

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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January 11, 2018

104910 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RICHARD BARNES

Affirmed.

Frank D. Celebrezze, Jr., J., Tim McCormack, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Ineffective assistance of counsel; motion to dismiss; preindictment delay; guilty plea.*

By pleading guilty, appellant waived any claim of ineffective assistance of counsel based on counsel's failure to file a motion to dismiss for preindictment delay. Even if appellant did not waive an ineffective assistance of counsel claim, he failed to demonstrate that he was actually prejudiced by the preindictment delay.

105107 PROBATE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
ZACHARY HAMMON v HUNTINGTON NATIONAL BANK, ET AL.

Affirmed in part; reversed in part and remanded.

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

KEY WORDS: *Civ.R. 12(b)(6); motion to dismiss; alternative motion for summary judgment; Civ.R. 56; guardianship; estate of minor ward; final account; res judicata; statute of limitations.*

The trial court misapplied the discovery rule to plaintiff-appellant's fraud claim against the former guardian of his estate as a minor. The former guardian's administration of the estate was separate and distinct from assurances the guardian allegedly made to plaintiff-appellant's parents regarding trust investment returns upon which plaintiff-appellant alleges that he and his family relied. Issues of material fact remained as to when plaintiff-appellant should have discovered the basis for his fraud claim, specifically the fact that the trust documents themselves did not guarantee return of the principal amounts. Plaintiff-appellant's claims against the trust company and the attorney for the estate were properly dismissed. Plaintiff-appellant failed to plead with sufficient particularity his fraud claims against the trust company and the attorney. Additionally, the complaint conclusively showed on its face that the breach of trust claim was barred by the statute of limitations.

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105211 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEMETRIUS BROWN

106278 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEMETRIUS BROWN

Vacated and remanded.

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

KEY WORDS: *Sentencing; sanctions; community control; conditions; violation; notification; prison term; journal entry; resentencing; restrictive; remedy; remand; vacate.*

The trial court erred in imposing a term of imprisonment for the community control violation based on its failure to make the necessary advisements under R.C. 2929.19(B)(4). At the resentencing, the trial court must choose between the only options remaining under R.C. 2929.15(B): (1) impose a longer time under the same sanction or, (2) impose a more restrictive sanction.

105399 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
JOHNNY ISAAC ADAMS v PATRICIA JONES MCELROY, ADMINISTRATOR, ETC., ET AL

Reversed and remanded.

Frank D. Celebrezze, Jr., J., Kathleen Ann Keough, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Motion to vacate; motion for relief from judgment; Civ.R. 60(B); default judgment; service of process; void judgment; personal jurisdiction; due process; Civ.R. 4.1; evidentiary hearing; abuse of discretion.*

Appellant's motion to vacate the default judgment entered against her based on lack of service contained operative facts that warranted relief from judgment. Thus, the trial court abused its discretion by denying appellant's motion to vacate without holding an evidentiary hearing.

105414 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CARLOS BINFORD

Affirmed.

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

KEY WORDS: *Sufficiency of evidence; manifest weight of evidence;*

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(Case 105414 continued)

ineffective assistance of counsel; consecutive sentences

Defendant's convictions for felonious assault, having weapons while under disability, and improperly handling firearms in a motor vehicle were supported by sufficient evidence and were not against the manifest weight of the evidence; there is no requirement the state must produce the gun used by defendant, and two witnesses testified that they saw the defendant shooting out of his car window; trial counsel was not ineffective for not introducing a police body camera video into evidence where counsel asked a witness about his inconsistent statements on the video and those statements were not necessarily helpful to the defendant's defense; the trial court properly imposed an 11-year prison sentence where the record reflects the court considered the purposes and principles of R.C. 2929.11 and the factors of R.C. 2929.12, and made the R.C. 2929.14(C)(4) statutory findings for imposing consecutive sentences.

105417 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ERIC M. MCNEIR

Affirmed.

Mary J. Boyle, J., Melody J. Stewart, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Crim.R. 11, coercion, competency hearing, waiver, harmless waiver.*

The trial court's colloquy with the defendant was not coercive, and the defendant's guilty plea was voluntary. Further, the trial court did not err in failing to hold a competency hearing because the defendant failed to maintain his request for a hearing and, even if he did properly maintain his request, there was insufficient indicia of incompetence.

105425 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEANDRE T. CARZELLE

Affirmed.

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

KEY WORDS: *Allied offenses, felonious assault, discharging of a firearm on or near prohibited premises.*

The trial court did not err in imposing a consecutive sentence for felonious assault and discharging a firearm on or near prohibited premises because these offenses are not allied offenses. The offenses were committed with separate animus or motivation and

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(Case 105425 continued)

caused a separate, identifiable harm.

105457 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
CARLA BUTLER v CLEVELAND CLINIC

Affirmed.

Patricia Ann Blackmon, J., Kathleen Ann Keough, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Trip and Fall; open and obvious.*

Trial court did not err in awarding Cleveland Clinic summary judgment in trip and fall case where plaintiff was hurt while stepping onto open and obvious raised concrete island.

105463 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
JOHN MCMILLAN, ET AL. v CITY OF LAKEWOOD, ET AL.

Affirmed.

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

KEY WORDS: *Administrative appeal; variance; setback; air conditioner; moot; ordinance; amended; practical difficulty; preponderance.*

Affirmed trial court's decision finding appellant's administrative appeal moot and, in the alternative, affirming the decision of the Lakewood Board of Zoning Appeals that granted a three-foot variance to an adjoining property owner for the installation of an air conditioner condenser unit. The zoning ordinance had been amended with regard to the setback requirement and, the trial court's decision was supported by the preponderance of substantial, reliable, and probative evidence where upon the evidence presented, the board could have reached a determination of practical difficulty and found in favor of granting the variance.

105470 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JACQUELINE D. BURTON

Affirmed.

Frank D. Celebrezze, Jr., J., Kathleen Ann Keough, P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Consecutive sentences; firearm specification; R.C.*

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(Case 105470 continued)

2929.14; due process; forfeiture; R.C. 2981.04.

Pursuant to R.C. 2929.14(C)(1)(a), the trial court was required to impose consecutive sentences on the two firearm specifications. Appellant's due process rights were not violated regarding forfeiture of property seized from her home.

105504 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: J.F., ET AL.

Affirmed.

Eileen T. Gallagher, J.; Frank D. Celebrezze, Jr., J., concurs; Mary Eileen Kilbane, P.J., dissents (with separate opinion).

KEY WORDS: Permanent custody; custody; visited; best interests of the child; trial court; juvenile court; legal custody; foster, factors; relative; case plan; suitable; restrictive.

The trial court did not abuse its discretion when it found by clear and convincing evidence that granting permanent custody to CCDCFS was in the children's best interests. The trial court's decision to terminate Mother's parental rights was supported by clear and convincing evidence.

105546 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v MAURICE REYNOLDS

Affirmed.

Melody J. Stewart, J., Eileen T. Gallagher, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: Aggravated menacing; subjective belief of serious physical harm; other acts evidence.

Testimony that defendant's statement threatening to kick the victim's teeth down her throat was sufficient to establish the victim's subjective belief that defendant would inflict serious physical harm upon the victim.

In an aggravated menacing prosecution, the court did not err by allowing victim to testify to prior instances of violence committed against her by the defendant because evidence of the defendant's violent character was admissible to prove that the victim believed that the defendant would cause serious physical harm to her.

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105580 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
PAMELA AKERSTROM v 635 W. LAKESIDE, LTD., ET AL.

Reversed and vacated.

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

KEY WORDS: *Condominium development; R.C. Chapter 5311; damages.*

The trial court erred by imposing a judgment in favor of a plaintiff for damages incurred by, and to be paid to, a nonparty — a condominium association is a legal entity separate from the individual unit owners.

105621 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MITCHELL SHIVERS

Affirmed.

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

KEY WORDS: *Sentence; R.C. 2929.11; R.C. 2929.12; clear and convincing; support; contrary to law; due process; guilty plea; waiver; preindictment delay; actual prejudice.*

Sentence was affirmed where the sentencing transcript and the judgment entry of conviction reflected that the court considered the factors set forth in R.C. 2929.11 and R.C. 2929.12, and it could not be determined by clear and convincing evidence that the record does not support the trial court's findings or that the sentence is otherwise contrary to law. Appellant's guilty plea resulted in a waiver of any alleged due process violation arising from preindictment delay and, irrespective of waiver, appellant failed to demonstrate that he was actually prejudiced by preindictment delay.

105767 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ANDREW P. PHILBIN, ET AL. v CITY OF CLEVELAND, OHIO, ET AL.

Reversed and remanded.

Frank D. Celebrezze, Jr., J., Kathleen Ann Keough, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Subject-matter jurisdiction; motion to dismiss; administrative appeal; R.C. 2506.01; zoning.*

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(Case 105767 continued)

The trial court erred by determining that the BZA and the court itself lacked jurisdiction to hear the appeal from the decision of the Cleveland Landmarks Commission. This matter is remanded for the trial court to determine the merits of the appeal.

105856 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CLARK JUSTEN

Dismissed.

Patricia Ann Blackmon, J., Mary Eileen Kilbane, P.J., and Eileen T. Gallagher, J., concur.

KEY WORDS: Anders; R.C. 2929.14; Cruel and unusual punishment; consistency in sentencing

Appellant pled guilty to aggravated vehicular homicide, aggravated vehicular assault and other offenses in connection with a motor vehicle collision associated with heroin use, and was sentenced to an eight year term of imprisonment. Appellant's counsel was permitted to withdraw from case and appeal was dismissed where potential assignment of error challenging maximum term, and pro se assignments of error raising cruel and unusual punishment and lack of consistency in sentencing, all lacked arguable merit.

105904 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MARCELLUS JOHNSON

Affirmed.

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

KEY WORDS: Sexual predator classification; masturbation; allied offenses; waiver.

Competent credible evidence that defendant's habit of publicly masturbating while in prison, in addition to the circumstances of a rape, supported trial court's decision to classify defendant as a sexual predator.

Defendant waived the right to raise the issue of allied offenses on appeal because he specifically agreed in the plea bargain that the offenses did not merge for sentencing.