

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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December 6, 2018

105742 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: M.H.

Reversed and remanded.

Tim McCormack, P.J.; Kathleen Ann Keough, J., concurs (with separate concurring opinion attached); Larry A. Jones, Sr., J., dissents (with separate dissenting opinion attached).

KEY WORDS: *Motion to suppress; social worker; interview; Miranda; custodial interrogation; law enforcement; agent; totality of circumstances.*

The trial court erred when it granted M.H.'s motion to suppress his statements to the social worker where the circumstances demonstrate the social worker was not acting as an agent of law enforcement and the juvenile was not subjected to custodial interrogation as contemplated by Miranda v. Arizona.

105769 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JEIMIL HUNT

Affirmed.

Anita Laster Mays, J., and Melody J. Stewart, P.J., concur; Sean C. Gallagher, J., concurs in judgment only.

KEY WORDS: *Statement of record; App.R. 9(C); presume regularity; R.C. 2945.06; Crim.R. 11.*

The appellant has not demonstrated through his App.R. 9(C) statement of record that the trial court or panel erred in any way. Where there is no transcript of the lower court's proceedings, we presume regularity. The trial court complied with R.C. 2945.06 and Crim.R. 11(C)(3), which requires a panel of three judges to accept a plea of guilty to a charge of aggravated murder with specifications.

106036 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
SMS FINANCIAL XXVI, LLC v THE WAXMAN CHABAD CENTER, ET AL.

106037 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
SMS FINANCIAL XXVI, LLC v THE WAXMAN CHABAD CENTER, ET AL.

Reversed and remanded.

Anita Laster Mays, J., Patricia Ann Blackmon, P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Res judicata, claim preclusion, final appealable order.*

The trial court erred in finding that res judicata applied to a 2016 commercial foreclosure action.

In 2014, the trial court granted summary judgment in favor of appellees in a commercial foreclosure action finding that the underlying promissory note was not properly endorsed. This court dismissed the appeal of that judgment and remanded the case to the trial court due to the lack of a final appealable order as the result of an outstanding fraud count.

On remand, the 2014 case was consolidated with a newly filed 2016 case between the same parties involving an endorsed version of the promissory note. In a single entry, the trial court again granted summary judgment in the 2014 case and determined that the 2016 filing was barred by the doctrine of res judicata, a finding that conflicted with the trial court's concurrent scheduling of a pretrial on the remaining fraud count in the 2014 case, indicating the matter was not, in fact, final. .

106336 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v EFRAIN ANGLERO

Affirmed.

Patricia Ann Blackmon, J., Mary J. Boyle, P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Res judicata; motion to withdraw guilty plea; imposition of postrelease control.*

Defendant's challenge to the imposition of a fine as part of his felony sentence is barred by res judicata, because he did not raise the issue in a direct appeal. The court properly notified defendant about postrelease control; therefore, the court did not err when it denied his motion to withdraw guilty plea.

106389 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CHRISTOPHER EVERETTE

Affirmed.

Mary Eileen Kilbane, P.J., Eileen T. Gallagher, J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Guilty plea; trial court's involvement in the plea bargaining process; Crim.R. 11(C); maximum penalty.*

The trial court's statements outlining the maximum potential prison sentence defendant would be facing if he were found guilty after a trial, do not amount to involvement in the plea bargaining process. To the contrary, the trial court was merely advising the defendant of

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the maximum penalty he could receive if he went to trial and was found guilty of all the counts alleged against him in the indictment. Under Crim.R. 11(C)(2)(a), the trial court must be sure that before a defendant pleads guilty to a felony, he knows the maximum penalty. Therefore, by explaining the maximum sentence defendant could receive, the trial court was complying with the requirements of Crim.R. 11(C)(2)(a).

106412 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JERMAINE BURKES

Affirmed.

Tim McCormack, J., Eileen A. Gallagher, A.J., and Mary J. Boyle, J., concur.

KEY WORDS: *Aggravated murder; R.C. 2903.01(A); prior calculation and design; provocation; cooling off; jury instruction; voluntary manslaughter; sudden; R.C. 2903.03(A); sufficiency of the evidence; manifest weight; murder; R.C. 2903.02(B); felonious assault; R.C. 2903.11(A); knowingly; Batson challenge; race neutral reasons; sentence; R.C. 2953.08(D)(3).*

Burkes failed to show serious provocation sufficient to warrant jury instructions on voluntary manslaughter where the evidence demonstrated a cooling off period between the alleged provocation and the commission of the crime that rendered the “sudden” element of voluntary manslaughter insufficient as a matter of law. The state presented sufficient evidence of prior calculation and design to support Burkes’s conviction for aggravated murder where Burkes expressed revenge for a prior incident with a man he knew, acquired a gun, obtained a ride to the home where he knew the victim to be staying, charged upstairs threatening the victim, called him outside, and shot and killed him. The state also presented sufficient evidence to support the knowing element of Burkes’s convictions for murder and felonious assault. Burkes’s convictions were not against the manifest weight of the evidence. The trial court did not err in denying Burkes’s Batson challenge where the court engaged in the proper analysis and the state provided sufficient race-neutral reasons for utilizing its peremptory challenge. Burkes’s sentence for aggravated murder is not reviewable pursuant to R.C. 2953.08(D)(3).

106415 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ALBERT BERRY

Vacated and remanded.

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

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KEY WORDS: Statute of limitations; preindictment delay; rape; 20-year statute of limitations; ineffective assistance of counsel; prejudice; R.C. 2901.13; reasonable diligence.

Judgment is vacated, and the matter is remanded so counsel can file a motion to dismiss the indictment. The state's attempts to locate defendant lacked the requisite "reasonable diligence" to commence the prosecution within the 20-year limitations period when the defendant was first arrested in 1995 for the offense, but the victim chose not to pursue the case and then the defendant was indicted one week prior to the 20 years after the investigator reopened the case based on a CODIS hit (on another male) from the victim's rape kit. The summons was returned via FedEx for a "bad address" and the case was stagnant for nearly two years until the defendant was arrested. Consequently, nearly 22 years passed since the incident in January 1995. During the state's investigation in 2014, the investigator was aware that the defendant was making child support payments, but he did not seek out defendant's contact information through the county agency.

106476	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v KYLE V. WOODS			

Affirmed.

Patricia Ann Blackmon, J., Tim McCormack, P.J., concurs; Melody J. Stewart, J., concurs in judgment only.

KEY WORDS: *Finding of guilt in open court; court speaks through its journal entry; firearm specification; having weapons while under disability; consecutive sentences.*

Court's consecutive sentence for firearm specification, having weapons while under disability, community control sanctions, and violations were supported by evidence in the record and not contrary to law.

106545	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v LORENZO COLLINS, JR.			

Affirmed.

Mary Eileen Kilbane, J., Eileen A. Gallagher, A.J., and Anita Laster Mays, J., concur.

KEY WORDS: *R.C. 2152.12(B); Juv.R. 30; amenability; discretionary bindover.*

The juvenile court did not abuse its discretion in determining that defendant-appellant was not amenable to rehabilitation in the juvenile system and discretionarily binding the matter over to the general division of the common pleas court for prosecution of

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defendant-appellant as an adult. Defendant-appellant does not dispute the juvenile court's finding of four of the nine factors in favor of transfer under R.C. 2152.12(D) and two of the eight factors against transfer under R.C. 2152.12(E). Defendant-appellant does argue, however, that the record supports the application of three additional factors against transfer. The record supports the juvenile court's resolution of the statutory factors and, therefore, does not demonstrate an abuse of the juvenile court's discretion.

106570 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v KASSIUS WILLIAMS

Affirmed.

Eileen T. Gallagher, J., Eileen A. Gallagher, A.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Guilty plea; Crim.R. 11; psychiatric diagnosis; learning disability; prescription drugs; ineffective assistance of counsel; breakdown; attorney-client relationship; consecutive sentences.

Defendant entered guilty pleas knowingly, intelligently, and voluntarily even though he had a learning disability and suffered from post-traumatic stress disorder where record shows defendant understood the proceedings and trial court complied with Crim.R. 11.

Defendant failed to establish claim of ineffective assistance of counsel where defendant acknowledged he was satisfied with his lawyer's efforts but was disappointed that they did not give him a copy of a motion that was intended for "counsel only" by the prosecutor.

Consecutive sentences were not contrary to law where the court made the necessary findings before imposing consecutive sentences and because nothing in R.C. 2929.14(C)(4) prohibits a trial court from making joint findings on multiple defendants simultaneously.

106573 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v STEVEN MORMILE

Reversed and remanded.

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

KEY WORDS: Driving privileges, R.C. 4510.021, R.C. 2945.67.

The state properly received leave to appeal the trial court's order

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granting the defendant driving privileges. The trial court's order granting the defendant driving privileges was improper because the order did not specify the times and places applicable to defendant's limited driving privileges. Additionally, when granting the defendant driving privileges, the trial court incorrectly found that the state had no objection to the defendant's request for driving privileges.

106594 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MOREQUITY, INC. v ANTHONY R. GOMBITA, ET AL.

Affirmed.

Eileen T. Gallagher, J., Eileen A. Gallagher, A.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Foreclosure; standing; allonge; note; mortgage; default; affidavit; personal knowledge; conditions precedent; holder; enforce; business record; hearsay; payment history; U.S. Department of Housing and Urban Development; possession; cure; acceleration.

Plaintiff met its burden under Civ.R. 56(C) of establishing its entitlement to foreclosure. Collectively, the documents incorporated into the affidavit attached to plaintiff's motion for summary judgment demonstrated (1) that plaintiff is the holder of the note and mortgage; (2) the chain of assignments and transfers; (3) that the mortgagor is in default; (4) that all conditions precedent have been satisfied, and (5) the amount of principal and interest due.

106598 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v EDWARD TAYLOR

Reversed and remanded.

Larry A. Jones, Sr., J., Tim McCormack, P.J., and Eileen T. Gallagher, J., concur.

KEY WORDS: R.C. 2967.28/postrelease control.

Appellant was guilty of an unclassified felony and was therefore entitled to be informed of postrelease control at his sentencing hearing.

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106615 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO, EX REL., CITY OF OLMSTED FALLS v TED BOWMAN, ET AL.

107150 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO EX REL CITY OF OLMSTED FALLS v TED BOWMAN

Affirmed.

Melody J. Stewart, J., Mary Eileen Kilbane, P.J., and Tim McCormack, J., concur.

KEY WORDS: *Subject matter jurisdiction; nuisance action; court of common pleas; defective pleading.*

A court of common pleas has subject matter jurisdiction over a nuisance action brought by a city, where jurisdiction is provided by statute. An imprecision or defect in pleading does not terminate a court's subject matter jurisdiction over such a case or invalidate its judgment.

106676 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JAMIE O. ROBINSON, SR.

106980 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JAMIE O. ROBINSON, SR.

Affirmed.

Mary J. Boyle, J.; Eileen A. Gallagher, A.J., concurs; Melody J. Stewart, J., dissents with separate opinion.

KEY WORDS: *Judicial release; Civ.R. 11(C)(2)(a); voluntary plea; maximum penalty; prejudice; substantial compliance.*

A trial court does not have to advise a defendant about judicial release under Civ.R. 11(C)(2)(a). When it does inform a defendant about judicial release, however, it cannot misinform the defendant about judicial release. But giving a defendant the wrong information about judicial release does not always invalidate the plea. In this case, although the trial court misinformed the defendant at his plea hearing that he may be entitled to judicial release, it did not unequivocally tell him that he would be able to get out of jail after a fixed amount of time. Further, the trial court's misinformation about judicial release did not prejudice the defendant because the record established that the defendant still would have entered into the plea even if he had been properly informed about judicial release because he entered into his guilty plea for a reduction in prison time rather than the vague possibility of judicial release.

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106694 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RAYNARD MCDONALL

Affirmed.

Larry A. Jones, Sr., J., Mary J. Boyle, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Crim.R. 11(C)(2)/guilty plea.*

The trial court's statement that the prison sentence for each of the two counts was mandatory was a correct statement. Appellant's challenges are nonconstitutional concerns; the trial court's substantial compliance therefore was sufficient under the requirements of Crim.R. 11(C)(2). Appellant's plea was made knowingly, voluntarily, and intelligently.

106749 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MICHAEL A. PIVONKA, ET AL. v
BARBARA SEARS, DIRECTOR OF OHIO DEPT. OF MEDICAID, ET AL.

Affirmed.

Mary J. Boyle, P.J., Patricia Ann Blackmon, J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Civ.R. 23; class certification; R.C. 5160.37; subject matter jurisdiction; R.C. 5101.58.*

The trial court had subject matter jurisdiction to certify the class. The trial court's grant of class certification was proper because adjudicating the action as a class action was superior to the administrative process; the damages calculation for class members would not require individual inquiries; and the class properly included individuals who paid under the former version of the Medicaid statute. Further, because the commonality and predominance requirements were satisfied, the trial court was not required to determine what statute of limitations applied.

106760 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v SHEILA GONZALES

Reversed and remanded.

Tim McCormack, P.J., Sean C. Gallagher, J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Consecutive sentences; R.C. 2929.14(C)(4); disproportionate; contrary to law.*

Where trial court failed to make the proportionality finding under

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R.C. 2929.14(C)(4), the imposition of consecutive sentences was contrary to law.

106768 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v
BALCER PERFORMANCE & RESTORATION, ET AL.

Affirmed in part, reversed in part, and remanded.

Sean C. Gallagher, J., Tim McCormack, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Replevin; unjust enrichment; quantum meruit; implied contract; service; storage; vehicle; stolen; restatement; restitution; mistaken belief; owner; knowledge; innocent recipient; forced exchange; notice.*

Affirmed the trial court's decision finding restoration shop and its owner were entitled to recover from State Farm, who is the legal owner of a stolen motorcycle, under a theory of unjust enrichment for the improved value of the motorcycle and for storage fees incurred from the time State Farm received a notice pertaining to the vehicle until the filing of a replevin action. No further recovery was permitted for storage fees, and there was no basis for awarding an artisan's lien.

106791 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEKARI HEARD

Affirmed.

Anita Laster Mays, J., Eileen A. Gallagher, A.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Consecutive sentencing factors; R.C. 2929.11; R.C. 2929.12; judicial release; R.C. 2929.20; eligible offender; premature.*

The trial court supported the imposition of consecutive sentences by clear and convincing evidence and cited the requisite statutory factors. Appellant's claim that the court erred when it ordered that he was not eligible for judicial release until he served 18 years of the sentence was premature. The appeal is not ripe for review until appellant becomes an eligible offender pursuant to the statute and files a motion for judicial release.

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106803 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
6610 CUMMINGS CT., LLC v DARREL SCOTT, ET AL.

106804 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MUNNA L. AGARWAL v DARREL SCOTT, ET AL.

Affirmed.

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

KEY WORDS: *Civ.R. 56, R.C. 1335.05, R.C. 5301.01, partial performance, tenancy at will, damages, prejudgment interest, manifest weight of the evidence.*

The trial court's grant of summary judgment to the defendants was proper because there was not an enforceable agreement between the parties requiring the defendants to purchase the property. Instead, the parties had a tenancy at will, under which the defendants were only liable for the amount of rent that they failed to pay during the weeks that they lived on the plaintiff's property. The trial court's damages calculation was also proper because it was based on the amount of rent that the defendants failed to pay during the weeks that they lived on the plaintiff's property.

106806 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
GPI DISTRIBUTORS, INC. v NORTHEAST OHIO REGIONAL SEWER DISTRICT

Affirmed.

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

KEY WORDS: *Administrative appeal; motion to dismiss; R.C. 2505.06; supersedeas bond; questions of law and fact; R.C. 2505.12; due process; equal protection; R.C. 2505.11; final appealable order; Civ.R. 54(B); R.C. 2505.02; constitutional issues; constitutional avoidance.*

The trial court properly granted appellee's motion to dismiss appellant's administrative appeal. Appellant filed an administrative appeal on questions of law and fact. Pursuant to R.C. 2505.06, appellant was required to file a supersedeas bond in order to perfect its notice of appeal. Appellant failed to post the requisite supersedeas bond, and did not substitute the supersedeas bond requirement pursuant to R.C. 2505.11. Accordingly, the trial court lacked subject matter jurisdiction over appellant's administrative appeal.

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106812 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ERIC DONALDSON

Affirmed.

Sean C. Gallagher, J., Tim McCormack, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Ineffective assistance; subject-matter jurisdiction; R.C. 2901.11; guilty plea.*

Trial court possessed jurisdiction over the abduction charge, part of which occurred out of state. Although it is strongly recommended that a trial judge stop after naming each constitutional right and ask if the defendant subjectively understands that right as just explained, the failure to do so did not invalidate the plea.

106816 CLEVELAND MUNI. G CIVIL MUNI. & CITY
CLEVELAND CENTRAL CATHOLIC HIGH SCHOOL v ARVELLA MILLS

Reversed and remanded.

Eileen A. Gallagher, A.J., Anita Laster Mays, J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Summary judgment; genuine issue of material fact; private school tuition; tuition voucher; necessities; R.C. 3103.03(D); unjust enrichment; superior equity; totality of the circumstances and equities.*

Trial court erred by entering summary judgment in favor of school and denying mother's motion for summary judgment on school's claim to recover the cost of daughter's private school tuition from mother as a necessary under R.C. 3103.03(D). School did not establish that the education it provided daughter was a necessary under R.C. 3103.03(D) or that mother had neglected to provide educational support for daughter. Trial court erred in granting summary judgment in favor of private school on its unjust enrichment claim. Genuine issues of material fact existed as to whether mother was unjustly enriched and, if so, the extent to which she was unjustly enriched by her daughter's receipt of private school education where school did not have a tuition contract with mother, mother believed that daughter had a tuition voucher that covered the cost of tuition and school knew, but did not notify mother, that daughter did not have a tuition voucher prior to daughter's enrollment.

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106819 PARMA MUNI. G CIVIL MUNI. & CITY
GREGORY J. HUDAK v JOE GOLUBIC, ET AL.

Affirmed in part, reversed in part, and remanded.

Tim McCormack, P.J., Anita Laster Mays, J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Small claims; paycheck; FLSA; OMFWSA; Prompt Pay Act; statutory damages; payroll deductions; abuse of discretion.*

Hudak did not request statutory damages pursuant to the FLSA, OMFWSA, and Ohio's Prompt Pay Act before the trial court and therefore waived the issues for purposes of the appeal. The trial court's finding that the employer's payroll deduction for health insurance was "proper and reasonable" was an abuse of discretion where the record shows that the employer deducted health insurance from Hudak's paycheck when Hudak was not an employee entitled to receiving this benefit.

106831 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v BRADLEY L. BRADFORD

Dismissed.

Tim McCormack, P.J., Melody J. Stewart, J., and Larry A. Jones, Sr., J. concur.

KEY WORDS: *Resentencing; firearm specification; R.C. 2929.14; Anders v. California.*

The trial court properly resentenced appellant to 11 years, declining to impose a firearm specification on one count pursuant to R.C. 2929.14(B)(1)(e) and ordering that the imposed firearm specifications be served consecutively pursuant to R.C. 2929.14(C)(1)(a).

106838 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
H. JEAN DORGHAM v WOODS COVE III, ET AL.

Affirmed.

Kathleen Ann Keough, J., Tim McCormack, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Compel; arbitration; written contract; oral contract; R.C. 2711.01.*

Trial court did not err in denying appellants' motion to compel

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arbitration because the parties agree that no written contract exists between them; the action is based on an alleged breach of an alleged oral contract. For an arbitration provision to be enforceable, the agreement does not need to be signed, but it must be in writing.

106840 SHAKER HTS. MUNI. G CIVIL MUNI. & CITY
ZHENNI JACKSON v HAMPTONS APARTMENTS, LLC

Dismissed.

Sean C. Gallagher, J., Tim McCormack, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: Extrinsic evidence; tendered payment; satisfaction; final judgment; moot.

A payment that is voluntarily tendered during the pendency of the appeal and is one that fully satisfies the final judgment renders the appeal moot.

106843 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEVIN M. YOUNG

Affirmed.

Tim McCormack, P.J., and Patricia Ann Blackmon, J., concur; Melody J. Stewart, J., concurs in judgment only.

KEY WORDS: Guilty plea; Crim.R. 11; privilege against self-incrimination; right to silence; R.C. 2953.08; R.C. 2929.11; R.C. 2929.12; consecutive sentence.

Defendant-appellant's guilty plea was knowing, intelligent, and voluntary where the court informed him of the rights he would be waiving and the maximum potential penalties he faced. The trial court's statements at sentencing did not constitute error. The trial court did not err where it considered all required factors in sentencing and made the requisite findings before imposing consecutive sentences.

106850 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v PARIS J. LESTER

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Affirmed.

Larry A. Jones, Sr., J., Mary J. Boyle, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Ineffective assistance of counsel; R.C. 2929.11(A)/sentencing; R.C. 2929.14(A)2/permissible range.*

Where trial counsel suggested to the trial court the lower end of the sentencing range, solicited letters on appellant's behalf, and presented family members to speak on appellant's behalf, appellant's trial counsel's performance did not fall below a reasonable level of performance.

The trial court considered the principles and purposes of sentencing and sentenced appellant within the permissible range. Appellant's sentence was not contrary to law.

106863 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v WILLIAM SCOTT

Affirmed.

Mary Eileen Kilbane, P.J., Tim McCormack, J., and Melody J. Stewart, J., concur.

KEY WORDS: *Untimely petition for postconviction relief; res judicata.*

The trial court has no jurisdiction to consider an untimely petition for postconviction relief. The trial court may, however, entertain untimely petitions for postconviction relief if the petitioner demonstrates either (1) he was unavoidably prevented from discovering facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in petitioner's situation. R.C. 2953.23(A)(1)(a). In addition, the petitioner must establish by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error at trial. R.C. 2953.23(A)(1)(b). Defendant satisfied none of the above conditions. Because defendant's petition was untimely and he did not satisfy the conditions in R.C. 2953.23(A)(1), the trial court lacked jurisdiction to consider the petition.

Even if defendant's petition was timely, the issues raised in assignment of errors two through six are barred by the doctrine of res judicata. The usual formulation of res judicata in postconviction proceedings is that it bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal. Because defendant's present assertions that were raised or could have been raised in either his prior petition for postconviction relief or in his direct appeal, they would have been barred by the doctrine of res judicata if his petition had been timely filed. As a result, the trial court did not err in dismissing Scott's petition for postconviction relief.

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106883 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: A.B., ET AL.

Affirmed.

Tim McCormack, P.J., Mary J. Boyle, J., and Anita Laster Mays, J., concur.

KEY WORDS: *Juvenile court; permanent custody; best interest of the child; R.C. 2151.414; clear and convincing evidence.*

The juvenile court made the required statutory findings that the children cannot or should not be placed with the parent within a reasonable time and that permanent custody was in the best interest of the children, and these findings were adequately supported by clear and convincing evidence.

106892 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
BENTON VILLAGE CONDOMINIUM OWNERS ASSOCIATION v WILLIAM W. BRIDGE IV, ET AL.

Affirmed.

Mary Eileen Kilbane, P.J., and Tim McCormack, J., concur; Melody J. Stewart, J., dissents (see separate dissenting opinion).

KEY WORDS: *Injunctive Relief; R.C. Chapter 5311.*

The party seeking a permanent injunction must demonstrate by clear and convincing evidence that they are entitled to relief under applicable statutory law, that an injunction is necessary to prevent irreparable harm, and that no adequate remedy at law exists.

R.C. Chapter 5311 of the Ohio Revised Code governs condominium associations. R.C. 5311.19 provides that individuals who purchase condominiums are bound by all covenants and conditions in the deed, as well as the condominium declaration and bylaws. The statute also authorizes an association to seek an injunction where a unit owner fails to comply with any of the rules or regulations.

The Condominium Association has a resolution pertaining to land contracts, which provides that any Owner intending to sell a Family Unit under a land contract shall record the land contract in Cuyahoga County Records before the buyer of the Family Unit begins occupying the Family Unit. Additionally, the Owner shall provide the Board with a copy of the land contract, with evidence that it has, in fact, been recorded before the buyer begins occupancy of the Family Unit.

Defendant failed to provide the Condominium Association with the information as required by the land contract resolution. Because defendant was not in compliance with the land contract resolution and thus in violation of the statute, the trial court's issuance of the permanent injunction was proper.

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106925 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ERIN M. SLATER v THOMAS F. SLATER, II, ET AL.

Reversed and remanded.

Sean C. Gallagher, P.J., Anita Laster Mays, J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Divorce decree; separation agreement; incorporated; show cause; contempt; arbitration; R.C. 2705.02(A).*

Trial court erred in referring to arbitration matters raised in post-divorce decree motions to show cause. Once the parties' separation agreement was incorporated into the divorce decree, the obligations thereunder became subject to enforcement through contempt proceedings. The parties' agreement could not divest the trial court of jurisdiction to issue a contempt order prescribed by statute.

106946 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v GARY MILLER

Affirmed.

Frank D. Celebrezze, Jr., J., Tim McCormack, P.J., and Sean C. Gallagher, J., concur.

KEY WORDS: *Driving while under the influence; OVI; motion to suppress; R.C. 4511.19; furthermore specification; prior conviction; inevitable discovery; Miranda warnings; custodial interrogation; harmless error; field sobriety tests; reasonable suspicion; probable cause to arrest; no contest plea; clerical error.*

The trial court properly denied appellant's motion to suppress. By entering a plea of no contest, appellant admitted the truth of the allegations in the indictment, including the allegation that he had three prior convictions for OVI or other equivalent offenses within six years. Accordingly, the trial court did not err by finding appellant guilty of fourth-degree felony OVI.

106950 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v LUCAS JOHNSON

Affirmed.

Tim McCormack, P.J., Sean C. Gallagher, J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Allied offenses; R.C. 2941.25; aggravated felonious assault; attempted abduction.*

CASE DECISION LIST

(Case 106950 continued)

The trial court did not err when it did not merge Johnson's convictions for aggravated felonious assault and attempted abduction where the offenses were committed separately — at separate times and with separate conduct — and the victim suffered separate, identifiable harm.

107043 BEDFORD MUNI. C CRIMINAL MUNI. & CITY
CITY OF SOLON v JOHN M. BRODERICK

Affirmed.

Tim McCormack, J., and Mary Eileen Kilbane, P.J., concur; Melody J. Stewart, J., concurs in judgment only.

KEY WORDS: Guilty plea; probation conditions; domestic violence; disorderly conduct; abuse of discretion; firearms; State v. Jones.

The trial court did not abuse its discretion in prohibiting firearms in the defendant-appellant's home as a condition of his probation following a conviction for disorderly conduct where the prohibition was reasonably related to rehabilitating the offender, had some relationship to the crime of which the offender was convicted, and relates to conduct that is criminal or reasonably related to future criminality and serves the statutory ends of probation.

107183 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
ROHIT MALIK v DIMPLE MALIK

Affirmed.

Tim McCormack, P.J., Melody J. Stewart, J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: Divorce; predecree; motion to sell marital residence; final appealable order; R.C. 2505.02(A); special proceedings; substantial right; R.C. 3105.171(J); abuse of discretion.

The trial court's predecree order to sell the marital residence was a final appealable order because the order was made in a special-proceeding divorce and it affects a substantial right. The court's order to sell the marital residence was not an abuse of discretion where the court provided the parties an opportunity to list the home for sale with a mutually agreed upon realtor and the proceeds from the sale would be placed in escrow pending the court's division of assets, and the record demonstrates the couple's continued assertion they cannot financially maintain the residence.