

CASE DECISION LIST

June 7, 2018

104874 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEMETRIUS H. CARTER

Affirmed.

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

KEY WORDS: *Sufficiency of evidence, manifest weight of evidence, prosecutorial misconduct, plain error, admission of text-message evidence, ineffective assistance of counsel.*

The evidence was sufficient and not against the manifest weight to convict appellant. The statements made by the prosecutor during the opening and closing arguments did not demonstrate that the prosecutor committed misconduct. All of defense counsel's action were permissible, and appellant was not prejudiced or denied a fair trial due to counsel's actions and decisions. Appellant has not demonstrated that the trial court committed plain error in allowing the testimony of the SANE nurse. The text messages from the victim were admissible because they were not being entered into evidence for the truth of the matter asserted.

105519 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CEDRIC GLAZE

Affirmed.

Larry A. Jones, Sr., J., Melody J. Stewart, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *R.C. 2929.14/sentencing; R.C. 2953.08(D)(1)/agreed sentence; ineffective assistance of counsel.*

The trial court acknowledged the agreed-upon sentencing range between the state and appellant; appellant's sentence was within the sentencing range and included nonmandatory consecutive sentences. Appellant's sentence was not contrary to law.

Appellant failed to show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's performance.

CASE DECISION LIST

105572 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
KIMBERLEE A. GERSTON, TRUSTEE v PARMA VTA, LLC, ET AL.

Affirmed.

Larry A. Jones, Sr., J., Eileen T. Gallagher, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Standing; necessary parties; jurisdiction; R.C. 1335.04/statute of frauds; contract documents; manifest weight; statute of limitations.*

Decedent's will established that his remaining assets transferred to the Trust thereby giving the Trust a vested interest giving appellee standing to bring forth its complaint against appellant.

None of appellee's claims included a claim for conversion. Appellee's declaratory judgment action was not untimely for failing to fall within the statute of limitations for conversion.

Appellee joined all necessary parties in its original action; the trial court had jurisdiction to proceed on appellee's complaint.

The statute of frauds was applicable where it was shown that a proper transfer had not occurred.

Contract documents stipulated that any modification, transfer, or assignment of interest must be done so in writing. Appellants submitted no evidence of a written agreement. The trial court did not err in finding that any alleged oral assignment was improper.

The trial court's judgment resolving the ownership dispute was supported by competent, credible evidence and was not against the manifest weight of the evidence.

105675 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
CLIFTON STEEL COMPANY v TRINITY EQUIPMENT COMPANY

Affirmed.

Mary J. Boyle, J.; Eileen A. Gallagher, A.J., concurs; Patricia Ann Blackmon, J., concurs in part and dissents in part with separate opinion.

KEY WORDS: *Contract interpretation; ambiguous; preliminary injunction; noncompete clause; motion to dismiss; final appealable order.*

Court did not err by finding contract language ambiguous and granting the appellee's motion for preliminary injunction.

CASE DECISION LIST

105683	CLEVELAND MUNI. CITY OF CLEVELAND v AZZAM HENDERSON	C	CRIMINAL MUNI. & CITY
105684	CLEVELAND MUNI. CITY OF CLEVELAND v AZZAM HENDERSON	C	CRIMINAL MUNI. & CITY
105685	CLEVELAND MUNI. CITY OF CLEVELAND v AZZAM HENDERSON	C	CRIMINAL MUNI. & CITY
105686	CLEVELAND MUNI. CITY OF CLEVELAND v AZZAM HENDERSON	C	CRIMINAL MUNI. & CITY

Affirmed in part; reversed in part and remanded.

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

KEY WORDS: *Motion for continuance; right to obtain counsel.*

The trial court erred where it did not grant appellant's motion for continuance in order to obtain new counsel.

105694	COMMON PLEAS COURT STATE OF OHIO v ASHLEY SHUTES	A	CRIMINAL C.P.
---------------	---	---	---------------

Affirmed.

Kathleen Ann Keough, J., Mary J. Boyle, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Excited utterance; manifest weight of the evidence.*

Trial court erred in admitting witness's statement about what the declarant told her as an excited utterance because the declarant was no longer under the stress of the event when he made the statement, although the error was harmless because the statement did not contribute to the guilty verdict; even though there were inconsistencies in the witnesses' testimony and conflicts in the evidence, defendant's conviction was not against the manifest weight of the evidence where the jury heard significant evidence that demonstrated defendant's guilt.

105802	COMMON PLEAS COURT STATE OF OHIO v MARVIN FISHER	A	CRIMINAL C.P.
---------------	---	---	---------------

Affirmed.

Anita Laster Mays, J., and Mary Eileen Kilbane, P.J., concur; Sean C. Gallagher, J., concurs in part and concurs in judgment only in part with separate opinion.

CASE DECISION LIST

(Case 105802 continued)

KEY WORDS: Sufficient evidence, manifest weight of the evidence, prior acts testimony, consecutive sentences, R.C. 2929.14(C)(4), imposition of court costs.

There was sufficient evidence to convict the appellant of aggravated arson. The evidence was not against the manifest weight because there was substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. Testimony concerning the appellant's prior acts of arson was admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The trial court did not err when it sentenced the appellant to serve consecutive sentences because it properly followed the guidelines and principles of R.C. 2929.14(C)(4).

105846 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MRI SOFTWARE, L.L.C. v WEST OAKS MALL FL, L.L.C.

Affirmed in part; reversed in part and remanded.

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

KEY WORDS: Contractual obligations; unjust enrichment; attorney fees.

The trial court did not err where it found that appellant provided the necessary notice to appellee of the problems with appellee's delivered product.

The trial court's allowance of parol evidence was not error where the terms of the contract were ambiguous and clarification was needed on particular terms; the court's finding that appellee failed to perform was supported by competent, credible evidence.

Where a valid, enforceable contract exists, an unjust enrichment claim fails.

The trial court erred where it failed to award attorney fees pursuant to the contract agreement.

105931 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RAYSHAWN FOSTER

Affirmed.

Frank D. Celebrezze, Jr., J., and Tim McCormack, J., concur; Eileen A. Gallagher, A.J., dissents with separate opinion.

KEY WORDS: Ineffective assistance of counsel; guilty plea; motion

CASE DECISION LIST

(Case 105931 continued)

to withdraw guilty plea; Crim.R. 32.1; abuse of discretion; Crim.R. 11.

Appellant was not denied his constitutional right to the effective assistance of counsel. The trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

105948 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MAGNUS INTERNATIONAL GROUP, INC., ET AL. v SCOTT FORSTER

Reversed and remand.

Patricia Ann Blackmon, J., Melody J. Stewart, P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: R.C. 1701.13(E)(5); advancement.

Trial court order denying advancements under R.C. 1701.13(E)(5) was erroneous where articles of incorporation did not disclaim a director's right to advancement, thereby invoking the mandatory advancement provisions set forth in R.C. 1701.13(E)(5). Further, the allegations of misconduct, including breach of fiduciary duty, do not negate the operation of this statute.

105988 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
YLLI AGAJ, ET AL. v UNIVERSITY HOSPITALS HEALTH SYSTEM, INC., ET AL.

Affirmed.

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

KEY WORDS: Complaint; voluntary dismissal; Civ.R. 12(B)(6); failure to state a claim; statute of limitations; savings statute; excusable neglect; R.C. 2305.19.

The trial court did not err by granting defendants' motion to dismiss for failure to state a claim. Plaintiffs' complaint was not timely filed and was not saved by the one-year savings statute because the refiling date was more than one year after the voluntary dismissal.

106002 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
DION TURNER v KIM K. DAVIS-TURNER

Affirmed.

Tim McCormack, P.J., Melody J. Stewart, J., and Mary J. Boyle, J., concur.

CASE DECISION LIST

(Case 106002 continued)

KEY WORDS: Divorce; division of property; competent, credible; marital property; separate property; marital debt; equitable; R.C. 3105.171; abuse of discretion.

The trial court did not abuse its discretion in dividing the marital property where there was competent, credible evidence to support its decision and the record demonstrates the court considered the statutory factors, namely the marital debt. The court's division of the marital property was not inequitable.

106073 GARFIELD HTS. MUNI. G CIVIL MUNI. & CITY
ROBERT P. ABDOW v BRIAN G. ADAMS

Affirmed.

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

KEY WORDS: Attorney fees, civil theft, conversion.

The trial court did not abuse its discretion in failing to award the appellant's attorney fees because a prevailing party in a civil action may not recover fees as part of the cost of litigation, except where punitive damages are awarded, which were not in this case. The trial court did not commit reversible error in not finding that the appellee committed civil theft because the appellant and appellee were joint owners of the property which appellee committed conversion of property.

106087 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
HADITHA KHAN v DONALD M. HUGHES, SR.

Affirmed.

Anita Laster Mays, J., Patricia Ann Blackmon, P.J., and Frank D. Celebrezze, Jr., concur.

KEY WORDS: Civil contempt, child support order, permanent partial disability.

Appellant failed to demonstrate that the trial court erred in holding him in contempt for failure to pay child support. The stipulated medical evidence demonstrated that appellant was able to perform sedentary employment activities as reflected by the workers' compensation award of permanent partial disability.

CASE DECISION LIST

106134 EAST CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF EAST CLEVELAND v TONJA M. HALL

Reversed and vacated.

Eileen A. Gallagher, A.J., Mary Eileen Kilbane, J., and Patricia A. Blackmon, J., concur.

KEY WORDS: *Criminal simulation; East Cleveland Codified Ordinances 545.13; attempt to cash altered check; alteration of check payee and amount; sufficiency of the evidence; manifest weight of the evidence.*

Defendant's conviction for criminal simulation in violation of East Cleveland Codified Ordinances 545.13(a) was not supported by sufficient evidence. Construing ambiguous ordinance strictly against the city and liberally in favor of defendant, altering a check to erase and replace the payee and amount of the check did not constitute "alter[ation]" of the "source" or "authorship" of an "object" within the meaning of E.C.C.O. 545.13(a).

106178 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ANTOINE D. WILLIAMS

Affirmed.

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

KEY WORDS: *Forfeiture; R.C. Chapter 2981.*

Trial court properly ordered forfeiture of \$385 where the preponderance of the evidence established that defendant was involved in drug trafficking immediately before his arrest and cash was found along with drugs at the time he was booked into jail.

106187 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v GREGORY BAXTER

Affirmed.

Anita Laster Mays, J., Patricia Ann Blackmon, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Waiver of the presentment, grand jury, guilty plea.*

The appellant's waiver of the presentment to the grand jury was valid because he was represented by counsel. Therefore, the appellant's guilty plea to the amended charges was made knowingly, intelligently, and voluntarily.

CASE DECISION LIST

106198 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JERON D. HIGH

Affirmed.

Mary Eileen Kilbane, J., Eileen A. Gallagher, A.J., and Patricia Ann Blackmon, J.

KEY WORDS: *Aiding and abetting; gang member; drive-by shooting; sufficiency of evidence; manifest weight of the evidence.*

Judgment affirmed. The state presented sufficient evidence to support defendant's convictions, and defendant's convictions are not against the manifest weight of the evidence when the record demonstrated that the defendant was more than a mere bystander. The defendant could have abandoned the plan to locate the rival gang member, but instead agreed to continue on with the two-car caravan in search of the rival gang members. The defendant, with a loaded firearm next to him in the vehicle, drove around with fellow gang members into areas frequented by rival members. Furthermore, defendant's Facebook records reveal that he shared the criminal intent of the principal during the shooting.

106214 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CURTIS W. BENSON

Affirmed.

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

KEY WORDS: *Sufficiency; Crim.R. 29(A)/motion for acquittal; manifest weight.*

Sufficient evidence was presented that appellant acted knowingly when he pushed the victim and it was foreseeable that that push could cause the victim to fall and hit his head.

Where evidence showed a knowing act rather than a reckless act, a lesser included instruction was not warranted. Appellant's conviction was not against the manifest weight of the evidence.

106272 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: J.C.

Affirmed.

Kathleen Ann Keough, J., Sean C. Gallagher, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Permanent custody; continuance; hearsay.*

CASE DECISION LIST

(Case 106272 continued)

Trial court did not abuse its discretion in denying Mother's request for a continuance of the permanent custody hearing where the case had been pending for nearly three years, the child deserved permanency, and Mother did not advise the court when she would be available for another hearing; trial court did not improperly admit hearsay testimony; the trial court's findings that child could not be placed with Mother due to her substance abuse and mental health issues were superfluous because the child had been in the agency's care for nearly three years, and under R.C. 2151.414(D), the trial court could immediately proceed to a determination of whether permanent custody was in the child's best interest.

106289 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
DICKSON & CAMPBELL LLC v JOY MARSHALL

Affirmed.

Tim McCormack, P.J., Eileen T. Gallagher, J., and Anita Laster Mays, J., concur.

KEY WORDS: Quantum meruit; attorney fees; abuse of discretion.

The trial court's determination of attorney fees owed to Campbell was made after holding a hearing in which both parties were able to present testimony and documentary evidence, and was not an abuse of discretion.

106293 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL MCLEAN

Affirmed.

Frank D. Celebrezze, Jr., J., Eileen A. Gallagher, A.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: Robbery; R.C. 2911.02; sufficiency; manifest weight; contrary to law; physical harm; R.C. 2901.01; allied offenses of similar import; R.C. 2941.25; plain error; Crim.R. 52; right to trial; vindictiveness; R.C. 2929.14; R.C. 2929.11; R.C. 2929.12.

Appellant's robbery convictions were supported by sufficient evidence and not against the manifest weight of the evidence. Appellant's robbery convictions were not allied offenses of similar import because they involved separate victims. The trial court did not commit plain error by sentencing appellant on both robbery convictions. The trial court's sentence is not contrary to law, and the trial court did not violate appellant's constitutional right to trial by punishing him with a harsher or vindictive sentence for exercising his right.

CASE DECISION LIST

106311 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MELINDA MCCAUGHEY

Affirmed.

Frank D. Celebrezze, Jr., J., Eileen A. Gallagher, A.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Indictment delay; Crim.R. 5(B); motion to dismiss; speedy trial; R.C. 2945.71(C)(2).*

Trial court did not err by dismissing indictment on speedy trial grounds. The statutory time for defendant's subsequent felony indictment began to run on the date of defendant's arrest, and the subsequent indictment 13 months after the date of arrest, with no other additional facts, violated defendant's constitutional rights.

106315 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
CITIZENS BANK N.A. v KATHLEEN C. CONWAY, ET AL.

Affirmed.

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

KEY WORDS: *Mortgage; foreclosure; summary judgment; plain error; Civ.R. 53.*

The trial court's adoption of the magistrate's decision granting summary judgment for Citizens Bank did not constitute plain error.

106361 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
U.S. BANK TRUST NATIONAL ASSOCIATION v FERENC JANOSSY, ET AL.

Dismissed.

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

KEY WORDS: *Dismiss; mootness; Civ.R. 56; confirmation of sale; stay of execution; R.C. 2329.45.*

The issues presented for review with respect to the decree of foreclosure are moot in light of the failure to seek a stay over the confirmation of sale proceedings.

CASE DECISION LIST

106479 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v RONALD BECKWITH

Affirmed.

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

KEY WORDS: *Postconviction relief; petition; sua sponte; dismiss; supporting affidavit; sworn; notary; ineffective assistance; failure to investigate; operative facts; prejudice.*

Trial court did not abuse its discretion by denying petition for postconviction relief. A trial court is permitted to sua sponte dismiss the petition, without a response from the prosecutor, if it determines there are no substantive grounds for relief that would warrant a hearing based upon the petition, the supporting affidavits, and the files and records of the case. Appellant failed to demonstrate ineffective assistance of counsel for an alleged failure to investigate when even if a letter attached to the petition were deemed a sworn statement and considered, it failed to contain sufficient operative facts to demonstrate the lack of competent counsel and that appellant was prejudiced. All of the witnesses' testimonies were consistent, and the overwhelming evidence at trial supported the guilty verdict.

106480 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL WILLIAMSON

Affirmed.

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

KEY WORDS: *R.C. 2953.71 through 2953.81/postconviction DNA testing.*

The victim was raped more than 40 times over an extended period of time. The items appellant requested to be tested related only to one incident and thus would result in an exclusion result as opposed to an outcome determinative result that is required.

Appellant seeks to have items tested that are not, and are likely to have never been, in the state's possession unlike an offender listed in R.C. 2953.71 et seq. where physical items remain in the state's possession and may qualify to be tested.

CASE DECISION LIST

106510 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MONTEFIORE HOME v MARY JOHNSON

Affirmed as modified.

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

KEY WORDS: *Interest at the contract rate.*

**Default judgment modified to reflect interest at the contract rate.
Judgment affirmed as modified.**

106724 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RYAN T. COLE

Affirmed in part, reversed in part, and remanded.

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

KEY WORDS: *Community based correctional facility; consecutive to prison; Paige.*

The trial court erred when it ordered the defendant to be returned to the county upon his release from prison to be placed in a community based correctional facility. The proper remedy pursuant to the Ohio Supreme Court's decision in Paige is to vacate the improperly imposed CBCF term and leave the remaining conditions of the community control sanctions in place.

106924 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v E. C. H.

Reversed and remanded.

Mary Eileen Kilbane, P.J., Melody J. Stewart, J., and Mary J. Boyle, J., concur.

KEY WORDS: *Conceded error; R.C. 2953.52(B)(1); hearing; motion to seal the record; expungement.*

Trial court's denial of appellant's motion to seal the record of charges dismissed without prejudice is reversed because the trial court failed to hold a hearing as required by R.C. 2953.52(B)(1). The matter is remanded to the trial court with instructions to hold the required hearing.