

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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May 3, 2018

104751 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RONALD L. PERRY

Affirmed.

Mary Eileen Kilbane, P.J.; Eileen T. Gallagher, J., concurs in judgment only; Melody J. Stewart, J., concurs in judgment only (see separate opinion concurring in judgment only).

KEY WORDS: *Kidnapping; Gross Sexual Imposition; R.C. 2953.08(D)(1); R.C. 2953.08(G)(2); consecutive sentences.*

The state's argument that appellant's sentence was unreviewable under R.C. 2953.08(D)(1) fails because the parties' recommendation that the trial court cap Appellant's sentence at 40 years did not amount to a definite agreed sentence or a definite agreed sentencing range. Trial court fulfilled its statutory duty to consider the purposes and principles of felony sentencing as set forth in R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12. The trial court did not err in imposing consecutive sentences as it made all required findings under R.C. 2929.14 as supported clearly and convincingly by the record.

104918 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ANTHONY GRANT

Affirmed.

Sean C. Gallagher, J., and Melody J. Stewart, J., concur; Kathleen Ann Keough, P.J., concurs in part, concurs in judgment only in part, and dissents in part with separate opinion.

KEY WORDS: *Agreed sentence; unreviewable; nonmandatory; consecutive sentences; costs; R.C. 2953.08(D)(1); jointly recommended; authorized by law; range; findings; juvenile record; criminal history; R.C. 2929.14(C)(4); R.C. 2947.23; notification; financial sanctions; ability to pay.*

Trial court's imposition of consecutive sentences in three underlying cases, as well as the trial court's imposition of costs, was upheld. An agreement to a sentencing range, as opposed to a specific term, is an agreed sentence for purposes of R.C. 2953.08(D)(1). Because the aggregate sentence imposed in two cases was an agreed sentence that was authorized by law, it was not subject to review on appeal pursuant to R.C. 2953.08(D)(1). No express agreement to nonmandatory consecutive sentences was required. As to the remaining sentence, the court made the required findings for imposing consecutive sentences, which were supported by the record. A defendant's juvenile record may be considered as part of an offender's "criminal history" for R.C. 2929.14(C)(4) purposes. Court costs are not financial sanctions and were properly assessed pursuant to R.C. 2947.23.

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105520 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v DAERICO CALHOUN

Reversed and vacated.

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

KEY WORDS: *Domestic violence, endangering children, sufficient evidence.*

Appellant's convictions of domestic violence and endangering children were not supported by sufficient evidence in the record. Appellant disciplined his 11-year-old son by removing him from a car, shaking his arm, poking him in the chest with a finger and raising his voice. Appellant's son was unharmed and the state failed to present sufficient evidence of abuse to support a conviction for child endangering. Appellant's conviction for domestic violence also lacked sufficient evidence where appellant used his forearm to push his son's mother away from him when she intervened in the discipline.

105587 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MARY BERRYHILL v RUSTOM R. KHOURI, ET AL.

Affirmed.

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

KEY WORDS: *Civ.R. 60(B), motion to vacate judgment, res judicata, law of the case.*

Appellant's claims under Civ.R. 60(B) lacked merit, and the trial court properly denied appellant's motion to vacate the judgment. Appellant's claims, sounding in liability, are barred by the doctrines of res judicata and law of the case.

105662 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DEANDREW SMITH

Reversed and remanded.

Frank D. Celebrezze, Jr., J., Sean C. Gallagher, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Felonious assault; aggravated assault; inferior offense; mistrial; hung jury; double jeopardy; jury instructions; final appealable order; interlocutory appeal.*

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(Case 105662 continued)

Appellant was acquitted of felonious assault during the first trial, and thus, retrial on this count is barred by the Double Jeopardy Clause. Double jeopardy does not bar the state from retrying appellant on the abduction count because the jury was unable to reach a verdict on this count during the first trial. The trial court's judgment permitting the state to retry appellant for felonious assault is reversed and the matter is remanded for a new trial on only the abduction count.

105921 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
KATHLEEN MARIE KOBAL v JOHN EDWARD KOBAL

Affirmed.

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

KEY WORDS: Divorce; termination date; de facto; marital property; separate property; pro se.

The trial court's order adopting the magistrate's decision granting plaintiff-appellee wife a divorce decree is affirmed. The trial court did not abuse its discretion in refusing to find a de facto termination date of the marriage earlier than the date of the final hearing because the parties presented no evidence of marital assets on the dates for which each party advocated. The trial court did not abuse its discretion in determining that the home defendant-appellant husband purchased prior to the marriage was not his separate property nor subject to a division of a property order because he transferred his interest in the home to his wife during the marriage who, in turn, transferred the home to the parties' adult sons. Likewise, the trial court did not abuse its discretion in finding that the funds from appellant's inheritance were no longer his because he had transferred the funds to a limited liability company owned by appellee without restriction. The appellant did not demonstrate that the trial court abused its discretion in adopting the magistrate's decision and the division of property order. A review of the record did not lead to the conclusion that the order was inequitable.

106068 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV, DOM OR PRO
MARY KINASZ v BLAKE DICKSON, ET AL.

Affirmed.

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

KEY WORDS: Summary judgment; Civ.R. 56; legal malpractice; statute of limitations; R.C. 2305.11; cognizable event; attorney-client relationship.

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(Case 106068 continued)

Appellant failed to demonstrate a genuine issue of material fact as to when the statute of limitations for her legal malpractice claim accrued. Accordingly, the trial court properly granted summary judgment in favor of defendants-appellees.

106117 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MOHAMMAD KHOSHKNABI

Vacated and remanded.

Frank D. Celebrezze, Jr., J., Eileen T. Gallagher, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Motion to withdraw; guilty plea; Crim.R. 32.1; manifest injustice; deportation; immigration; passing bad checks; theft; ineffective assistance of counsel; R.C. 2943.031; 8 U.S.C. 1227.

Appellant's trial counsel failed to properly advise him about the deportation consequences of his guilty plea. Appellant demonstrated a reasonable probability that but for counsel's erroneous advice, and had he known about the mandatory deportation consequences of his guilty plea, he would not have pled guilty and would have insisted on going to trial. Accordingly, the trial court abused its discretion in denying appellant's motion to withdraw his guilty plea.

106142 CLEVELAND HTS. MUNI. G CIVIL MUNI. & CITY
ADRIA ADAMS v RELMAX

Reversed and remanded.

Tim McCormack, J., and Eileen A. Gallagher, A.J., concur; Mary Eileen Kilbane, J., dissents (with separate opinion attached).

KEY WORDS: Residential lease; holdover tenant; security deposit; month-to-month tenancy; lease agreement; R.C. 5321.16(B); R.C. 5321.17(B).

The lower court's judgment ordering landlord to return month-to-month holdover tenant's security deposit was in error where tenant failed to provide landlord 30 days notice of her intent to terminate the tenancy.

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106149 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v EMERIC BOZSO

Reversed.

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

KEY WORDS: *R.C. 2943.031(D)/postsentence motion to withdraw plea; INA §212(c)/immigration consequences.*

Appellant was prejudiced where his trial counsel failed to inform appellant that relief from immigration consequences was wholly unavailable to appellant.

106171 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v BRIAN WIMBLEY

Affirmed.

Tim McCormack, P.J., Frank D. Celebrezze, Jr., J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Consecutive sentence; R.C. 2929.14(C)(4); statutory findings; R.C. 2953.08.*

The trial court made the statutorily required findings necessary to impose consecutive sentences under R.C. 2929.14(C)(4), and the findings were clearly and convincingly supported by the record.

106242 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
OHIO PLUMBING LTD. v FIORILLI CONSTRUCTION INC.

Reversed and remanded.

Eileen A. Gallagher, A.J., Melody J. Stewart, J., and Frank D. Celebrezze, J., concur.

KEY WORDS: *Arbitration provision; commercial parties; failure to pay; presumption of arbitrability; motion to stay pending arbitration; R.C. 2711.02(B); in default of proceeding with arbitration; procedural unconscionability; substantive unconscionability.*

Trial court erred in denying contractor's motion to stay pending arbitration pursuant to R.C. 2711.02(B). Subcontractor's claims for breach of contract and violation of Ohio Prompt Payment Act were within the scope of arbitration provision. Contractor was not in default of proceeding with arbitration where it did not initiate arbitration proceedings prior to filing motion to stay. Arbitration provision was not unenforceable due to unconscionability grounds where subcontractor failed to offer any evidence of procedural unconscionability.

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106478	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v KIMBERLY BRISCOE			

Reversed and remanded.

Melody J. Stewart, P.J., Anita Laster Mays, J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Conceded error; community control sanction; sentencing.

The court erred by incorrectly journalizing the degree of the offense to which the defendant pleaded guilty, by misstating the maximum penalty for violating the terms of community control, and by imposing a mandatory term of postrelease control.