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Court of Appeals, Eighth Appellate District

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April 19, 2018

105537 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v EARRON RAYMOND LEE

Affirmed.

Anita Laster Mays, J., and Larry A. Jones, Sr., J., concur; Kathleen Ann Keough, P.J., concurs in judgment only.

KEY WORDS: *Ineffective assistance of counsel, motion to suppress, joinder, manifest weight of evidence, sufficient evidence, and Batson challenge.*

The appellant was not denied effective assistance of counsel when his counsel failed to file a motion to suppress the witnesses' photo identification because the photo identification was conducted properly. The appellant was not denied effective assistance of counsel or prejudiced by the decision to try the two indictments together. There was sufficient evidence to convict the appellant, and the appellant's convictions were not against the manifest weight of the evidence. The trial court did not err when it denied appellant's Batson challenge because the appellant did not demonstrate a prima facie case of purposeful discrimination.

105545 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v JANE HARRIS

Affirmed.

Anita Laster Mays, J., Eileen A. Gallagher, A.J., and Melody J. Stewart, J., concur.

KEY WORDS: *Conflict of interest, dual representation of criminal defendants.*

A criminal defendant who fails to object to dual legal representation at trial must establish that an actual conflict occurred and the attorney's performance in defending the client was adversely affected as a result.

105692 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEVONTAE HUGLEY

Affirmed in part, reversed in part, and remanded.

Anita Laster Mays, J., Mary Eileen Kilbane, P.J., and Kathleen Ann Keough, J., concur.

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(Case 105692 continued)

KEY WORDS: Evid.R. 611(C), Evid.R. 614, adverse witness, impeachment evidence, witness of the court, R.C. 2905.01(A)(3), kidnapping, sufficiency and manifest weight of the evidence.

The trial court did not abuse its discretion in allowing impeachment evidence during examination of an adverse witness of the court who substantially recanted key statements and was recorded discussing the testimony with appellant prior to trial. Evid.R. 611(C) and 614. Appellant's conviction for kidnapping is not supported by sufficient evidence and is against the manifest weight of the evidence where there is no evidence of restraint, removal, or a purpose to terrorize or inflict physical harm.

105752	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v SEAN QUIGLEY			

Affirmed and remanded.

Patricia Ann Blackmon, J., Mary J. Boyle, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Guilty plea; consecutive sentences; costs; merger; R.C. 2925.11.*

Trial court strictly complied with duty to apprise defendant that he did not have to testify against himself and did not have to further explain that silence could not be used against him at trial; consecutive sentences were proper but journal entries lacked R.C. 2929.14(C) findings; costs were erroneously imposed in defendant's absence; possession of different drugs within same schedule did not constitute allied offenses subject to merger.

105841	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v TAMIRA JOHNSON			

Affirmed.

Melody J. Stewart, J., Eileen T. Gallagher, P.J., and Sean C. Gallagher, J., concur.

KEY WORDS: *R.C. 2919.22; endangering children; sufficiency of the evidence; manifest weight of the evidence; circumstantial evidence; recklessness.*

Trial court did not err by finding a mother guilty of endangering children where her toddler was found by a stranger, outside alone, wearing only a diaper, after she left him unattended in her apartment. Evidence of a prior incident involving another child, who when left alone seriously burned herself, was sufficient to show the mother knew leaving a child unattended posed a substantial risk of harm. Conviction was not against the manifest weight despite the mother's testimony that she was unaware of the risk.

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105849 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
PAUL J. BROBST, ET AL. v CITY OF LYNDHURST

Affirmed in part, reversed in part, and remanded.

Eileen T. Gallagher, P.J.; Melody J. Stewart, J., concurs in judgment only; and Patricia Ann Blackmon, J., dissents with separate attached opinion.

KEY WORDS: *Summary judgment; ordinance; home occupation; retail store; sale of goods; abuse of discretion; statutory construction; unambiguous, clear meaning; expressio unius est exclusio alterius.*

The trial court erred by granting summary judgment in favor of the city. The trial court's finding is not supported by the broad definition of a "home occupation" set forth in L.C.O. 1150.09(c)(73). However, the trial court did not abuse its discretion by denying the city's motion to submit additional evidentiary materials in support of its motion for summary judgment.

105850 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
BLISSWOOD VILLAGE HOME OWNERS ASSOCIATION v
GENESIS REAL ESTATE HOLDINGS GROUP, LLC, ET AL.

Dismissed.

Tim McCormack, J., Mary Eileen Kilbane, P.J., and Eileen T. Gallagher, J., concur.

KEY WORDS: *Foreclosure; confirmation of sale; R.C. 2329.45; mootness.*

The debtor's failure to seek a stay rendered his appeal from the order confirming the sale moot because the property had been sold and the proceeds were distributed. Therefore, the proceeds of the sale are no longer under this court's jurisdiction and there is no effective relief available.

105870 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ANATOLY POVROZNIK

Convictions affirmed; remanded for resentencing.

Tim McCormack, J., Eileen A. Gallagher, A.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Felonious assault; domestic violence; endangering children; manifest weight; sufficiency of the evidence; merger; allied offenses of similar import; R.C. 2941.25.*

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(Case 105870 continued)

Povroznik's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. Felonious assault, domestic violence, and endangering children are allied offenses of similar import that should have merged for sentencing where the offenses were committed with the same conduct, did not cause separate harm, and were committed with a single animus.

105880 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
HSBC MORTGAGE SERVICES, INC. v MITCHELL BARNEY, ET AL.

Affirmed.

Sean C. Gallagher, J., Mary J. Boyle, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: Foreclosure decree; assignment; summary judgment; Civ.R. 56; standing; affidavit; personal knowledge.

Appellant failed to demonstrate genuine issues of material fact with respect to the decree of foreclosure entered in favor of the mortgagee and holder of the note.

105928 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MATTHEW JUNG

Affirmed in part, reversed in part and remanded.

Eileen A. Gallagher, A.J., Melody J. Stewart, J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: R.C. 2929.11; R.C. 2929.12; violation of community control sanctions; maximum sentences; postrelease control; R.C. 2967.28; unclassified felony.

When sentencing defendant on felony convictions after he violated community control sanctions, it was presumed that trial court considered principles and purposes of sentencing under R.C. 2929.11 and relevant sentencing factors under R.C. 2929.12 where defendant did not affirmatively show otherwise. Defendant's sentences on felony convictions were not clearly and convincingly contrary to law and the record did not otherwise clearly and convincingly fail to support his sentences. Portion of sentence that imposed postrelease control for violation of R.C. 3734.03, an unclassified felony, was contrary to law and is, therefore, vacated.

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105935 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JUDITH O. NAGY

Affirmed in part, reversed in part, and remanded.

Sean C. Gallagher, J., Mary J. Boyle, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Restitution; amount; R.C. 2929.18(A)(1); plea agreement; payments; account; vacate; reversed; remanded; instructions; modify.*

The trial court erred by imposing restitution in an amount that was not consistent with the plea agreement and failed to credit appellant for payments that had been made to the victim. Appellant was not entitled to vacate her plea; rather, the case was reversed as to the order of restitution only, remanded to the trial court with instructions to modify the restitution order, and affirmed in all other respects.

105945 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
JACQUELINE G. COLLINS v LINCOLN W. COLLINS, SR.

Affirmed.

Eileen T. Gallagher, J., Mary Eileen Kilbane, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Marital property; contempt of court; show cause; jail; imprisonment for debt; constitutional; inability to pay defense.*

Trial court acted within its discretion in finding husband in contempt of court for failure to pay settlement amount representing wife's share of marital property where husband admitted failure to make payment and failed to demonstrate an inability to pay.

105978 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v GEORGE DUNCAN

Affirmed.

Melody J. Stewart, J., Eileen A. Gallagher, A.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Crim.R. 11; Crim.R. 32; guilty plea; judicial release; substantial compliance.*

Court substantially complies with Crim.R. 11 when defendant does not claim prejudice, and under totality of circumstances, it is clear that defendant understood judicial release ineligibility was term of

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guilty plea. It is harmless error when the court fails to inform defendant of right to appeal where defendant is appointed counsel for appeal.

106003 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CYNTHIA D. MAY

Affirmed.

Mary J. Boyle, P.J., Patricia Ann Blackmon, J., and Anita Laster Mays, J., concur.

KEY WORDS: Sufficiency, aggravated vehicular assault, R.C. 2903.08(A)(1)(a), R.C. 4511.19(A)(1)(a).

The defendant's convictions for aggravated vehicular assault were supported by sufficient evidence because witnesses testified that she was drinking in the bar that night, she had glassy eyes, and she smelled of alcohol and surveillance footage showed the defendant's car traveling at a high rate of speed and swerving into the victims' vehicle.

106011 BEDFORD MUNI. C CRIMINAL MUNI. & CITY
VILLAGE OF WOODMERE v JOEY LEE YOUNG

Affirmed.

Patricia Ann Blackmon, J., Eileen A. Gallagher, A.J., and Sean C. Gallagher, J., concur.

KEY WORDS: Ineffective assistance of counsel; failure to object.

Trial counsel was not ineffective for failing to object to certain testimony presented in the state's case-in-chief. It is within the court's discretion whether to admit leading questions on direct examination, and, because this case was tried to the bench, we presume the court did not rely on inadmissible hearsay.

106031 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v SIXTO COLON

Affirmed.

Eileen A. Gallagher, A.J., Sean C. Gallagher, J., and Patricia A. Blackmon, J., concur.

KEY WORDS: Felonious assault, aggravated assault, self-defense, R.C. 2907.05.

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(Case 106031 continued)

The United States Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637, (2008) did not render Ohio's self-defense statute, R.C. 2907.05, unconstitutional. The jury's decision to reject appellant's affirmative defense of self-defense was not against the manifest weight of the evidence.

106053 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v GREGORY A. COPLEY

Affirmed.

Patricia Ann Blackmon, J., Mary J. Boyle, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Presentence motion to withdraw no contest plea; motion to disqualify counsel; ineffective assistance of counsel.*

The trial court did not err when it denied Copley's presentence motion to withdraw his no contest pleas and his motion to disqualify appointed counsel; counsel was not ineffective for advising Copley to plead no contest in light of the compelling evidence obtained by the state and given that this strategy resulted in a sentence that was shorter than the state's best offer.

106086 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ALONZO HOUSTON v FERNANDO MORALES

Affirmed.

Mary Eileen Kilbane, P.J., Frank D. Celebrezze, Jr., J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Motion for summary judgment; Civ.R. 56; fellow employee immunity; R.C. 4123.471; injury occurring in the course of and arising out of the plaintiff's employment. — Judgment affirmed.*

The trial court properly determined that the fellow employee immunity statute applied to the instant case. First, the injury was caused by another employee. There is no dispute that both plaintiff and defendant were employees at Hose Master, and plaintiff was injured as a result of the accident. Second, the injury occurred in the course of and arising out of plaintiff's employment. There is no dispute that plaintiff was awarded workers' compensation benefits for the injuries he sustained from the accident with the defendant.

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106468 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v WILLIAM DILLEY

Affirmed.

Patricia Ann Blackmon, J., Eileen A. Gallagher, A.J., and Sean C. Gallagher, J., concur.

KEY WORDS: Postconviction relief; subject matter jurisdiction; probate; general division; R.C. 2931.03; R.C. 2931.01.

Court of Common Pleas, General Division, had subject matter jurisdiction to convict defendant of theft and other offenses where he served as financial advisor for a person who was incompetent and executed amended trust which named himself as beneficiary; interpleader action involving trust proceeds did not vest all jurisdiction over defendant's conduct in the probate division.