

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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March 29, 2018

105121 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL HAWTHORNE

Reversed and remanded.

Larry A. Jones, Sr., J., and Kathleen Ann Keough, P.J., concur; Eileen T. Gallagher, J., dissents with separate opinion.

KEY WORDS: *Crim.R. 30(A)/jury instruction; ineffective assistance of counsel; prosecutorial misconduct; joinder; moot.*

The trial court erred to appellant's prejudice where it informed appellant that he had to testify in order to advance a self-defense claim.

105244 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
S. D. v K. H., ET AL.

Affirmed.

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

KEY WORDS: *Motion to register foreign parentage order; "three-parent law" in California; two mothers; biological father; jurisdiction; minor child; best interest of the child. Trial court's order denying Mother 2's petition to register foreign parentage order is affirmed. Ohio does not recognize more than two legal parents. The Ohio Court was first to assert continuing and exclusive jurisdiction over custody determinations of the minor child under the UCCJEA. The Ohio Court never relinquished jurisdiction and did not consent for the California Court to have jurisdiction. Therefore, the California Court was without subject-matter jurisdiction to find Mother 2 as a parent.*

105287 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
KISLING NESTICO & REDICK, LLC v PROGRESSIVE MAX INSURANCE COMPANY, ET AL.

Affirmed.

Mary Eileen Kilbane, J., and Eileen A. Gallagher, A.J., concur; Larry A. Jones, Sr., J., dissents (see separate dissenting opinion).

KEY WORDS: *Motion for summary judgment; attorney charging lien; assignment; third-party settlement with former client, despite prior notice of charging lien.*

Judgment affirmed. An attorney and client may lawfully agree upon compensation to the attorney contingent upon the amount to be

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recovered, either by settlement or by judgment. Ohio courts recognize the validity of this charging lien. Law firm's charging lien is enforceable against tortfeasor's insurer because the law firm advanced expenses and obtained a settlement demand from the insurer, the insurer had knowledge of the law firm's charging lien before it settled the claim with the law firm's former client and, despite this knowledge, distributed the settlement proceeds to the former client solely.

105353 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v W.C.

Reversed and remanded.

Kathleen Ann Keough, P.J., and Patricia Ann Blackmon, J., concur. Frank D. Celebrezze, Jr., J., dissents with separate opinion.

KEY WORDS: R.C. 2953.52, sealing records, acquittal, meaningful appellate review

Trial court failed to set forth in the record its findings indicating the requisite interests of the defendant and the state, and weighing those interests against each other for this court to engage in meaningful appellate review of the decision to deny the appellant's motion to seal his arrest record following an acquittal.

105364 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
TANGLEWOOD SHOPPING CENTER, LLC v RISER FOODS COMPANY

Affirmed.

Tim McCormack, P.J., Eileen T. Gallagher, J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: Summary judgment; commercial lease; unjust enrichment; trespass.

The trial court did not err in granting summary judgment in favor of defendant-appellee because there is no genuine issue of material fact as to whether the amended lease governs the entire expansion.

105443 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JAYQUILLE CLEVELAND

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Affirmed.

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

KEY WORDS: *Discretionary transfer of jurisdiction, R.C. 2152.10(D), victim-impact, seriousness of crime, R.C. 2152.12, transfer factors.*

The juvenile court's decision to transfer the appellant to the trial court for adult prosecution did not constitute an abuse of discretion. The trial court fully considered and stated for the record the statutory factors supporting and opposing transfer for adult adjudication and concluded that, based on the totality of the circumstances, the seriousness of the crime supported the transfer.

105664 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MICHELLE KENNEY v CITY OF CLEVELAND, ET AL.

Affirmed.

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

KEY WORDS: *Breach of contract; promissory estoppel; statute of limitations; governmental immunity; summary judgment.*

The court did not err by granting defendant's summary judgment motion as plaintiff's claims were barred by the statute of limitations.

105738 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JOHN CRAWFORD

Affirmed.

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

KEY WORDS: *Date of indictment; Megan's Law; S.B. 2; Adam Walsh Act; H.B. 86; R.C. 2929.11 and 2929.14/minimum and consecutive sentences.*

The trial court proceeding on the indictment was proper. The indictment on Count 1 stated that the offense was alleged to have occurred on or about December 22, 2004.

Appellant committed one of his offenses prior to the enactment of the Adam Walsh Act and was therefore not constitutionally subject to its requirements. R.C. 158(B) allowed appellant the sentencing benefit of a reduced sentence where appellant had not yet been sentenced before the enactment of H.B. 86.

The trial court considered the factors and the principles and purposes for sentencing and the trial court made the necessary findings to impose consecutive sentences. Appellant's consecutive sentences were not contrary to law.

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105774 COMMON PLEAS COURT B CRIMINAL C.P. (DEATH PENALTY)
STATE OF OHIO v QUISI BRYAN

Affirmed.

Sean C. Gallagher, J., Eileen T. Gallagher, P.J., and Melody J. Stewart, J., concur.

KEY WORDS: *Death penalty; motion for leave; motion for a new mitigation trial; Hurst; untimely; Crim.R. 33; postconviction; independently; legally correct; App.R. 12(A)(1)(c).*

In a death penalty case, trial court's denial of defendant's Crim.R. 33 motion for leave to file a motion for a new mitigation trial, which was premised on Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), was upheld because the motion for leave was untimely. Although the trial court incorrectly determined the motion should have been filed under R.C. 2953.23, when Crim.R. 33 procedures for a new trial exist independently from the procedure for postconviction relief, an appellate court may affirm the decision of the trial court as long as it is legally correct on other grounds.

105776 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL J. BROOKS

Affirmed in part and remanded in part.

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

KEY WORDS: *Consecutive sentences, Eighth Amendment rights, res judicata, nunc pro tunc.*

The appellant claims that the trial court erred in its consecutive sentencing and violating his Eighth Amendment rights are barred by res judicata because he could have argued both claims in his previous appeal to this court. This matter is remanded to the trial court for the limited purpose of issuing a nunc pro tunc entry to reflect what actually occurred in open court.

105805 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v SAVONTE D. HUFFMAN

Sentence vacated; remanded.

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

KEY WORDS: *Agreed sentence; plea agreement; accept; reject; expressly; concurrent; consecutive; recommended sentence; due*

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process.

Appellant’s sentence was vacated, and the case was remanded for the trial court to resentence appellant under the plea agreement or to allow appellant to withdraw his guilty plea. Agreed sentences are distinct from recommended sentences. Where a plea agreement includes an agreed sentence, it is incumbent upon the trial court to expressly accept or reject that agreement. Moreover, due process requires the trial court to put the defendant on notice of the possibility that it could impose a longer prison term than negotiated under a plea agreement before accepting a guilty plea. Because no appeal was taken in a separate case for which a joint sentencing hearing was held, any challenge to the imposition of consecutive sentences in that case could not be addressed.

105815	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v NERY ECHEVARRIA			

Affirmed.

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

KEY WORDS: Felonious assault; self-defense; jury instructions; R.C. 2901.09(B); castle doctrine; duty to retreat; R.C. 2901.05(B); presumption of self-defense; prejudicial error; manifest weight of the evidence.

Trial court did not abuse its discretion or otherwise err in failing to specifically instruct the jury that defendant had no duty to retreat based on the castle doctrine where trial court did not instruct the jury that defendant must prove that she did not violate a duty to retreat in order to find that she acted in self-defense. Trial court did not abuse its discretion or otherwise err in failing to give jury instruction regarding presumption of self-defense where it was undisputed that victim entered the defendant’s residence at defendant’s invitation. Defendant’s felonious assault convictions were not against the manifest weight of the evidence.

105821	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ELIJAH D. ELEM			

Affirmed.

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

KEY WORDS: Attempted murder; aggravated robbery; juvenile court; bindover; merger; consecutive sentences; plain error; R.C. 2929.14(C); guilty plea; Crim.R. 11; plea colloquy; knowing, intelligent, and voluntary

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The offenses should not have been merged for sentencing because they were not allied offenses of similar import. The appellant received effective assistance of counsel, consecutive sentences were clearly and convincingly supported by the record, and the appellant's plea was knowingly, intelligently, and voluntarily entered.

105907 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MYOCARE NURSING HOME, INC. v WILLIAM HOHMANN, ET AL.

Affirmed.

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

KEY WORDS: Creditor's bill; garnishment; legal malpractice; manifest weight; attorney fees.

The summary judgment entered in favor of the attorney and law firm upon the legal malpractice claims is affirmed because as a matter of law, the attorney did not breach a standard of care by losing priority over certain monies the debtor received through an unrelated settlement. The trial court's award of attorney fees is not against the manifest weight of the evidence.

105933 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
PATRICK BARNO v DIRECTOR, ODJFS, ET AL.

Reversed and remanded.

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

KEY WORDS: Unemployment compensation; just cause to quit; failure to pay as promised.

UCRC's decision finding no just cause to quit and disallowing employee's unemployment compensation benefits was against the manifest weight of the evidence. Hearing officer's decision improperly found that employee's failure to quit "immediately" and failure to notify anyone other than his immediate supervisor of workplace issues did not amount to just cause to quit. Furthermore, hearing officer improperly concluded that the employer's failure to address the employee's concerns was reasonable; just cause to quit, under unemployment compensation law, focuses on the conduct of the employee, not the employer.

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105950 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
SUZANNE THAYER, ET AL. v B.L. BUILDING & REMODELING, LLC, ET AL

Reversed and remanded.

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

KEY WORDS: *Civ.R. 56; summary judgment; trip-and-fall; genuine issues of material fact; open and obvious hazard; negligence; contributory negligence; proximate cause.*

Trial court erred in granting summary judgment in favor of defendant contractor in trip-and-fall case where plaintiff fell through a partially constructed window during a hospital remodeling project. Open and obvious doctrine did not bar negligence claims against contractor. Genuine issues of fact existed as to whether contractor breached its duty of ordinary care to plaintiff and whether any such breach was the proximate cause of plaintiff's injuries. Genuine issues of fact also existed as to whether plaintiff was contributorily negligent in failing to observe and avoid the hazard presented by the partially constructed window and, if so, the extent to which plaintiff's own negligence was the proximate cause of her injuries.

105969 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CALVIN L. ALEXANDER

Affirmed.

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

KEY WORDS: *Sentence; judgment of conviction; fact of conviction; void; postconviction relief; untimely; jurisdiction; Crim.R. 32; allocution; mitigation; hearing; appointed counsel; presentence investigation; prison term.*

The record and petition do not identify an error that would render defendant's sentences void. Accordingly, the trial court did not abuse its discretion in denying the petition for postconviction relief without holding a hearing. An indigent petitioner has neither a state nor a federal constitutional right to be represented by appointed counsel in a postconviction proceeding.

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105995 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v D.H.

Affirmed.

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

KEY WORDS: *R.C. 2953.32; R.C. 2953.52; eligible offender; expungement; seal; record of conviction; felony; misdemeanor; vacate.*

Court did not err in denying an R.C. 2953.52 (R.C. 2953.32) motion to seal the record of a conviction where defendant's criminal history makes him statutorily ineligible to have his record sealed.

106032 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ROBERT M. PORTER

Affirmed.

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

KEY WORDS: *R.C. 2953.21/postconviction petition; evidentiary hearing; R.C. 2953.23(A)(1)/exception requirements for an untimely petition.*

Appellant failed to show that but for his trial counsel's performance he would not have pled guilty to the charges; appellant's guilty plea was knowing, intelligent, and voluntary. Appellant also failed to meet the exception requirements for filing an untimely postconviction petition. The trial court's denial of appellant's petition without a hearing and without issuing findings of fact and conclusions of law was proper.

106045 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: J.B., ET AL.

Affirmed.

Mary Eileen Kilbane, J., Eileen A. Gallagher, A.J., and Sean C. Gallagher, J., concur.

KEY WORDS: *Parental rights; 25 U.S.C. 1912; due process; best interest of child; clear and convincing; R.C. 2151.414. Termination of parental rights affirmed. The juvenile court's decision to award permanent custody of appellant-father's two children to the Cuyahoga County Department of Children and Family Services ("CCDCFS") was supported by clear and convincing evidence. The juvenile court properly considered all factors under R.C. 2151.414(D) in determining that permanent*

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custody of the children to the agency was in the children's best interest. The trial court's denial of father's counsel's request for a continuance of the permanent custody trial because of father's unavailability did not violate his due process rights and was not an abuse of the trial court's discretion. Upon limited remand, the trial court remedied its failure to inquire of the parents as to the applicability of the Indian Child Welfare Act ("the ICWA") as required by *In re R.G.* The ICWA did not apply to the proceedings because neither the children's mother nor father met their burden to prove that the children met the statutory definition of an "Indian child" under the act.

106104 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
HANSFORD MILLER v METROHEALTH MEDICAL CENTER, ETC, ET AL

Affirmed.

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

KEY WORDS: *Medical battery; written consent; summary judgment.*

Trial court properly granted summary judgment in favor of doctor and hospital on patient's medical battery claim. Where patient executed written consent form that expressly authorized doctor to perform surgery, patient's testimony that he had previously told certain hospital staff that he did not want doctor to perform surgery did not create a genuine issue of material fact as to whether patient had consented to surgery.

106119 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DANIEL R. ROSARIO

Affirmed.

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

KEY WORDS: *Consecutive sentence.*

Court's consecutive sentence was not contrary to law.

106270 PROBATE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
NORMAN MILLSTEIN v THE KEVIN MILLSTEIN TRUST

Affirmed.

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

KEY WORDS: Trust interpretation; intent of grantor; irrevocable gift trust; summary judgment; R.C. 5808.13(C); financial accounting.

The trial court's judgment granting summary judgment to defendants was affirmed because there were no genuine issues of material fact remaining. The plaintiff-grantor had no right to a full financial accounting of two trusts under the plain language of the trusts and subsequent agreements signed by plaintiff. Only the beneficiaries under the trust had a right to the full account of books.