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Court of Appeals, Eighth Appellate District

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March 22, 2018

104574 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL MARBUERY DAVIS

Affirmed in part; reversed in part; remanded.

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

KEY WORDS: KEYWORDS:

Motion to withdraw guilty plea; effective assistance of counsel; ability to pay; R.C. 2929.11; R.C. 2929.12; R.C. 2947.23; court costs; postrelease control; mandatory; driver's license suspension.

The trial court did not abuse its discretion in denying defendant's oral postsentence and subsequent written motions to withdraw his guilty plea. The trial court held a hearing on defendant's motion; the evidence adduced at the hearing did not support defendant's allegations that defense counsel promised he would receive the mandatory minimum sentence. Defendant's ineffective assistance claim was without merit as he failed to demonstrate a reasonable probability that the trial court would have waived the mandatory fine had defense counsel filed an affidavit of indigence prior to sentencing. The trial court made all required findings under R.C. 2929.14(C) supporting the imposition of consecutive sentences. R.C. 2929.11 and 2929.12 are not fact-finding statutes; a trial court is not required to make specific findings on the record with respect to its consideration of the factors under these statutes. R.C. 2947.23 provides that notification of possible court-ordered community service need only be given if the judge or magistrate imposes a community control sanction or other nonresidential sanction; the statute no longer requires such notification when a trial court imposes a prison term. A trial court need not consider a defendant's ability to pay court costs. The trial court properly exercised its discretion in imposing court costs. The trial court properly advised defendant of postrelease control; the trial court was not required to repeat the advisement for each period of postrelease control. The trial court erred in failing to impose the mandatory driver's license suspension under former R.C. 2929.03(D)(2) and (G). The failure to impose this mandatory term rendered defendant's sentence void in part, requiring resentencing limited to imposition of the mandatory driver's license suspension.

104884 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
CHARLENE H. GLATLEY v MARK C. GLATLEY

104943 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
CHARLENE H. GLATLEY v MARK C. GLATLEY

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105179 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
CHARLENE H. GLATLEY v MARK C. GLATLEY

Affirmed in part, reversed in part, and remanded.

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

KEY WORDS: *Dissolution, shared parenting plan, separation agreement, R.C. 3105.73, post-decree attorney fees, guardian ad litem fees, children's attorney fees, R.C. Chapter 3119, child support.*

Interpretation of the separation agreement and shared parenting agreement incorporated into the dissolution of marriage is a matter of contract. Evidence of withdrawal receipts from automated teller machines with handwritten notations indicating the alleged expenditure for which the withdrawal was made is insufficient to demonstrate that the expenses were actually incurred and remitted. The trial court had broad discretion to determine entitlement to post-decree attorney fees in spite of an income disparity. The trial court is given considerable discretion in allocating guardian ad litem fees and the children's attorney fees based on which party caused the need for the services. The trial court did not abuse its discretion in calculating child support and has broad discretion in computing child support where the parents' combined income is greater than \$150,000, and the credibility of the complaining spouse may be considered by the trial court in reaching a determination.

105122 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CORNELIUS LYNCH

Affirmed.

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

KEY WORDS: *Rape; kidnapping; preindictment delay; actual prejudice; prosecutorial misconduct; ineffective assistance of counsel; double jeopardy; plain error; Crim.R. 52; mistrial; manifest necessity.*

Appellant failed to demonstrate actual prejudice resulting from the delay in prosecution, and thus, the trial court did not err in denying appellant's motions to dismiss for preindictment delay. The prosecutor's comments during closing arguments did not constitute prosecutorial misconduct. The trial court did not abuse its discretion in determining that there was a manifest necessity to declare a mistrial. The state's subsequent prosecution was not barred by the Double Jeopardy Clause. Appellant was not denied his constitutional right to the effective assistance of counsel.

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105209 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
CUYAHOGA METROPOLITAN HOUSING AUTHORITY v
FRATERNAL ORDER OF POLICE OHIO LABOR COUNCIL, INC.

Affirmed.

Kathleen Ann Keough, P.J., and Mary Eileen Kilbane, J., concur. Tim McCormack, J., dissents with separate opinion.

KEY WORDS: *Arbitration award, collective bargaining agreement, police officer, public policy*

The arbitration award modifying a police officer's termination to a substantial suspension, without back pay and benefits, drew its essence from the collective bargaining agreement, was not unlawful, arbitrary, or capricious, and is not against public policy.

105312 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.

105575 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 in part; affirmed in part.

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

KEY WORDS: KEYWORDS:

Foreclosure; confirmation of sale; R.C. 2329.45; moot; attorney fees.

Appellant property owner's consolidated appeals from the order of foreclosure and the order confirming the sale of the property are moot. Appellant never sought a stay of the foreclosure proceedings nor a stay of the distribution of the proceeds from the sale prior to the order of confirmation. The property has been sold to a third party and the proceeds of the sale have been distributed. Thus, there is no available relief and the appeal is moot. The trial court did not abuse its discretion by awarding attorney fees to the foreclosing home owners association under R.C. 5311.081(A)(1)(b).

105375 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ANTHONY R. THOMAS

Affirmed.

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

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KEY WORDS: *Guilty plea; robbery; R.C. 2905.02; ineffective assistance of counsel; motion to withdraw guilty plea; Crim.R. 11; manifest injustice; Crim.R. 32.1; allied offenses of similar import; R.C. 2941.25; plain error.*

Appellant was not denied his constitutional right to the effective assistance of counsel. The trial court did not abuse its discretion in failing to vacate appellant's guilty plea sua sponte, nor by denying appellant's postsentence motion to withdraw his guilty plea without a hearing. The robbery and abduction counts were not allied offenses of similar import, and thus, the trial court did not err by imposing consecutive sentences on these counts.

105438	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v SALVATORE PASSAFIUME			

105439	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v SALVATORE PASSAFIUME			

Reversed and remanded.

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

KEY WORDS: *Crim.R. 32.1; manifest injustice; ineffective assistance of counsel; guilty plea withdrawal; noncitizen client; deportation consequences; Padilla v. Kentucky; new rule; retroactive application.*

Because Padilla v. Kentucky announced a new rule in Ohio regarding the duty of trial counsel to advise a noncitizen client of deportation consequences at a plea hearing, it cannot be applied retroactively to convictions that had become final before March 31, 2010, when Padilla was decided. Thus, appellant cannot rely on Padilla to establish counsel's deficient performance in the plea proceedings from 2009. Additionally, the record demonstrates the trial court fully complied with Crim.R. 11 and appellant knowingly, intelligently, and voluntarily entered guilty pleas. Thus, appellant has not demonstrated that counsel's performance resulted in a fundamental flaw in the plea proceedings.

105566	ROCKY RIVER MUNI.	C	CRIMINAL MUNI. & CITY
CITY OF NORTH OLMS TED v KIM ROCK			

Convictions affirmed, sentence reversed in part and remanded.

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

KEY WORDS: *North Olmsted Ordinances 1363.105, 1363.302.1, 1363.302.2; sufficiency; first-degree misdemeanor sentencing; R.C.*

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2929.25.

Defendant's convictions for failing to remove rubbish and discarded items from her yard, and failing to comply with a notice of violations were supported by sufficient evidence. Defendant's sentence was not erroneous.

105651 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: A.S.

Affirmed.

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

KEY WORDS: Juvenile court; temporary custody; standing; educational neglect.

The juvenile court did not err in upholding the magistrate's award of temporary custody to DCFS because the allegations in the complaint had not been adequately addressed.

105706 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ERIC D. BUCHANAN

Affirmed.

Larry A. Jones, Sr., J., Tim McCormack, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Crim.R. 29/motion for acquittal; manifest weight; prejudicial error; plain error; allied offenses; R.C. 2929.14(C)(4)/consecutive sentences; R.C. 2929.14(B)(2)(a)/repeat violent offender.

The trial court's denial of appellant's motion for acquittal was proper. The state provided sufficient evidence to sustain the element of serious physical harm; the jury had the task of determining how much weight to give to the victim's in-court identification of appellant.

The kidnapping and rape offenses were separate crimes with a separate animus and therefore not allied offenses.

The trial court considered and stated its findings pursuant to R.C. 2929.14(C)(4) regarding consecutive sentences, and found that appellant qualified as a repeat violent offender under R.C. 2929.14(B)(2)(a). Appellant's sentence is supported by the record and is not contrary to law.

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105707 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
IN RE: INVESTIGATION INTO THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE

Affirmed.

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

KEY WORDS: *Petition for release; grand jury transcripts; Crim.R. 6(E); public interest; particularized need that outweighs need for secrecy.*

Trial court did not abuse its discretion in denying petitioners' petition for the release of grand jury transcripts and exhibits. Petitioners' request for disclosure was not for a purpose authorized under Crim.R. 6(E) and petitioners did not demonstrate a particularized need for disclosure that outweighs the need for secrecy.

105773 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
RUSSELL ELLIOTT v CUYAHOGA COUNTY EXECUTIVE & COUNCIL, ET AL.

Affirmed.

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

KEY WORDS: *R.C. Chapter 2744, sovereign immunity, governmental function, proprietary function, Civ.R. 12(C), motion for judgment on the pleadings.*

The trial court properly denied appellants' motion for judgment on the pleadings where the complaint alleged that the political subdivision's employees acted wantonly and recklessly in fulfilling or failing to fulfil their duties.

105782 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v EMANUEL C. CHURN

Affirmed.

Kathleen Ann Keough, J., Tim McCormack, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *lesser-included offense, felony-murder, involuntary manslaughter, felonious assault,*

Trial court did not refuse to consider the lesser-included offense, rather the evidence did not reasonably support both an acquittal on the murder charge and a conviction upon the lesser-included

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offense of involuntary manslaughter. Defendant's murder conviction upheld where the evidence demonstrated that the repeated blows to the victim's head and face caused the brain to vibrate, which caused severe brain trauma and ultimately the victim's death.

105796 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.

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

KEY WORDS: Mootness; dismiss; effectual relief; stay of distribution; foreclosure; sheriff's sale; confirmation; restitution; remedy; satisfaction.

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 proceeds were distributed. If this court reversed the order of confirmation, there is no relief that can be afforded appellant.

105854 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
BLISSWOOD VILLAGE HOME OWNERS ASSOCIATION v
EUCLID COMMUNITY REINVESTMENT, LLC., ET AL.

Dismissed.

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

KEY WORDS: Mootness; dismiss; effectual relief; stay of distribution; foreclosure; sheriff's sale; confirmation; restitution; remedy; satisfaction.

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 proceeds were distributed. If this court reversed the order of confirmation, there is no relief that can be afforded appellant.

105861 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.

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Dismissed.

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

KEY WORDS: KEYWORDS:

Mootness; dismiss; R.C. 2329.45; foreclosure; sheriff's sale; confirmation of sale; relief.

Appellant property owner's argument related to the validity of the underlying foreclosure order is barred in its appeal from the confirmation of the sale of the property. Additionally, the appeal is moot. There is no relief that can be afforded to appellant, because the property had been sold to a third party and the proceeds of the sale have been distributed.

105874 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ANGELA GROOMS

Affirmed.

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

KEY WORDS: *Statute of limitations, Ohio Administrative Code, business records, hearsay, trafficking in or illegal use of food stamps, tampering with records*

The Ohio Revised Code, not the Ohio Administrative Code, provides the relevant statute of limitations for a criminal prosecution for trafficking in or illegal use of food stamps, and tampering with records. Trial court abused its discretion in admitting at trial employment records as business records because no testimony was given by the custodian of the records or a qualified witness who could attest to the business records. The admission of the employment records, however, was harmless when other admissible testimony and evidence was presented to prove the defendant's employment history.

105895 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
MELODY L. GLENDELL-GRANT v ROBERT E. GRANT

Affirmed.

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

KEY WORDS: *Abuse of discretion; magistrate's decision; untimely; shared parenting plan; best interest of the children; R.C. 3109.04(F)(1); R.C. 3109.04(F)(2).*

Trial court did not abuse its discretion in adopting the magistrate's decision finding that the amended shared parenting plan filed by

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mother with her closing argument was in the best interest of the children; father waived any objection to the plan because he did not object to the untimely filing in his objections to the magistrate's decision and he too filed an amended parenting plan; the trial court considered all of the relevant factors in R.C. 3109.04(F)(1) and (F)(2) and there was competent, credible evidence to support the trial court's conclusion that mother's amended shared parenting plan was in the best interest of the children.

105993 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
WADE HUFFMAN, ET AL. v VILLAGE OF NEWBURGH HEIGHTS, ET AL.

Reversed and remanded.

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

KEY WORDS: Emergency call; child abduction; police chase; accident; immunity; R.C. 2744.02(B)(1)(a); R.C. 2744.03(A)(6)(b); political subdivision; employee; police officer.

The trial court erred when it denied summary judgment to the village of Newburgh Heights, its police chief, and a patrolman in a case involving a one- to two-minute, high-speed police chase that ended with the suspect vehicle colliding with an RTA bus shelter and injuring the plaintiffs, who were pedestrians. The village was entitled to immunity under R.C. 2744.02(B)(1)(a) when the patrolman was responding to an emergency 911 dispatch that reported the suspect vehicle had been involved in a child abduction and there was no evidence of wanton or willful misconduct. The police chief and the patrolman were entitled to immunity under R.C. 2744.03(A)(6)(b) when there was no evidence of wanton misconduct, malicious purpose, or bad faith, and reasonable minds could not conclude from the evidence that either had engaged in reckless conduct.

106039 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: K.W.

Affirmed.

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

KEY WORDS: R.C. 2151.414/permanent custody; manifest weight.

The trial court's granting the motion for permanent custody was not against the manifest weight of the evidence. The record held competent, credible evidence that the child could not be placed with the mother in a reasonable period of time and it was in the best interest of the child to remove the child from the mother's custody.

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106074 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CRAIG A. COWAN

Reversed and remanded.

Anita Laster Mays, J., Eileen T. Gallagher, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Conceded error, nunc pro tunc.*

The state concedes that the trial court erred when the sentencing journal entry reflected that discharging a firearm on or near prohibited premises was a first-degree felony instead of a third-degree felony. The use of a nunc pro tunc entry is the correct method to correct a clerical error.

106125 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ISAIAH MARTIN

Reversed and remanded.

Kathleen Ann Keough, J., Tim McCormack, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *felonious assault, aggravated assault, lesser-included offense, inferior offense*

Defendant's conviction for aggravated assault is reversed because the trial court's finding of guilty was premised on the mistaken belief that aggravated assault is a lesser-included offense of felonious assault. Aggravated assault is an inferior offense of felonious assault when the mitigating factor of serious provocation exists. The trial court found defendant not guilty of felonious assault, precluding a finding of guilty of aggravated assault.

106130 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: N.M., ET AL.

Affirmed.

Frank D. Celebrezze, Jr., J., Tim McCormack, P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Permanent custody; manifest weight; best interest; legal custody; motion to intervene; R.C. 2151.414.*

The trial court's determination that permanent custody is in the children's best interest is supported by clear and convincing evidence in the record. Accordingly, the trial court's judgment granting permanent custody of the children to appellee and denying

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appellant's motion for legal custody is affirmed.

106131 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: N.M., ET AL.

Affirmed.

Tim McCormack, J., Frank D. Celebrezze, Jr., J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Parental rights; permanent custody; legal custody; CCDCFS; R.C. 2151.414; children's best interest; relatives; clear and convincing evidence.

The juvenile court considered the factors outlined in R.C. 2151.414(E) and found that the children cannot be placed with the father within a reasonable time or should not be placed with the father pursuant to R.C. 2151.414(B)(1)(a). The court's finding was supported by clear and convincing evidence. The court also considered the factors set forth in R.C. 2151.414(D) and found that permanent custody was in the best interest of the children. Clear and convincing evidence supports the court's determination. Because permanent custody to the agency is in the children's best interest, legal custody to the paternal grandfather necessarily is not. The juvenile court's decision to award permanent custody of the minor children to the agency is therefore affirmed.