

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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February 8, 2018

103290 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RANDY JONES

103302 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CARISSA JONES

Affirmed in part; vacated in part and remanded.
Decision En Banc:

Patricia Ann Blackmon, J., Mary J. Boyle, J., Eileen T. Gallagher, J., Mary Eileen Kilbane, J., and Anita Laster Mays, J., concur. Melody J. Stewart, J., concurs in judgment only with a separate opinion. Sean C. Gallagher, J., dissents with separate opinion with Frank D. Celebrezze, Jr., J., Eileen A. Gallagher, A.J., Tim McCormack, J., and Kathleen Ann Keough, J., concurring.

Decision of the Merit Panel:

Larry A. Jones, Sr., P.J., Mary Eileen Kilbane, J., and Mary J. Boyle, J., concur.

KEY WORDS: *En banc; R.C. 2953.08(G)(2)(a)/modify/vacate sentence; Crim.R. 29/motion for acquittal; manifest weight; Evid.R. 701/opinion testimony; R.C. 313.19/coroner's determination; jury instructions; Evid.R. 404(B)/other acts; Crim.R. 52(B)/plain error; R.C. 2929.11(A) and 2929.12/sentencing.*

Sufficient evidence was presented to establish an act of recklessness and that appellants' inaction was the proximate cause of the child's death. The trial court did not err in denying appellants' motion for acquittal.

The jury, as factfinder and in the best position to weigh the evidence and judge the credibility of witnesses, believed the state's theory. Appellants did not show that the jury lost its way.

A treating physician called to testify as viewer of their patient's physical condition is proper; it is within the expertise of the coroner to give an opinion on whether a death is a homicide. The coroners admitted testimony determining the cause of death was proper.

Appellant did not challenge the testimony and evidence presented at trial regarding the victim's other injuries. Nonetheless, that testimony and evidence was relevant to Count 3 of appellant's indictment and was properly admitted.

The trial court did not err in its instruction to the jury on recklessness. The instruction given was within the guidelines set forth in the Ohio Jury Instructions.

Appellant's behavior was intrinsic to the crime as charged and the trial court did not err in not giving a limiting instruction to the jury.

Appellants did not request that the trial court issue a multiple defendants instruction and on plain error have not shown that a lack of that instruction affected their substantial rights.

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105226 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL J. JENKINS

Reversed and remanded.

Tim McCormack, P.J., and Anita Laster Mays, J., concur; Sean C. Gallagher, J., concurs (with separate opinion attached).

KEY WORDS: *Preindictment delay; actual prejudice; ineffective assistance of counsel; motion to dismiss; sufficiency of the evidence; rape; complicity to rape; kidnaping; unavailable witness; unjustifiable reason for delay.*

Jenkins suffered actual prejudice based on the unavailability of a critical witness, and the state was unable to establish any justifiable reason for the nearly 20 year delay in prosecution. Therefore, his conviction is reversed.

105276 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JAMIL H. MCDONALD

Affirmed in part, reversed in part, and remanded.

Mary J. Boyle, J.; Frank D. Celebrezze, Jr., J., concurs;
Tim McCormack, P.J., concurs in judgment only with separate opinion

KEY WORDS: *Drug trafficking and possession; possessing criminal tools; sufficiency of the evidence; allied offenses of similar import; anonymous tip; trash pull.*

The state presented sufficient evidence that defendant was trafficking drugs, possessing drugs, and possessing criminal tools. The trial court erred by not merging the drug trafficking and drug possession counts.

105281 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO EX REL. MORE BRATENAHL, ET AL. v VILLAGE OF BRATENAHL, OHIO, ET AL.

Affirmed.

Mary Eileen Kilbane, J., Kathleen Ann Keough, P.J., and Tim McCormack, J., concur.

KEY WORDS: *Sunshine Law; Open Meetings Act; secret ballot; meeting minutes; executive session; motion for summary judgment.*

Judgment affirmed. The trial court properly granted summary

(Case 105281 continued)

judgment in favor of the municipality and properly denied relator’s motion for summary judgment when (1) the “secret ballots” were maintained by the municipality as a public record and subsequently produced to relator. The ballots were handwritten and included the name of the nominated individual as well as the name of each councilmember issuing the vote. Thus, the public was not denied the knowledge of the municipality’s decision-making process; (2) the meeting minutes in question provided an accurate and adequate record of the Finance Committee’s proceedings, recommendations, and council’s actions on the same. The minutes at issue reference the ordinance and resolution numbers being considered for recommendation to council, identification of each motion, some discussion and the votes of the committee members. Additionally, Relator acknowledged that the meetings were audio recorded and fully revealed the discussions and information at each meeting; and (3) review of the audio recording of the council meeting in question evidences that the motion and roll call vote to hold executive session were clearly taken. The motion and roll call vote took place before the court reporter began transcribing the record. The roll call vote is also reflected in the Clerk’s notes, which was provided during discovery.

105286	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v CHRISTOPHER L. NAVE			

105288	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v CHRISTOPHER L. NAVE			

Dismissed.

Eileen A. Gallagher, A.J., Sean C. Gallagher, J., and Anita Laster Mays, J., concur.

KEY WORDS: *Final appealable order, final judgment of conviction, nunc pro tunc, sentencing entry, blanket sentence.*

Consolidated cases were dismissed due to a lack of final appealable orders. In the first case the trial court imposed a blanket sentence that covered six counts and the error could not be fixed with a nunc pro tunc entry. In the second case the trial court’s sentencing entry failed to conform to the requirements of State v. Lester, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142 and State v. Baker, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163.

105419	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
ALPHA PLAZA INVESTMENTS, LTD. v CITY OF CLEVELAND			

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Affirmed.

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

KEY WORDS: *Civ.R. 56/summary judgment; R.C. 2744.02/political subdivision/immunity.*

The trial court did not err where it determined that appellant stated a negligent claim in its complaint; appellant, as a political subdivision, acts through its employees and thus falls under the provisions of R.C. 2744.02(B) for purposes of liability; the trial court's review of appellant's motion against appellee sought review of the merits of the case and was premature. The trial court's denial of appellant's motion for summary judgment was proper.

105501	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MICHAEL D. PERRY, JR.			

Affirmed.

Larry A. Jones, Sr., J., and Tim McCormack, P.J., concur; Eileen T. Gallagher, J., concurs in judgment only.

KEY WORDS: *Sufficiency; manifest weight; R.C. 2925.11(A)/possession of drugs; R.C. 2923.24(A)/criminal tools; R.C. 2941.25/allied offenses.*

Based on the totality of the circumstances and the witness testimony, there was sufficient evidence to support appellant's convictions and forfeiture of appellant's property; appellant's convictions are not against the manifest weight of the evidence.

Appellant's counsel's decision to admit the video as trial tactic and strategy does not rise to the level of ineffective assistance of counsel.

Appellant's constructive possession of two types of drugs constitutes two separate offenses and do not merge as allied offenses of similar import.

105511	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v KENNETH D. YOUNG			

Affirmed.

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

KEY WORDS: *R.C. 3772.99(E); gambling; craps; dice sliding; unconstitutionally vague; specificity in indictment; differentiation; other acts; Evid.R. 404(B); knowledge; absence of mistake; identification; sufficiency of the evidence; manifest weight; restitution; R.C. 2929.18; abuse of discretion; allied offenses.*

(Case 105511 continued)

R.C. 3772.99(E)(5) and (7) are not unconstitutionally vague as relating to dice sliding. Although dice sliding is not specifically defined in Ohio’s gambling statute, a person of average intelligence would have no difficulty understanding that the manipulation of the dice in a craps game by pre-setting the dice to a fixed number, throwing the dice in a way that prevents the dice from tumbling, using a third party to distract casino personnel during the throws, and placing wagers with knowledge of the attempted outcome is “acquiring knowledge that is not available to all players and concerns the outcome of the casino game” under R.C. 3772.99(E)(5) and/or “claiming, collecting, taking, or attempting to claim, collect, or take money” from a casino game with the “intent to defraud” under R.C. 3772.99(E)(7).

The evidence presented at trial sufficiently differentiated the multiple, duplicative counts contained in Young’s indictment such that the indictment did not lack specificity. The trial court did not abuse its discretion in permitting evidence of Young’s dice sliding in another casino where the evidence was presented to show the defendant’s knowledge and the absence of mistake pursuant to Evid.R. 404(B). The in-court identification was not error where it was used for proper Evid.R. 404(B) purpose and not for the purposes of identifying Young as the individual sliding dice at the Horseshoe Casino in Cleveland. The state presented sufficient evidence to support Young’s conviction, and the conviction was not against the manifest weight of the evidence.

The trial court did not abuse its discretion in ordering restitution in the amount of \$39,342 as the order was supported by competent, credible evidence in the record.

The trial court did not err when it did not merge Young’s convictions. Every roll of the dice was a separate and distinct act with a separate animus, and each roll harmed different victims.

105544	DOMESTIC RELATIONS	F	CIVIL C.P.-JUV, DOM, PROBATE
LISA KEST v BENNETT S. KEST			

Affirmed, modified and remanded.

Larry A. Jones, Sr., J, Kathleen Ann Keough, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Civ.R. 53/issuance of magistrate’s decision; R.C. 3105.19(E)(1)/jurisdiction to modify alimony/spousal support.*

The parties entered into a settlement agreement that was read into the record and proposed journal entries were submitted to the court upon which the trial court issued a final decree of divorce. There was no necessity for the magistrate to issue a decision.

Pursuant to R.C. 3105.18(E), the parties’ separation agreement was silent as to whether the trial court would retain jurisdiction to modify alimony or spousal support and appellant failed to negotiate

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(Case 105544 continued)

that term and have it placed upon the record. The trial court did not abuse its discretion in adopting the terms of the agreement that was read and placed in the record; and where arrears existed and there was no specific agreement to waive or reduce those arrears, the trial court did not abuse its discretion in preserving jurisdiction over that issue.

Appellant did not move to vacate or set aside the settlement agreement that was read into the record or request an evidentiary hearing. The trial court did not err in adopting the judgment entry of divorce.

It was improper for the trial court to leave extraneous comments in the final journal entry of divorce.

105677 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
WFG NATIONAL TITLE INSURANCE COMPANY v MICHAEL P. MEEHAN, ET AL.

Affirmed.

Eileen A. Gallagher, A.J., Kathleen A. Keough, J., and Mary Eileen Kilbane, J., concur.

KEY WORDS: *Defamation, breach of contract, breach of fiduciary duty, motion to dismiss, motion for summary judgment, admissions, motions to compel, privilege.*

Trial court did not err in granting a motion to dismiss portions of appellant's counterclaims against appellees stemming from communications made to the Ohio Department of Insurance and the Office of Disciplinary Counsel because the communications were privileged. Trial court did not err in denying appellant's untimely motions to compel. Trial court did not err in granting summary judgment against appellant based on facts deemed admitted due to appellant's untimely participation in discovery. Trial court did not err in failing to disqualify appellee's counsel after appellant's counterclaims added claims against said counsel.

105679 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ABDUL HAKIM

Affirmed.

Mary J. Boyle, J., Eileen A. Gallagher, A.J., and Eileen T. Gallagher, J., concur.

KEY WORDS: *Motion to suppress; search warrant; probable cause; scope of the search warrant; Fourth Amendment; particularity requirement; plain view; plain smell; marijuana; incriminating nature; immediately apparent.*

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(Case 105679 continued)

The trial court's judgment granting defendant's motion to suppress was affirmed. The plain view doctrine did not apply to a common, orange translucent pill bottle because the incriminating nature of the contents in the pill bottle was not immediately apparent to the officer without the officer first manipulating the bottle. The plain smell doctrine did not apply to a "balled up" paper towel because the trial court implicitly found that the officer's testimony that he smelled marijuana lacked credibility; the officer failed to include the fact that he smelled marijuana in his written report and did not mention it on direct examination.

105794 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v LUIS A. REYES

Affirmed.

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

KEY WORDS: *R.C. 2929.14(C); consecutive sentences; R.C. 2953.08(G)(2); clearly and convincingly; attempt; aggravated arson*

The trial court did not err in imposing consecutive sentences on defendant-appellant's attempted aggravated arson convictions. The trial court's finding that defendant's conduct warranted consecutive sentences was supported by the record, which reflected that the defendant poured gasoline on his girlfriend in the basement of his home during a domestic violence incident. Defendant threatened to burn down the home and his girlfriend's daughter stopped him from igniting the gasoline he had poured by knocking a lighter out of his hand.

105837 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
TRUSTAR FUNDING, LLC v CHARLES W. HARPER, ET AL.

Affirmed.

Mary J. Boyle, J., Tim McCormack, P.J., and Sean C. Gallagher, J., concur.

KEY WORDS: *Motion to vacate judgment; Civ.R. 60(B); reasonable time; meritorious defense; cognovit note.*

The trial court did not abuse its discretion when it denied defendant's Civ.R. 60(B) motion to vacate cognovit judgment because defendant did not establish the threshold requirement that he filed the motion within a reasonable time. The defendant did not meet his burden of establishing that a delay of five and a-half years was justified.

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106138	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JESSTINE JOHNSON			

Reversed and remanded.

Sean C. Gallagher, J., and Larry A. Jones, Sr., J., concur; Kathleen Ann Keough, P.J., concurs in judgment only.

KEY WORDS: Conceded error; R.C. 2947.23(A); community control work service.

The trial court erred in imposing community control work service in the final entry of conviction.