyard by airplane surveillance. Police then entered the property without a warrant to seize the plants. After finding no Fourth Amendment violation in the warrantless search by airplane, we then addressed whether the subsequent warrantless entry on foot was in violation of the Fourth Amendment. We found he marijuana growing in the woods was subject to the open fields doctrine. *Id*. at ¶28. However, we found the potted marijuana plants in the backyard of the resident were located within the curtilage of the home, and the warrantless search and seizure of the plants in the backyard was in violation of the Fourth Amendment. *Id*. at ¶30.

{¶27} In the case sub judice, we find the trial court did not err in finding the area where the vehicle was located was not within the curtilage of the house. The vehicle was located approximately 280 feet from the house and 80 feet from neighboring property. There was no fencing on the property. The photographs show a burn pit and junk vehicles located behind the house, and the vehicle in question located even farther from the house,

in a wooded area. Because the vehicle was not located in the curtilage of the home, we find Appellant did not have a reasonable expectation of privacy in the area based on the open fields doctrine, and officers therefore could search the area without a warrant.

{¶28} Appellant appears to argue the use of the drone is more intrusive than a search on foot, and is in violation of the Fourth Amendment even in an open field where the officer could have lawfully entered and searched on foot without a warrant. We disagree. This Court has previously recognized air surveillance generally does not require a warrant. *Wooley, supra,* at ¶25, *citing State v. Little*, 183 Ohio App.3d 680, 2009–Ohio–4403, 918 N.E.2d 230, ¶ 22 (2nd Dist.), *appeal dismissed,* 125 Ohio St.3d 1458, 2010–Ohio–2753, 928 N.E.2d 735.

{¶29} Likewise, the United States Supreme Court has found no violation of the Fourth Amendment in several cases involving the use of air surveillance. In *Dow Chem. Co v. United State*s, 476 U.S. 227, 106 S. Ct. 1819, 90 L.Ed 2d 226, the court held aerial photographs of Dow's plant complex from an aircraft lawfully in public navigable airspace was not a search prohibited by the Fourth Amendment. The EPA did not use a unique sensory device not available to the public, but rather used a conventional, albeit precise, commercial camera commonly used in mapmaking, and the photographs were not so revealing of intimate details as to raise constitutional concerns. *Id*. at 238.

{¶30} Similarly, in *California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809, 90 L.Ed 2d 210, officers used an airplane flying at an altitude of 1,000 feet over the defendant's home after receiving a tip he was growing marijuana in his backyard. The area was fenced, but from the air officers were able to observe marijuana with the naked eye. Despite the fact the plants were in the curtilage of the home, the court held the warrantless air surveillance

did not require a warrant because anyone happening to fly over the defendant's home could glance down and see the marijuana plants growing. The court specifically noted the search took place within public navigable airspace, in a physically nonintrusive manner. *Id*. at 213.

{¶31} Finally, in *Florida v. Riley,* 488 U.S. 445, 109 S. Ct. 693, 102 L.Ed. 2d 835 (1989), police received an anonymous tip marijuana was being grown on the defendant's property. The investigating officer discovered he could not observe the contents of a greenhouse on the property from ground level. The greenhouse was enclosed on two sides and obscured from view on the other sides by trees, shrubs, and a residence. The officer then circled twice over the property in a helicopter at an altitude of 400 feet and made naked-eye observations of marijuana plants through openings in the greenhouse roof. The court found no violation of Riley's Fourth Amendment rights despite the fact he had taken precautions to shield the greenhouse from view at ground level. The court concluded the helicopter was flying within navigable airspace pursuant to FAA regulations for helicopters, there was no evidence the helicopter interfered with Riley's use of the greenhouse or other parts of the curtilage of the residence or intimate details were observed, and there was no evidence of undue noise, dust, wind, or threat of injury. *Id*. at 451-52.

{¶32} While the use of drones as a tool for criminal investigations is currently an undeveloped area of the law, we find no reason to distinguish the use of the drone in this case from other air surveillance. Nothing in the record suggests the drone in the instance case, flying at an altitude of 300-396 feet, is more intrusive than the helicopter flying at 400 feet in *Riley*, *supra*. The vehicle was not located in the curtilage of the home, and no

steps were taken to hide the vehicle from view, either at ground level or by air. The camera attached to the drone was similar to a cell phone or I-pad camera, both of which were readily available to the public, and the drone itself was a model readily available to the public. The drone was flying in Class G airspace within FAA regulations. We find the trial court did not err in finding the warrantless flyover by the drone in this case did not violate the Fourth Amendment.

{¶33} The second assignment of error is overruled.

{¶34} The judgment of the Coshocton County Common Pleas Court is affirmed.

By: Hoffman, P.J.
Wise, J., concurs and
King, J., concurs in part; dissents in part

King, J. concurring in part, dissenting in part,

{¶ 35} I concur in judgment because this case is resolved by the open fields doctrine. I respectfully dissent from the majority's assertion in paragraph 32 that "we find no reason to distinguish the use of the drone in this case from other air surveillance." As the majority notes, this is an emerging area of the law and there is reason to think there may indeed be material distinction.

{¶ 36} In *Florida v. Riley*, 488 U.S. 445, 452, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989), five members of the court agreed surveillance by helicopter over a subject's property at an altitude of at least 400 feet did not require a search warrant. The plurality of the court focused on whether law enforcement had the legal right to be in the airspace it occupied. *Id*. at 450-451. The plurality's consideration of the lawfulness of law enforcement's presence focused on whether law enforcement had violated FAA rules or other laws. *Id*. at 451-452.

{¶ 37} One can question whether *Riley* controls the federal constitutional analysis for aerial drones because there are obvious differences in the technologies. True, they do share some superficial similarities, but the differences are significant. It would be inapt to conclude a dairy cow is a race horse because both are mammals that eat grass. Compared to a helicopter, a drone is small, quiet, less noticeable, remotely operated, and maneuverable in small places. Further, a drone is seemingly able to conduct more intrusive surveillance than the naked eye could conduct from a helicopter. In other words, the technology deployed here is qualitatively different than the helicopter examined in *Riley*.

{¶ 38} In reviewing the interplay of technology and the Fourth Amendment, the United States Supreme Court held one of the key considerations is whether the technology allows the government to explore details "that would previously have been unknowable without physical intrusion." *Kyllo v. United States*, 533 U.S. 27, 40, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). When certain technology is used this way, it is a search and thus subject to the warrant requirement. *Id*. In the *Kyllo* case, it was the use of thermal imaging to see through the walls into a home.

{¶ 39} Here, the operation of the drone appears superficially consistent with the operation of the helicopter in *Riley*. On the other hand, the qualities of the drone allow it to obtain details that would be "unknowable without a physical intrusion" *e.g.,* flying over a fence and then photographing license plates or people or objects through windows or open doorways of homes, barns, and accessory buildings. The use of the device in that way to surveil a house or curtilage would be equivalent to a physical intrusion and thus a search requiring a warrant. Thus, the court should remain conscious of the difference in the technologies and not give carte blanch to the use of aerial drones merely because of *Riley*.

{¶ 40} The United States Supreme Court returned to the issue of the deployment of newer technologies in *United States v. Jones*. 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). In *Jones*, law enforcement attached a GPS surveillance device to a vehicle to track the subject's movements. *Id.* at 403. This device was attached while the vehicle was parked in a public parking lot. *Id*. Yet, the court held, "[t]he Government physically occupied private property for the purpose of obtaining information" and concluded there was a Fourth Amendment violation. *Id*. at 404-405.

{¶ 41} The *Jones* analysis was not grounded in the *Katz* line of cases, rather the "common-law trespassory test." *Id*. *Jones* went on to say by applying 18th-century understandings of trespass to the case, the court was setting forth the minimum protection afforded an individual. *Id*. at 405-407. Moreover, the court stated this minimum protection was in addition to whatever protections might be afforded under *Katz*. *Id*. at 411 ("What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted.") (Emphasis sic.)

{¶ 42} The *Jones* test applied to drone surveillance would suggest a different result than under the plurality's approach to helicopter aerial surveillance addressed in *Riley*. Under the common law ad coelum doctrine, a property owner's rights extend above and below the surface. Cf. *United States v. Causby,* 328 U.S. 256, 260-261, 66 S.Ct.1062, 90 L.Ed. 1206 (1946). It follows then, if the surreptitious attachment of a GPS tracking device to a vehicle parked in a public place is a trespass that would be recognized under the common law, then it would seem flying a drone that physically intrudes into a property owner's common law airspace should also be recognized as a trespass under *Jones*.

{¶ 43} The *Jones* court did caution that the boundaries of the Fourth Amendment are not co-extensive with common law understanding of property rights rules (and thus trespass). *Jones*, 545 U.S. at 951. The court then went on to re-affirm its earlier holding in *Oliver v. United States*, 466 U.S. 170, 183, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), which concluded a common law trespass into an open field was not a protected area under the Fourth Amendment.

{¶ 44} With regard to *Causby*, *supra,* the court's casual rejection of the ad coelum doctrine was dicta, as the underlying claim arose under the Fifth Amendment. *Causby* at 258. Moreover, the court recognized it was possible for the aerial intrusion to be so severe that a taking occurs. *Id*. at 261. This implies some property interest remains despite federal regulations. Further, *Jones* also recognized a warrant can be required even when the physical intrusion takes place in a public area. Assuming arguendo all regulated airspace is a public place, *Jones* still suggests a warrant would be required if that intrusion was into a constitutionally protected area.

{¶ 45} Accordingly, whether a warrant is required to operate an aerial drone in federally regulated airspace now turns on whether the intrusion was into a constitutionally protected area.

{¶ 46} With regard to fixed wing aircraft surveillance, the United States Supreme Court has held there is no constitutional protection when an airplane flies in commercially navigable airspace. *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *Dow Chemical Co. v. U.S.*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986). As the court observed, it would be incongruent to subject the government to a higher burden, when any member of the public was free to look out the window of a commercial aircraft and observe the same. *Ciraolo* at 213-214. But the fractured nature of the *Riley* decision, compounded with the *Jones* decision, leaves open the question of whether the airspace below 400 feet, within which a drone can legally operate, is constitutionally protected and thus subject to the warrant requirement.

{¶ 47} The plurality in *Riley* made much out of the helicopter's legal right to be in the airspace because of FAA regulations. *Riley*, 488 U.S. at 450-451. Yet, this approach

was rejected by a majority of the *Riley* court, in a series of separate opinions (O'Connor, J., concurring, Brennan, J., dissenting, and Blackmun, J., dissenting). Moreover, that same majority appeared to broadly agree (though for different reasons) the Fourth Amendment provides protection, to varying degrees, in the airspace below 400 feet. O'Connor, J., concurrence at 455, Brennan, J., dissent at 460, and Blackmun, J., dissent at 467.

{¶ 48} Thus, the parameters of Fourth Amendment protections a property owner has in the airspace over the home and curtilage in which an aerial drone can lawfully operate was left undefined by *Riley*. But *Causby* and *Riley*, along with the technological differences of an aerial drone to a helicopter, lead me to conclude there is both some property right in that airspace and some constitutional protection against surveillance in that airspace.

{¶ 49} While this case is resolved by the open fields doctrine, a warrant may well be required for aerial drone surveillance of the curtilage or home. The area defined as the curtilage is protected under the Fourth Amendment, thus requiring a warrant for government actors to enter the property. *See Collins v. Virgina*, 138 S. Ct. 1663, 1666, 201 L.Ed.2d 9 (2018), citing *Florida v. Jardines*, 569 U.S. 1, 11, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). It follows that if some portion of the airspace above it is also constitutionally protected, under either *Katz* or *Jones*, then a warrant would be required. Further, Article I, Section 14, of the Ohio Constitution may afford property owners protection above what the Fourth Amendment provides.

{¶ 50} For these reasons, I concur in judgment, but partially dissent from the majority's opinion.

State v. Newcomb

Court of Appeals of Ohio, Fourth Appellate District, Lawrence County

February 27, 2024, Released

Case No. 21CA18

Reporter
2024-Ohio-805 *; ***237 N.E.3d 324*** **

STATE OF OHIO, Plaintiff-Appellee, v. JAMES V. NEWCOMB, Defendant-Appellant.

Disposition: JUDGMENT AFFIRMED.

Counsel: Jonathan T. Tyack and Madison Mackay, The Tyack Law Firm, Co., L.P.A., Columbus, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and Steven K. Nord, Assistant Lawrence County Prosecutor, Ironton, Ohio, for appellee.

Judges: Kristy S. Wilkin, Judge. Smith, P.J. and Hess, J.: Concur in Judgment and Opinion.

Opinion by: Kristy S. Wilkin

Opinion

[328]** DECISION AND JUDGMENT ENTRY

Wilkin, J.

[*P1] This is an appeal from a Lawrence County Court of Common Pleas judgment of conviction in which the jury found appellant, James V. Newcomb, guilty of assault, felonious assault, and theft. The trial court imposed an aggregate minimum prison term of four years and a maximum prison term of six years. Newcomb challenges his felonious assault and theft convictions on several grounds.

[*P2] First, Newcomb argues the jury lost its way in finding his co-defendant Shannon Clark credible and convicting Newcomb of theft. We disagree. The evidence at trial established that Newcomb smacked the drone's remote control from Steve Hindi's hand and it fell on the ground. Newcomb then picked up the drone's remote control and smashed it against his mailbox. At this point, while the drone was in the air, it started flying everywhere. After Newcomb physically assaulted Hindi and threatened him to either leave or die, Hindi left the area without his drone and without the remote control. Clark testified that later he saw the drone and the remote control in Newcomb's firepit where they were burnt. We defer to the jury's assessment of Clark's credibility as it was in the best position to gauge his demeanor, gestures, and voice inflictions, and hold that Newcomb's theft conviction was supported by the manifest weight of the evidence.

[*P3] **[**329]** Second, Newcomb argues the trial court abused its discretion when it instructed the jury in Counts One, Three and Four of complicity. Newcomb's claim mainly focuses on Count Three, theft, and argues that there was no evidence that supported the claim Newcomb was complicit in the theft of the drone. We first note, as is well-established, that a defendant is on notice that the jury may be instructed on complicity even if the defendant is charged as a principal offender. Further, the evidence established Newcomb committed the theft of the drone as a principal offender as well as a complicit. Newcomb smashed and destroyed Hindi's drone's remote control, physically assaulted Hindi with the help of Clark, and then Newcomb threatened Hindi to leave or die. Hindi left

without his drone or remote control. Contrary to Newcomb's argument, Clark was found to be credible by the jury and he testified that Newcomb picked up the remote control from the ground and that the drone was in Newcomb's firepit before it was lit by someone else. Thus, the trial court properly instructed the jury on complicity.

[*P4] Third, Newcomb argues the trial court erred when it denied his Crim.R. 29 motion for acquittal as to Count Three, theft. He contends there was insufficient evidence to convict him of the theft of the drone. His claim lacks merit. We previously under the first assignment of error found that Newcomb's theft conviction was supported by the manifest weight of the evidence. This conclusion is dispositive of a sufficiency of the evidence challenge. We thus, uphold Newcomb's theft conviction.

[*P5] Fourth, Newcomb argues the trial court erred when it admitted hearsay evidence identifying the Chevy tan truck that struck Adam Fahnestock's SUV as belonging to Newcomb's wife. During his direct examination, Detective Sergeant Aaron Bollinger testified that as part of his investigation, he ran the Chevy tan truck's VIN number using a national database and determined it belonged to Newcomb's wife. Newcomb claims the admission violated the rules of evidence and the Confrontation Clause of the Sixth Amendment. Newcomb did not raise the Confrontation Clause violation at trial, thus, we will not address it. As for the hearsay violation argument, we find the admission of the testimony was harmless as it was cumulative to other testimony previously admitted at trial that identified Newcomb as the driver of the Chevy tan truck.

[*P6] Finally, Newcomb argues his indefinite sentence under the Reagan Tokes Law violates the separation-of-powers doctrine, his right to a jury trial, his right to due process, and violates double jeopardy. The first three challenges have recently been rejected by the Supreme Court of Ohio in *State v. Hacker*, __ Ohio St.3d __ , 2023-Ohio-2535, 229 N.E.3d 38. As a court bound to follow the Supreme Court of Ohio, we reject Newcomb's first three challenges. As to his double jeopardy claim, we similarly reject it since Newcomb is not facing retrial under the Reagan Tokes Law sentencing scheme, and he is being punished only once for the felonious assault conviction.

FACTS AND PROCEDURAL BACKGROUND

[*P7] Steve Hindi is the founder and president of SHARK ("Showing Animals Respect and Kindness"). On January 3, 2021, Hindi, and two of his SHARK colleagues, Adam Fahnestock and Michael Kobliska, drove to Lawrence County, Ohio, to investigate a claim that cockfighting was occurring in that area. They came prepared with investigatory equipment, including handheld camcorders, body cameras, walkie-talkies, and drones. They had **[**330]** two rental vehicles, a blue and a white SUV.

[*P8] At approximately 9:40 a.m., Hindi drove the blue SUV to Newcomb's property, where cockfighting was suspected to be occurring. Fahnestock was in the passenger seat. Both Hindi and Fahnestock were wearing body cameras and Fahnestock was also recording with the use of a camcorder. Hindi parked the SUV before reaching the gate. Hindi on foot approached the open gate leading to Newcomb's house in which Shannon Clark and Scott Aldridge were standing at each side of the gate. Hindi asked if there was a church service or a special event as many vehicles could be seen on the property. This is when Clark inquired who Hindi was and why was he there. Hindi did not respond to these questions but when Clark asked him to step back behind the gate, Hindi complied and began to walk back towards the blue SUV. Clark then closed the gate.

[*P9] Hindi went to the trunk of the blue SUV and informed Fahnestock to keep an eye on Clark and Aldridge, and if there is any movement to move over to the driver's side and drive off. While Fahnestock was keeping a lookout, and transferred over to the driver seat, Hindi was setting up a drone. As soon as Hindi flew the drone up, you can hear a gentleman telling him to set it back down, and then from Fahnestock's camcorder, you see Newcomb, who was radioed in by Aldridge, open the gate and start heading toward Hindi. From Hindi's camera in his ballcap and Fahnestock's camcorder and body camera, Newcomb is seen striking Hindi's hand causing the drone's remote control to fall to the ground. Newcomb then picks up the remote control and smashes it on his mailbox. The altercation continues with Newcomb rushing toward Hindi and trying to kick him. Newcomb even attempted to break the driver-side window of the blue SUV by slamming the remote control on the window.

[*P10] This is when Hindi told Fahnestock to drive off. From the side mirror of the blue SUV, as recorded by Fahnestock's camcorder, you can see Newcomb body slam Hindi against the car. Hindi fell down and from his ballcap camera you hear him scream as he is kicked by Newcomb and Clark. Hindi in his testimony elaborated that Newcomb and Clark beat him with the use of their fists, legs, and struck him on the back of the head with an object. The screams you hear in the video, Hindi explained, were from the kicks to the ribs. Because of this physical assault, Hindi suffered a broken rib, laceration to the back of the head, separation in his back, and several bumps and bruises. As Hindi was on the ground, you hear Newcomb tell him "last chance, leave or die."

[*P11] Hindi got up and began walking away from Newcomb's property and towards the street. Clark followed him for a short period. As Hindi was walking, he looked down at his vest, and as his ballcap camera was still recording, you can see both of his body cameras were missing and blood can be seen on the vest. Hindi testified that he was assaulted a second time by Newcomb. After walking for a distance, Hindi saw a parked semi-truck driver and asked if he had cell service to contact authorities. While conversing with the semi-truck driver, Newcomb approached driving a tan truck. After Newcomb saw Hindi, he stopped, and assaulted Hindi again using his fist and legs. Hindi was able to obtain the tan truck's license plate number before Newcomb left. After this second assault, Hindi decided to go into the woods and hide until he could reach one of his colleagues to pick him up.

[*P12] Newcomb's assault continued with him now targeting Fahnestock. After driving **[**331]** off, Fahnestock drove around trying to find Kobliska. He was not able to find him so he kept driving before stopping and getting out a walkie-talkie from the trunk. As soon as he got the walkie-talkie, Hindi was reaching out asking for Fahnestock to pick him up. Fahnestock told Hindi he thinks he is being followed, and at that point, Hindi told him to just keep driving and get out of here. Fahnestock continued to drive and he mentions that he is still being followed. Fahnestock's comments are recorded through his body camera that has been continuously recording. Around 11 a.m., Fahnestock speeds up and shortly thereafter you see his body jerk and hear a bump. After the sixth bump, Fahnestock loses control and crosses the lane and ends up in a deep ditch.

[*P13] From the body camera, a tan truck is seen driving off as Fahnestock is in the ditch and his body is sideways. As part of the investigation, Detective Sergeant Aaron Bollinger obtained a homeowner's security surveillance video that had recorded the accident. As described by Detective Sergeant Bollinger, the Chevy tan truck did a pit maneuver on Fahnestock's vehicle in which the truck hit the SUV on the corner causing it to spin out of control. The video also showed Clark and another passenger exit the truck with the truck driving off.

[*P14] Fahnestock was sore for a week, had discomfort in his neck, both arms, down his legs, and had some scrapes and cuts. Because of the accident, Fahnestock received chiropractic treatment.

[*P15] As a result of his conduct on January 3, 2021, Newcomb was charged with four offenses: Count One, felonious assault with Hindi as the victim; Count Two, felonious assault with Fahnestock as the victim; Count Three, theft as a fifth-degree felony for the theft of the drone; and Count Four, tampering with evidence. Newcomb pleaded not guilty and the matter proceeded to a two-day jury trial. The jury found Newcomb guilty of the lesser offense of assault in Count One, guilty as charged of felonious assault in Count Two, guilty of theft as charged in Count Three, and not guilty of tampering with evidence.

[*P16] The trial court imposed 180 days in jail for the assault conviction, a minimum prison term of 4 years and maximum prison term of 6 years for the felonious assault conviction, and 12 months in prison for the theft offense. The trial court ordered the sentences to be served concurrently. It is from this judgment of conviction entry that Newcomb appeals.

ASSIGNMENTS OF ERROR

> I. DEFENDANT'S CONVICTIONS FOR FELONIOUS ASSAULT (COUNT II) AND THEFT (COUNT III) WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO AMEND THE INDICTMENT AND PRESENTED A COMPLICITY JURY INSTRUCTION FOR AIDING AND ABETTING AS TO COUNT III (THEFT).

III. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR ACQUITTAL UNDER CRIM. R. 29(A) & (C) AS THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION AS TO COUNT III (THEFT).

IV. THE TRIAL COURT ERRED BY ADMITTING THE HEARSAY TESTIMONY OF DET. BOLLINGER.

[332]** V. MR. NEWCOMB'S INDEFINITE SENTENCE UNDER THE REAGAN TOKES ACT VIOLATES HIS CONSTITUTIONAL RIGHTS UNDER THE OHIO CONSTITUTION AND THE U.S. CONSTITUTION.

ASSIGNMENT OF ERROR I

[*P17] In the first assignment of error, Newcomb argues the state failed to present any evidence that he withheld or disposed of the drone.[1] According to Newcomb, the evidence was conflicting, where Steve Hindi and Shannon Clark presented contradictory testimony with regard to the drone. Hindi testified that the drone was still in the air, but Clark testified that Newcomb got the drone down but did not explain how that was done. The state had the alternate theory that destroying the remote deprived Hindi of the drone. But the state failed to present any evidence regarding the effect of the remote control's incapacity on the drone. Due to inconsistent testimony, Newcomb asserts the theft conviction cannot stand as it is not supported by the manifest weight of the evidence.

[*P18] The state disagrees and maintains that Newcomb smashed the remote control and because of that action, the drone remained hovering over Newcomb's property until the battery died and Hindi could not retrieve the drone as he was assaulted and chased away. There was thus direct evidence and additional circumstantial evidence that Newcomb deprived Hindi of being able to retrieve the drone. There was also direct evidence from Clark of the fate of the drone being burnt in the firepit at Newcomb's property. The state asserts that the jury did not lose its way in finding Clark's testimony credible and there was evidence of the value of the lost drone of more than $2,500.

Law and Analysis

[*P19] In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997- Ohio 52, 678 N.E.2d 541 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717 (1st Dist.1983). "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

> Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.

State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus.

[*P20] The weight and credibility of evidence are to be determined by the trier of fact. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, **[**333]** ¶ 132. The trier of fact "is free to believe all, part or none of the testimony of any witness," and we "defer to the trier of fact on these evidentiary weight and credibility issues

[1] Newcomb withdrew his challenge to Count Two, felonious assault, after submitting the brief and confirmed the withdrawal of the challenge to that count at oral argument. Accordingly, we will solely address the theft conviction under the first assignment of error.

because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility." *State v. Dillard*, 4th Dist. Meigs No. 13CA9, 2014-Ohio-4974, ¶ 28, citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23.

[*P21] In addition, "[a] verdict is not against the manifest weight of the evidence because the finder of fact chose to believe the State's witnesses." *State v. Chancey*, 4th Dist. Washington No. 15CA17, 2015-Ohio-5585, ¶ 36, citing *State v. Wilson*, 9th Dist. Lorain No. 12CA010263, 2014-Ohio-3182, ¶ 24, citing *State v. Martinez*, 9th Dist. Wayne No. 12CA0054, 2013-Ohio-3189, ¶ 16. Moreover, "'[w]hile the jury may take note of inconsistencies and resolve or discount them accordingly, * * * such inconsistences (sic.) do not render defendant's conviction against the manifest weight or sufficiency of the evidence.'" *State v. Corson*, 4th Dist. Pickaway No. 15CA4, 2015-Ohio-5332, ¶ 31, quoting *State v. Proby*, 10th Dist. Franklin No.15AP-1067, 2015-Ohio-3364, ¶ 42, citing *State v. Gullick*, 10th Dist. Franklin No. 13AP-317, 2014-Ohio-1642, ¶ 10.

[*P22] In the matter at bar, the state alleged Newcomb committed theft by taking control of Hindi's drone and destroying it, thus, depriving Hindi from recovering the drone. To prove Newcomb committed theft, the state was required to prove that he "with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent[.]" R.C. 2913.02(A)(1). "A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." R.C. 2901.22(A). Deprive means to do any of the following:

> (1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;
> (2) Dispose of property so as to make it unlikely that the owner will recover it;
> (3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration.
>
> R.C. 2913.01(C).
>
> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.
>
> R.C. 2901.22(B).

[*P23] We previously additionally defined:

> **[**334]** "Obtain" means "just what it says, to get, to secure possession of." *State v. Healy* (1951), 156 Ohio St. 229, 239, 102 N.E.2d 233, quoting *Tingue v. State* (1914), 90 Ohio St. 368, 108 N.E. 222. And "control" means: "1. To exercise power or influence over. 2. To regulate or govern. 3. To have a controlling interest in." Black's Law Dictionary (2nd Pocket Edition 2001) 143.

State v. Dobbins, 4th Dist. Washington No. 11CA6, 2011-Ohio-6777, ¶ 12.

[*P24] Applying the theft statutory provision and the definitions as outlined above, we find that the jury did not lose its way by convicting Newcomb of theft. There was direct evidence that Newcomb snatched the drone's remote control from Hindi's hand, smashed it against the mailbox, and then dropped it on the ground away from Hindi. Thus, Newcomb knowingly exerted control over the drone's remote control, and consequently the drone. Moreover, Newcomb after physically assaulting Hindi, threatened him to leave or die; therefore, not permitting Hindi to retrieve the broken remote control or the drone.

[*P25] There was additional evidence as to the fate of the drone directly from Newcomb, in which during his interview with Detective Sergeant Bollinger, Newcomb stated that after smashing the remote control against the mailbox, the drone went everywhere. Even though Newcomb claimed he did not know where the drone ended up, Clark testified that he observed the drone and the remote control in Newcomb's firepit before the firepit was started. The jury, as the trier of fact, found Clark's testimony to be credible and we defer to the jury's credibility determination.

[*P26] Finally, the value to replace the drone, the remote control, and the memory card that was inside the drone, is approximately $2,500. This amount is above the minimum threshold to support the theft offense as a fifth-degree felony. *See* R.C. 2913.02(B)(2) (for fifth-degree felony, the value must be more than $1,000 and less than $7,500.)

[*P27] Accordingly, we hold that the manifest weight of the evidence supports Newcomb's theft conviction and overrule his first assignment of error.

ASSIGNMENT OF ERROR II

[*P28] In the second assignment of error, Newcomb argues the trial court erred when it overruled his objection and granted the state's request to include complicity instructions as to Counts One, Three, and Four. Newcomb maintains the trial court's decision was an abuse of discretion because the evidence did not support such an instruction. According to Newcomb, the only evidence in support of the instruction came from the co-defendant Shannon Clark, and moreover, as to Count Three, there was no evidence to support the conviction as an aider or abettor.

[*P29] In support of his argument, Newcomb attacks Clark's credibility and inconsistent testimony citing the following points. Clark for the first time at trial testified that he witnessed individuals burning the drone and cameras on Newcomb's property. But yet, Clark could not recall who had the drone's remote control. Clark could not identify who placed the drone and cameras in the firepit and he did not get close enough to the firepit to see the objects. Clark could not definitively testify that Newcomb burnt or aided in the burning of the objects. Thus, the instructions were improperly given to the jury.

[*P30] The state disagrees and asserts that the trial court did not abuse its discretion in granting its request because there **[**335]** was evidence that Newcomb participated in the burning of the drone. The weighing of Clark's credibility was left to the trier of fact and Clark testified that he observed the drone in the firepit and Newcomb at the firepit.

Law and Analysis

[*P31] We find no abuse of discretion by the trial court in instructing the jury of complicity. "A charge of complicity may be stated in terms of this section, or in terms of the principal offense." R.C. 2923.03(F). The Supreme Court of Ohio made it clear that R.C. 2923.03(F) "adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 181.

[*P32] We previously summarized the trial court's duty to provide the jury with full and complete instructions:

> A trial court generally has broad discretion in deciding how to fashion jury instructions. *State v. Hamilton*, 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, 2011 WL 2397088, ¶ 69. However, "a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. "Additionally, a trial court may not omit a requested instruction, if such instruction is 'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.'" *Hamilton* at ¶ 69, quoting *State v. Lessin*, 67 Ohio St.3d 487, 493, 1993- Ohio 52, 620 N.E.2d 72 (1993). "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a

> requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Ellis*, 5th Dist. Fairfield No. 02 CA 96, 2004-Ohio-610, 2004 WL 251809, ¶ 19.

State v. Jones, 4th Dist. Ross No. 16CA3574, 2018-Ohio-239, ¶ 10, 104 N.E.3d 34.

[*P33] "An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable." *State v. Ables*, 4th Dist. Pickaway No. 11CA22, 2012-Ohio-3377, ¶ 9, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

[*P34] Complicity is defined as:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
> (1) Solicit or procure another to commit the offense;
> (2) Aid or abet another in committing the offense;
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
> (4) Cause an innocent or irresponsible person to commit the offense.

R.C. 2923.03(A).

[*P35] In the matter at bar, the trial court instructed the jury as follows:

> The state of Ohio presented a theory that the defendant acted in complicity with the principal offender in the commission of felonious assault in Count 1, theft in Count 3, and tampering with evidence in Count 4. A person who is complicit with another in the commission of a criminal offense is regarded as guilty as if - - guilty as if he personally performed every act constituting the offense. This is true even if he did not personally perform every act constituting the offense, or was not physically **[**336]** present at the time the offense was committed.
> Before you can find the defendant guilty of complicity in the commission of a felonious assault in Count 1, theft in Count 3, and tampering with evidence in Count 4, you must find beyond a reasonable doubt that on or about the third day of January, 2021, in Lawrence County, Ohio, the defendant aided or abetted another in executing the offenses identified in Counts 1, 3 and 4.
> Aided or abetted. Before you can find the defendant guilty of complicity by aiding and abetting, you must find beyond a reasonable doubt that the defendant supported, assisted, encouraged, cooperated with, advised, solicited, procured or incited the principal offender in the commission of the offense and that the defendant shared the criminal intent of the principal offender. Such intent may be inferred from the circumstances surrounding the offense, including but not limited to presence, companionship, and conduct before and after the offense was committed. The mere presence of the defendant at the scene of the offense is not sufficient to prove in and of itself that the defendant was an aider or abetter (Sic.).

[*P36] Newcomb does not challenge the language used by the trial court in instructing the jury, but rather that complicity was not supported by the evidence. We begin by first noting that although Newcomb in his assignment of error indicates he is challenging the instructions as to Counts One, Three and Four, he was found not guilty of tampering with evidence, Count Four, and in his brief, Newcomb attacks solely the theft offense, Count Three. Accordingly, we will focus our analysis on Count Three, the theft of the drone.

> "When the evidence adduced at trial could reasonably be found to have proven the defendant guilty as an aider and abettor, a jury instruction by the trial court on that subject is proper." *State v. Perryman* (1976), 49 Ohio St.2d 14, 358 N.E.2d 1040, paragraph five of the syllabus, vacated in part on other grounds by *Perryman v. Ohio* (1978), 438 U.S. 911, 98 S.Ct. 3136, 57 L.Ed.2d 1156. "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *State v. Johnson* (2001), 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, at the syllabus.

State v. Dyer, 4th Dist. Scioto No. 07CA3163, 2008-Ohio-2711, ¶ 19.

[*P37] As we previously stated, "circumstantial evidence and direct evidence inherently possess the same probative value." *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus. The evidence adduced here is that Newcomb was acting as a principal offender in depriving Hindi of the drone and also as a complicit. Newcomb knowingly and purposefully smacked the drone's remote control from Hindi's hand. Further, Newcomb picked up the remote control and smashed it against his mailbox at which point he saw the drone just go everywhere. Newcomb and Clark then physically assaulted Hindi and Newcomb threatened Hindi "last chance, leave or die here."

[*P38] Moreover, after Hindi left, it was Newcomb who picked up the two body **[**337]** cameras that fell out of Hindi's vest. The same cameras that Clark testified he saw with the drone in Newcomb's firepit. Newcomb, Aldridge and Clark were the only three present when Hindi was assaulted and the remote control was destroyed while the drone was in the air. Out of those three, only Newcomb's property was being investigated for cockfighting, and Newcomb testified to observing the drone after he smashed the remote control. This evidence viewed together with the evidence that the firepit was on Newcomb's property and his wife was adding paper and lit it, demonstrates Newcomb encouraged and assisted in permanently depriving Hindi from retrieving the drone and the remote control.

[*P39] Based on the evidence presented in the case, we do not find the trial court acted irrationally, arbitrarily, or unreasonably in instructing the jury on complicity. We therefore, overrule Newcomb's second assignment of error.

ASSIGNMENT OF ERROR III

[*P40] In the third assignment of error, Newcomb argues the trial court erred in denying his Crim.R. 29 motion for acquittal as to Count Three, theft, because the state failed to present evidence that Newcomb obtained or exerted control over the drone. Newcomb maintains that the state presented contradictory testimony and theories that the theft occurred because Newcomb smashed the remote control, but that also Newcomb grounded the drone and destroyed it. Further, he argues that even if we find that the state established Newcomb exerted control over the remote control, the value of which is less than $1,000, he did not obtain or exert control over the actual drone. Thus, the state failed to demonstrate an element of the offense to warrant a conviction of theft as a fifth-degree felony. Newcomb again attacks Clark's testimony as being inconsistent and not credible since he did not witness who placed the drone and cameras in the firepit. Finally, Newcomb asserts there was no evidence he aided or abetted anyone in procuring and placing the drone in the firepit. (Brief page 15).

[*P41] The state disagrees and reiterates its arguments presented in the first assignment of error. According to the state, there was testimony from Hindi that Newcomb took the remote control and smashed it, then assaulted him and chased him away from the property in which he could not retrieve the drone. The state further maintains that there was also evidence that Newcomb burnt the drone, and there was evidence that the drone's value was $2,500.

Law and Analysis

[*P42] "A motion for acquittal may be granted only when, construing the evidence most strongly in favor of the state, the evidence is insufficient to sustain a conviction." *State v. Grate*, 164 Ohio St.3d 9, 2020-Ohio-5584, 172 N.E.3d 8, ¶ 146. When reviewing whether the evidence is sufficient to sustain a conviction, the focus is on the adequacy of the evidence. *See State v. Sims*, 4th Dist. Athens No. 21CA15, 2023-Ohio-1179, ¶ 115, 212 N.E.3d 458. Thus, "[t]he standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Id.*

[*P43] Under this assignment of error, Newcomb again solely challenges his theft conviction. A finding that a conviction is supported by the manifest weight of the evidence is "also dispositive of the issue of sufficiency." *State v. Sims*, 4th Dist. Athens No. 21CA15, 2023-Ohio-1179, ¶ 120, 212 N.E.3d 458, citing *State v. Waller*, 4th Dist. **[**338]** Adams No. 17CA1044, 2018-Ohio-2014, ¶ 30. Accordingly, as we previously have sustained Newcomb's

theft conviction under the first assignment of error, we similarly sustain his conviction here and overrule his third assignment of error.

ASSIGNMENT OF ERROR IV

[*P44] Under the fourth assignment of error, Newcomb presents several arguments challenging the admission of Detective Sergeant Bollinger's testimony identifying the Chevy tan truck as belonging to Newcomb's wife through its VIN number. The detective obtained the information through a national data base. Newcomb argues the state failed to present a certified copy of either the national database or the state of Ohio database to certify the detective's VIN number record search. Newcomb claims the hearsay evidence was admitted for the truth of the matter asserted, in which it was presented to establish Newcomb was the driver since the Chevy truck belonged to his wife. The state did not present any exception to Evid.R. 802 that would have allowed the testimony to be admitted for the truth of the matter asserted. The testimony was not presented due to unavailability of a witness, Evid.R. 803 or as a public record, Evid.R. 804.

[*P45] According to Newcomb, the admission of this hearsay evidence was not harmless evidence because the only other evidence linking Newcomb to the truck was the not credible testimony of co-defendant Clark. The video and photo evidence established Clark was in the truck and his testimony identifying Newcomb as the driver only came about after he was offered a deal by the state. Therefore, "there exists reasonable possibility that the identification of the vehicle belonging to Defendant, through Det. Bollinger's hearsay testimony, contributed to his conviction for Count II-Felonious Assault." Newcomb concludes that the testimony was improperly admitted in violation of the rules of evidence and constitutionally in violation of the Confrontation Clause.

[*P46] The state disagrees and asserts that Clark testified as to the ownership of the truck during trial and that it was Newcomb who was driving the truck at the time of the assault. This testimony was prior to Detective Sergeant Bollinger's testimony, so the detective's testimony was cumulative. Moreover, in response to an objection, the detective replied that the VIN number was run because the Chevy truck was missing a license plate, so it was conducted as part of the investigation. The detective was also instructed not to repeat what he was told by others, and to only limit his testimony to his personal knowledge. The state therefore maintains that the detective's testimony was properly admitted and if not, it was harmless error.

Law and Analysis

[*P47] We begin by outlining the line of questioning and answers presented at trial in the matter at bar. Detective Sergeant Bollinger was the state's final witness. During his testimony, the following occurred:

> A. With that Deputy Mullins had actually ran the VIN number because it did not have a license plate.
> Mr. Tyack: Objection.
> The Court: Basis?
>
> Mr. Tyack: **Hearsay**. (Boldface added)
> The Court: Was that part of the investigation that you conducted or independently verified?
> The witness: Absolutely.
>
> The Court: Okay. Then I'm going to allow you to respond to the question - - to the State of your personal knowledge based on your investigation, but not repeating **[**339]** what anybody else said or for the use of proving the truth of the matter asserted in that statement.
> The witness: Yes, sir.
> The Court: Can you reask (sic.) based on that admonition from the court?
> Mr. Nord: Yes.
> By Mr. Nord:
> Q. As part of your investigation with respect to this matter and the incidents which we've been discussing the next day - - or the entire yesterday and all day today, was there an investigation done with respect to the tan truck that was - - you indicated was at the residence of - - or not at the residence, but at the barn of the property owner that leased to Mr. Clark?

A. Yes.
Q. What was done with respect to that?
A. The VIN number - -

Mr. Tyack: Objection. **Hearsay**. (Boldface added)
The Court: Reask (sic.).
By Mr. Nord:
Q. As part of your investigation with respect to this matter and the incidents as alleged, did you obtain the VIN number of the vehicle?
A. I did.
Q. What else did you do with respect to your investigation concerning the tan truck?
A. The VIN number was on the radio log of the sheriff's office.
Q. Okay.
A. As being read from that property.
Q. Okay.
A. And then I verified that the VIN number belongs to Rebecca Newcomb, with a driver's license - - or with a license plate number of HIL1286.
Q. What's the - - if anything, what's the significance of the license plate number?
A. Because in the original report with Sergeant Easterling, it had quoted that the license plate number was HIL286. So it was one number off.
Q. One number off?
A. Yes.
Q. Okay. You've got access to or State's Exhibit No. 6 up there I believe.
A. Yes, sir.
Q. Have you seen that photograph before?
A. I have. This is what was provided to me.
Q. So that was provided to you as part of your investigation?
A. Yes, it was.
Q. And as part of your investigation you obtained the VIN number?
A. Yes. This is the vehicle that had the VIN number that was registered to Rebecca Newcomb, which is Mr. James Newcomb's --

Mr. Tyack: Objection. **Hearsay**. (Boldface added)
The Court: Overruled. I think it's been established that it's been conducted through his investigation to verify that information.
You may continue.
The witness: Mr. James Newcomb's wife.
By Mr. Nord:
Q. Oaky. What did you do to determine the VIN number, who the vehicle belonged to?
A. Well, I mean, everything we do is, you know, through national databases. The national crime database is where it was originally ran. I also ran it through - - it's a system called OHLEG, it's done and developed and everything held by the attorney general's office here in the state of Ohio.

[340]** Q. Okay. And through that investigation, is that how you learned who the vehicle belonged to?
A. Absolutely.

[*P48] As the record demonstrates, Newcomb raises for the first time on appeal an objection to the detective's testimony based on the Confrontation Clause, in which at trial he solely objected based on hearsay. "Generally, a defendant who fails to raise a Confrontation Clause issue during the trial court proceedings forfeits the right to present it for the first time on appeal." *State v. Russell*, 4th Dist. Ross No. 21CA3750, 2022-Ohio-1746, ¶ 90. Thus, objecting on one ground does not preserve additional objections not mentioned at trial. *Id.* Therefore, we will solely address Newcomb's hearsay claim.

[*P49] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement." Evid.R. 801(C). A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Evid.R. 801(A). And a "declarant" is "a person who makes a statement." Evid.R. 801(B).

> Hearsay is not admissible 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 a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

Evid.R. 802.

[*P50] Generally, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343 (1987), paragraph two of the syllabus. Accordingly, "we review a trial court's hearsay rulings for an abuse of discretion." *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97. An abuse of discretion "is more than a mere error of law or judgment; it implies that a trial court's decision was unreasonable, arbitrary or unconscionable." *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, 90 N.E.3d 857, ¶ 27, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983).

> Testimony to explain police conduct is admissible as nonhearsay if it satisfies three criteria: (1) the conduct to be explained is relevant, equivocal, and contemporaneous with the statements, (2) the probative value of the statements is not substantially outweighed by the danger of unfair prejudice, and (3) the statements do not connect the accused with the crime charged.

State v. Beasley, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 172, citing *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 27.

[*P51] On January 3, 2021, Fahnestock was struck with a tan truck driven by Newcomb. The same tan truck was seen earlier by Hindi when Hindi was assaulted a second time by Newcomb. During this assault, Hindi was able to obtain the license plate number of the truck, which he recorded as HIL286, and on that same day, January 3rd, Hindi provided Sergeant Todd Easterling with the license plate number. Then on January 6th, Clark's landlord, who also resides on the same property as Clark, contacted the Sheriff's department and reported a Chevy tan truck was randomly parked on his property. Deputy Mullins went to the property and took a photo of the truck, which was admitted as State's Exhibit 6. The Chevy tan truck did not have a license plate, and **[**341]** so the VIN number of the truck was recorded, and Deputy Mullins ran the VIN number in the national database.

[*P52] Detective Sergeant Bollinger testified that he is responsible for reviewing all deputies' reports relating to a case to determine whether additional investigation is required. He, thus, reviewed the January 3rd and 6th reports, and then on January 8th, Detective Sergeant Bolling himself went to Clark's property to check on the Chevy tan truck, but the truck was no longer there. Detective Sergeant Bollinger then obtained the VIN number through the radio log at the Sheriff's office from January 6th and verified the VIN number as belonging to a Chevy truck registered to Newcomb's wife that had a license plate number of HIL1286, which is one number off from the license plate number provided earlier by Hindi.

[*P53] As outlined above, Detective Sergeant Bollinger took several steps to identify the Chevy tan truck's owner. The first of which was to obtain the VIN number of the Chevy truck, which he got from the sheriff's radio log. The log was not admitted as an exhibit at trial. The VIN number in the log was not written down by Detective Sergeant Bollinger, so he was not the declarant. Detective Sergeant Bollinger then ran the VIN number through the Ohio Law Enforcement Gateway ("OLEG") database system, which identified the owner of the Chevy truck as belonging to Rebecca Newcomb, and further, that the truck's license plate number was HIL1286. This information was admitted for the truth of the matter asserted to connect Newcomb to the felonious assault crime in Count Two. The state did not submit any evidence regarding the OLEG database or argue that the database was reliable and can be accessed as a public record. We therefore hold that the testimony was hearsay and did not meet any exception to explain the detective's police conduct.

[*P54] We, nonetheless, overrule Newcomb's assignment of error because even though the admission of Detective Sergeant Bollinger's identification of the Chevy tan truck as belonging to Newcomb's wife was erroneous, the admission was harmless as it was cumulative to other evidence admitted at trial. *See State v. Williams*, 38 Ohio St.3d 346, 350, 528 N.E.2d 910 (1988) (admission of hearsay that was cumulative to other admitted evidence constitutes harmless error.) Harmless error is "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A).

[*P55] Hindi testified that Newcomb was in a tan truck when he exited and assaulted Hindi a second time. A tan truck rammed Fahnestock's SUV several times before Fahnestock lost control of the SUV and ended up sideways in a ditch. The tan truck stopped after striking Fahnestock and two passengers exited. One of the passengers was Clark, who also confirmed that Newcomb was the driver of the tan truck, later identified as a Chevy truck.

[*P56] Clark testified that approximately 30 minutes after Hindi left Newcomb's property, Newcomb got into the driver seat of the Chevy tan truck with Clark and another male getting into the front passenger seats. Clark was in the truck when Newcomb rammed the back of Fahnestock's SUV several times. Clark said after Fahnestock flipped into the ditch, he told Newcomb to let him out. Newcomb then stopped the truck and both Clark and the other passenger exited. The next time Clark saw the truck was that evening when his landlord, who lives on the same property as Clark, asked Clark whose Chevy truck was parked in front of the barn. Clark recognized the truck as that **[**342]** belonging to Newcomb and the one Clark was a passenger in just hours earlier. It was the same truck that rammed into Fahnestock's SUV and the same truck as depicted in the photo in State's Exhibit 6. Clark stated that this Chevy truck is registered in Rebecca Newcomb's name, Newcomb's wife, but that James Newcomb is the one who drives it regularly.

[*P57] Wherefore, there is cumulative evidence demonstrating Newcomb was the driver of the Chevy tan truck when he struck Fahnestock's SUV, irrespective of Detective Sergeant Bollinger's testimony regarding the trucks VIN number. Accordingly, we overrule Newcomb's fourth assignment of error.

ASSIGNMENT OF ERROR V

[*P58] Before sentencing, Newcomb filed a motion arguing the Reagan Tokes Law ("ACT") was unconstitutional on its face. He presented four arguments. First, Newcomb claimed the ACT violates the separation-of-powers doctrine in which the executive branch, the Department of Rehabilitation and Corrections ("DRC"), can extend his sentence beyond the minimum prison term that was imposed by the judiciary branch. Second, Newcomb asserted the ACT violates his right to a jury trial since his sentence can be increased beyond the minimum sentence imposed at the disposition hearing.

[*P59] Third, Newcomb contended the ACT violates his right to due process in which the presumption of release upon serving the minimum sentence creates a protected liberty interest. That liberty interest is violated where the hearing under the ACT is not conducted by the sentencing judge, the hearing has no structure, and the ACT fails to notify a defendant of what conduct triggers an increase in the prison sentence. Finally, Newcomb argued the ACT violates double jeopardy claiming he is being sentenced twice for the same offense.

[*P60] At sentencing, Newcomb informed the trial court of his motion but then stated that the trial court does not have jurisdiction to decide the issue due to precedent from this court holding the issue was not ripe until he served his minimum prison term. Newcomb now raises the same four constitutional right violations under this assignment of error. He further states that since his sentence, the Supreme Court has determined that the issue is ripe for review and requests that we find the ACT unconstitutional.

[*P61] The state agrees that the issue is ripe for review but disagrees that the ACT is unconstitutional. The state asserts that the DRC does not extend a defendant's sentence beyond that imposed by the trial court. A defendant's maximum sentence is the sentence imposed by the trial court and the DRC cannot extend a defendant's prison term beyond the maximum sentence. Accordingly, the state maintains that the ACT is constitutional.

Law and Analysis

[*P62] The trial court did not rule on Newcomb's motion that the ACT was unconstitutional following our precedent at the time in which we held that the issue was not ripe for review until a defendant serves his minimum prison term. *See State v. Walker*, 4th Dist. Washington No. 20CA24, 2021-Ohio-2693, ¶ 20 ("the constitutionality of Reagan-Tokes sentencing is not yet ripe because on direct appeal an appellant has yet to serve his or her minimum prison term, which is the first instance in which the department of corrections could take any action that affects the length of appellant's incarceration.") Since Newcomb's sentencing, however, the Supreme Court of Ohio in *State v. Maddox* held that "a criminal defendant's challenge to the constitutionality **[**343]** of R.C. 2967.271 is ripe for review on the defendant's direct appeal of his or her conviction and prison sentence." 168 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797, ¶ 22.

[*P63] Generally, we remand issues to the trial court that were not addressed by the court, but in this case, we do not. This is because we conduct a de novo review of constitutional challenges to a statute. *See State v. Rister*, 4th Dist. Lawrence No. 21CA17, 2023-Ohio-1284, ¶ 14.

[*P64] In *State v. Hacker* the Supreme Court addressed three similar facial constitutional challenges to the ACT: separation-of-powers doctrine, right to a jury trial, and procedural due process. __ Ohio St.3d __, 2023-Ohio-2535, 229 N.E.3d 38 , ¶ 1. The Supreme Court outlined the application of the ACT which provides for an indefinite sentence for first-degree and second-degree felony offenders in which life imprisonment is not an available sentence. *Id.* at ¶ 7. The indefinite sentence has a minimum prison term and a maximum prison term that are imposed at disposition by the trial court. *Id.* The ACT presumes that a defendant will be released after completing the minimum prison term, but that presumption can be rebutted by the DRC. *Id.* at ¶ 9.

[*P65] In rejecting the claim that the ACT violates the separation-of-powers doctrine, the Supreme Court held:

> Once the trial court imposes minimum and maximum prison terms under R.C. 2929.14(A)(1)(a) or (2)(a), the sentence for the offender has been set. "[D]efendants who have been sentenced under the Reagan Tokes Law have received the entirety of their sentences and the sentences have been journalized." *State v. Maddox*, 168 Ohio St.3d 292, 2022-Ohio-764, 198 N.E.3d 797, ¶ 16. If the DRC determines that the presumption of release has been rebutted, it may maintain the offender's incarceration—but only within the bounds set by the trial court. It does not impede the court's exercise of its judicial powers.
> * * * Should the DRC determine that the presumption of release is rebutted as the result of an offender's behavior during his incarceration, the additional time that the offender may have to serve is limited by the sentence that has already been imposed by the trial court. R.C. 2967.271(D).
> * * *
> We conclude that allowing the DRC to rebut the presumption of release for disciplinary reasons does not exceed the power given to the executive branch and does not interfere with the trial court's discretion when sentencing an offender. Therefore, we hold that the Reagan Tokes Law does not violate the separation-of-powers doctrine.

Id. at ¶ 16, 23, 25.

[*P66] The Supreme Court also rejected the argument that the ACT violates a defendant's right to a jury trial holding:

> But here, the "prescribed range of penalties" is determined upon the return of a guilty verdict—or, as in the cases before us, when the offender pleads guilty to the charged offenses. Once an offender is found guilty of an eligible offense, the trial court has the discretion to sentence him to any minimum sentence within the appropriate range. R.C. 2929.14(A)(1)(a) and (2)(a). And the maximum sentence is calculated based on that minimum sentence. *Id.*; R.C. 2929.144(B)(1). Because no determination by the DRC regarding Simmons's behavior while in prison will change the range of penalties prescribed by the legislature and imposed by the trial court, the right to a jury trial is not implicated.

[344]** *Hacker*, __ Ohio St.3d __ , 2023-Ohio-2535, 229 N.E.3d 38, at ¶ 28.

[*P67] With regard to the procedural due process challenge, the Supreme Court first held that the presumption of release upon serving the minimum prison term "creates an interest that entitles offenders to due-process protection." *Id.* at ¶ 36. Accordingly, due process requires a hearing before an offender is deprived of that right. *Id.* at ¶ 37. And the "Reagan Tokes Law provides the offender with a hearing before his incarceration is maintained. So, it does not, by its terms, deprive an offender of 'notice and an opportunity to be heard * * * at a meaningful time and in a meaningful manner,' *Hochhausler*, 76 Ohio St.3d 455 at 459, 1996- Ohio 374, 668 N.E.2d 457." *Id.* at ¶ 39.

[*P68] Pursuant to the Supreme Court's decision in *Hacker*, which we are bound to follow, we overrule Newcomb's arguments that the ACT violates the separation-of-powers doctrine, his right to a jury trial, and his right to due process.

[*P69] Newcomb additionally argues that the Act violates his right against double jeopardy claiming he is being punished twice for the same offense. We overrule this argument as well. The Double Jeopardy Clause protects against three abuses: (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3) "multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

[*P70] We find persuasive a decision by the Third District Court of Appeals that concluded the first two double jeopardy protections are not implicated under the ACT. In *State v. Harrison*, the Third District held:

> application of the Reagan Tokes law does not constitute double jeopardy under the law. Double jeopardy prohibits one from being retried for the same offense. *State v. Mutter*, 150 Ohio St.3d 429, 2017-Ohio-2928, 82 N.E.3d 1141. The decision whether an inmate serves more than the minimum sentence is not a retrial of the original offense, but is based upon subsequent behavior. The sentence may not be extended more than the maximum sentence originally imposed by the trial court. Thus the double jeopardy clause of the constitution is not implicated in this matter.

3d Dist. Logan No. 8-22-05, 2022-Ohio-2537, ¶ 25, *appeal allowed*, 168 Ohio St. 3d 1470, 2022-Ohio-4380, 199 N.E.3d 543, ¶ 25, and *appeal dismissed as improvidently allowed sub nom*. *In re Cases Held for State v. Hacker & State*, 2023-Ohio-3863, ¶ 25.

[*P71] The third protection under the double jeopardy clause is the protection against multiple punishments. Contrary to Newcomb's argument, the ACT's indefinite sentence scheme does not violate this protection. "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution affords protections against the imposition of multiple criminal punishments for the same offense." *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 16, citing *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). The prohibition against multiple punishments is codified in R.C. 2941.25, which relates to allied offenses.

[*P72] In the case at bar, Newcomb does not claim that his felonious assault conviction involving Fahnestock as the victim is an allied offense to his assault or theft convictions. Newcomb received one indefinite **[**345]** prison sentence for his felonious assault conviction. The rebuttal presumption of serving more than the minimum prison term will be based on new behaviors that Newcomb commits while in prison, and not based on his conduct in committing felonious assault. *See* R.C. 2967.271(C). Moreover, once Newcomb serves the maximum prison term of six years that was imposed by the trial court at sentencing, he must be released from prison.

[*P73] Accordingly, we find that the ACT does not violate the separation-of-powers doctrine, double jeopardy, Newcomb's right to a jury trial, and his right to due process. We therefore overrule his fifth assignment of error.

CONCLUSION

[*P74] Having overruled Newcomb's five assignments of error, we affirm the trial court's judgment entry of conviction.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. and Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

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