

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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May 10, 2018

104465 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MARTIN YAVORCIK

Vacated and remanded.

Anita Laster Mays, J.; Kathleen Ann Keough, P.J., concurs in judgment only; Sean C. Gallagher, J., concurs in judgment only with separate opinion.

KEY WORDS: *R.C. 2923.32, Ohio Corrupt Practices Act, pattern of corrupt activity, criminal enterprise, R.C. 2923.01, conspiracy to engage in a pattern of corrupt activity, R.C. 2901.12(H), venue, course of conduct, Crim.R. 29(C), motion for judgment of acquittal for lack of venue.*

The trial court erred in denying defendant's motion for judgment of acquittal for lack of venue pursuant to Crim.R. 29(C) and determining that venue was proper in Cuyahoga County. Venue lies where a member of an enterprise conducts an illegal act in furtherance of the purpose of the enterprise.

The evidence is insufficient to support that the alleged conspiracies are related to the affairs of the same enterprise and formed for a common purpose. A pattern of corrupt activity by a criminal enterprise is not established by asserting that various unindicted individuals engaged in predicate crimes at various times independently and without coordination. Separate conspiracies by different enterprises for different purposes may not be bootstrapped in an attempt to support a pattern of corrupt activity for the purpose of establishing venue in a legally remote jurisdiction.

105285 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CECIL W. MOORE

Reversed and remanded.

Kathleen Ann Keough, J., Mary Eileen Kilbane, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Sexual battery, coercion, sufficiency of the evidence, manifest weight of the evidence, credibility, inconsistency, DNA*

Appellant's conviction for sexual battery is supported by sufficient evidence because under the sufficiency standard, a reasonable juror could find that the appellant knowingly coerced the victim to engage in sexual conduct, if the jury believed the victim's testimony. However, his conviction is against the manifest weight of the evidence because the victim's trial testimony was inconsistent and contradictory with her narrative given to medical professionals a day after the incident, and with the statement given to police. These inconsistencies coupled with no DNA evidence substantiating the victim's testimony, warranted reversal.

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105366 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
PAUL NEEL, ET AL. v A. PERRINO CONSTRUCTION, INC., ET AL.

Affirmed in part, reversed in part, and remanded.

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

KEY WORDS: *Motion to stay proceedings; arbitration; R.C. 2711.02; unconscionability; ambiguity; consumer construction contract; R.C. 4722.02; waiver of right to arbitrate; loser-pays provision.*

The trial court did not err in granting a motion to stay pending arbitration because the arbitration clause of the agreement was not unconscionable or ambiguous and Perrino did not waive their right to arbitration. The trial court erred in failing to stay all claims against all parties pending arbitration.

105494 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
WOODS COVE III, LLC v AMERICAN GUARANTEED MANAGEMENT CO., LLC, ET AL

105901 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
WOODS COVE III, LLC v NICK PAPADELIS, ET AL.

Affirmed.

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

KEY WORDS: *Summary judgment; constitutionality; tax certificate foreclosure statute; attorney general; R.C. 5721.371; magistrate's decision; extension of time; motion to reconsider; jurisdiction; declaratory judgment.*

Trial court properly granted summary judgment ordering foreclosure on tax certificate holder's certificates where delinquent property owners did not produce any evidence demonstrating a genuine issue of material fact regarding the certificate owner's right to foreclose or the amounts due; trial court was without jurisdiction to render a declaratory judgment regarding the constitutionality of Ohio's tax certificate legislation because the Ohio attorney general was not served in the action as required by R.C. 2721.12(A); the trial court did not err in adopting the magistrate's decision awarding attorney fees even without a determination of the reasonableness of the fees because the magistrate awarded attorney fees less than \$2,500 and under R.C. 5721.371(B)(1), attorney fees less than or equal to \$2,500 are presumptively reasonable; trial court did not err in denying appellants' motion for extension of time to respond to magistrate's decision where appellants' counsel was not newly retained and had been working on the case for two months before he filed a notice of appearance; trial court did not err in denying appellants' motion for reconsideration because it raised new issues that were not raised in appellants' motions for summary judgment and responses to plaintiff's summary judgment motion.

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105499 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO, EX REL. LUCY MCKERNAN v
CITY OF SEVEN HILLS, OHIO CITY COUNCIL, ET AL.

Affirmed in part, reversed in part and remanded.

Eileen A. Gallagher, A.J., Tim McCormack, J., concur; Sean C. Gallagher, J., dissents (with separate opinion attached).

KEY WORDS: *Declaratory judgment, ordinance, R.C. 733.59, R.C. 731.30.*

In a statutory taxpayer's action for injunctive relief pursuant to R.C. 733.59, the trial court erred in denying appellant's motion for summary judgment as moot as to her request for costs and reasonable attorney fees pursuant to R.C. 733.61 where the action was rendered moot by the municipality's repeal of the ordinance in question prior to judgment.

105550 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
FANNIE MAE v LYNDA HICKS

Reversed and remanded.

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

KEY WORDS: *Foreclosure; damages; possession; purchaser; jurisdiction; pending appeal; abeyance.*

Trial court erred in denying motion for a hearing on damages where court denied the motion due to a pending appeal rather than holding the motion in abeyance until the appeal was decided. And principles of equity and fairness require the trial court hold a hearing on damages sustained to the property while it was in bank's possession before being returned to the property owner as a result of a vacated judgment in foreclosure.

105628 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v GREG RUCKER

Affirmed and remanded.

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

KEY WORDS: *Motion for a mistrial, discovery violations, jail house phone calls, sufficient evidence, consecutive sentences.*

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(Case 105628 continued)

Trial court did not err in denying appellant's motion for a mistrial based on a surprise in-court identification made by a police officer who engaged in a footchase with appellant. Appellant could not establish that the prosecutor committed a willful violation of the discovery rules. Calls to appellant from associates in jail were properly authenticated. The state presented sufficient identification evidence tying appellant to the offenses in an aiding and abetting role. The trial court did not err in imposing consecutive sentences but appellant's journal entry did not comply with State v. Bonnell, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.

105678 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
BANK OF NEW YORK MELLON v MARVIN D. PRIMES, ET AL.

Affirmed.

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

KEY WORDS: Foreclosure; mortgage; promissory note; personal knowledge; Civ.R. 56(E); standing; equitable assignment.

Loan analyst who stated he worked for both parent company and subsidiary company that serviced loan documents established firsthand knowledge that bank possessed promissory note.

Debtor's standing arguments rendered immaterial because bank possessed promissory note indorsed in blank, established that it was a person entitled to enforce the note, so an equitable mortgage arose under law that security follows the debt.

105682 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CHRISTIAN N. MORGAN

Affirmed.

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

KEY WORDS: Restitution, stipulation, ability to pay, consideration, sentence, contrary to law, supported by the record.

The record demonstrates that the trial court considered appellant's present and future ability to pay restitution when sufficient information was contained in the presentence investigation report. Additionally, the appellant stipulated to the restitution amount and order. Appellant's maximum sentence is not contrary to law and is supported by the record.

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105714 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
BARBARA RIEGER v GIANT EAGLE, INC.

Affirmed in part, modified in part, and remanded.

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

KEY WORDS: *Directed verdict; Civ.R. 50; de novo; negligence; negligent entrustment; punitive damages; R.C. 2315.21; punitive damages cap; unconstitutional as applied; Gore Factors; reprehensibility; excessive; admissibility of evidence.*

Compensatory damages award affirmed, punitive damages award reversed and remanded to trial court with instructions to enter award twice the compensatory damages amount. Trial court did not err when it denied defendant's motion for directed verdict with respect to negligence, negligent entrustment, and punitive damages. The \$1,198,000 punitive damages award was unconstitutionally excessive under the Gore factors. There was no evidence of reprehensibility by the defendant. Therefore, the punitive damages award should be capped at \$242,000 or twice the compensatory damages award. The trial court's admissions of post-incident accidents was harmless error. The admission of prior similar incidents was not an abuse of discretion.

105777 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CHRISTOPHER TRUSSELL

Affirmed.

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

KEY WORDS: *Challenge for cause; Crim.R. 24(C); manifest weight of the evidence; credibility; ineffective assistance of counsel.*

Defendant-appellant's jury convictions for rape, kidnapping, and domestic violence affirmed. Defendant was not prejudiced by the trial court's denial of his challenge for cause that caused his counsel to exercise the final peremptory challenge. The trial court heard the challenged juror testify that she could be fair and impartial in the present case even though she volunteered at a rape crisis telephone hotline 25 years prior. Defendant's convictions for rape and kidnapping were not against the manifest weight of the evidence. Defendant's attacks of the victim's credibility ignored important aspects of her testimony. Defense counsel was not ineffective for failing to subpoena video surveillance footage to impeach the victim's credibility. Defendant failed to demonstrate that counsel's failure to subpoena this evidence fell below an objective standard of professional reasonableness or resulted in prejudice to the defense.

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105894 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ALIJAH K. LEE

Affirmed.

Sean C. Gallagher, J., and Melody J. Stewart, J., concur; Eileen T. Gallagher, P.J., concurs in judgment only with separate opinion.

KEY WORDS: *R.C. 2953.08(D)(1); agreed sentence; appellate review.*

Appellant's sentences are authorized by law and are ones that were jointly recommended by the parties and imposed by the trial court. There was no mandatory duty for the court to address R.C. 2941.25 in this case, and thus, the sentences were authorized by law.

105994 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
T. D. v C. N., ET AL.

Affirmed as modified.

Patricia Ann Blackmon, J., and Kathleen Ann Keough, J., concur; Tim McCormack, P.J., dissents with attached dissenting opinion.

KEY WORDS: *Civil Stalking Protection Order; R.C. 2903.211; sufficiency; manifest weight; First Amendment.*

Petitioner established requirements of R.C. 2903.211 by a preponderance of the evidence so CSPO was properly granted; grounds for relief from judgment were not established, but First Amendment concerns required limiting the 500 feet restriction.

106021 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v C.S.

Affirmed.

Mary Eileen Kilbane, P.J., Eileen T. Gallagher, J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Expungement; restitution; "finally discharged"; R.C. 2929.18; R.C. 2953.32; cognovit note; client's security fund.*

Judgment affirmed. The defendant was "finally discharged" for purposes of expungement as set forth in R.C. 2953.32(A). The defendant repaid \$45,000, which was a condition of her sentence, and from what can be gleaned from the sparse record, she has continued to repay the Fund. Therefore, we find that the trial court did not err by granting the defendant's application for expungement of criminal record.

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106033 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ROBERT A. LITTLEJOHN

Affirmed.

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

KEY WORDS: *Aggravated burglary; felonious assault; Crim.R. 29; motion for acquittal; insufficient evidence; R.C. 2923.03; complicity; aid or abet; shared criminal intent; surrounding circumstances; mere presence; ineffective assistance; Crim.R. 7(D); amend; indictment; names; victims.*

Appellant's convictions for aggravated burglary and felonious assault were affirmed. The trial court did not err in denying a Crim.R. 29 motion for acquittal on various counts when the evidence demonstrated that appellant was complicit in committing the crimes by acting as an aider and abetter, a shared criminal intent could be inferred from the surrounding circumstances, and it was not a case of "mere presence." No ineffective assistance of counsel was shown since the trial court's amendment of the indictment to include the names of additional victims was permitted under Crim.R. 7(D) because it did not change the name or identity of the crimes charged.

106038 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v TRAMAINE E. MARTIN

Affirmed.

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

KEY WORDS: *Motion to suppress; motion to dismiss; speedy trial; sufficiency of the evidence; manifest weight; attempted rape; gross sexual imposition; kidnapping; sexual motivation specification.*

The trial court did not err in denying defendant-appellant's pro se motion to suppress without conducting a hearing. The suppression motion did not contain any claims or factual allegations that would justify relief. The trial court did not err in denying defendant's pro se motions to dismiss. Defendant's constitutional speedy trial claim fails because he did not meet the threshold showing of a "presumptively prejudicial delay." Likewise, defendant's statutory speedy trial claim was unpersuasive because he was brought to trial within the time prescribed by R.C. 2945.71 to 2945.73. Defendant's convictions for attempted rape, gross sexual imposition, and kidnapping were supported by sufficient evidence and were not against the manifest weight of the evidence. Defendant's arguments that his sex offender registration requirement and sexual motivation specification were convictions, resulting in a double jeopardy violation when coupled with the underlying kidnapping offense, were without merit.

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106049 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ROSARIO D. ROBINSON

Affirmed.

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

KEY WORDS: *Sufficiency of the evidence; weight of the evidence; consecutive sentences.*

There is ample evidence in the record demonstrating that the defendant committed felonious assaults against several victims, and in light of a concession, the imposition of consecutive sentences is affirmed.

106050 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ANTHONY COLLINS, JR.

Affirmed.

Mary Eileen Kilbane, P.J., Eileen T. Gallagher, J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Crim.R. 11(C); maximum penalty; prison.*

The trial court complied with Crim.R. 11(C) by advising the defendant before accepting his guilty plea of the maximum penalty involved in the first-degree felony offenses to which he would be pleading guilty and ascertaining that the defendant understood the penalty; the trial court advised the defendant and he understood that he would be going to prison.

106052 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DELVONTA L. MALLORY

Affirmed in part; vacated in part; and remanded for resentencing.

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

KEY WORDS: *Aggravated menacing; vandalism; hearsay; plain error; prosecutorial misconduct.*

Evidence that defendant yelled at victim in a “threatening manner,” without the content of what was actually stated, was insufficient to establish that an actual threat of serious physical harm had been made or that the victim, in the moment, believed the defendant to be in earnest and capable of acting.

Insufficient evidence to prove the “serious physical harm” element

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(Case 106052 continued)

of vandalism which requires physical harm to property that results in loss to the value of the property of one thousand dollars or more because state failed to show the dollar value of damage caused to the victim's house.

106062 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v VINCENT PARKER

Affirmed.

Eileen A. Gallagher, A.J., Tim McCormack, J., and Sean C. Gallagher, J., concur.

KEY WORDS: Motion to withdraw guilty plea, jurisdiction.

Trial court did not err in denying appellant's motion to withdraw his guilty plea after appellant's convictions had been affirmed on direct appeal. A trial court lacks jurisdiction to consider a defendant's motion to vacate his guilty pleas under Crim.R. 32.1 after a court of appeals has reviewed and affirmed the defendant's convictions. Nor did the trial court err in failing to hold a hearing on the motion or issue findings of fact and conclusions of law.

106063 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v OWEN J. KILBANE

106064 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v MARTIN A. KILBANE

Affirmed.

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

KEY WORDS: Crim.R. 33, motion for new trial, jury misconduct, internal deliberations, prejudice, evidentiary hearing.

Defendants' motion for a new trial pursuant to Crim.R. 33 for jury misconduct was properly denied. Defendants demonstrated that the article containing the newly discovered information regarding jury deliberations was not available within 120 days of the jury's verdict as required by Crim.R. 33(A)(6) because it had not been published. Defendants state they did not know of the article until recently, more than 30 years after the verdict and after publication of the article. The reenactment of the crime by the jurors during deliberations as revealed by the article was not improper. The reenactment was not based on extrinsic evidence but only on the evidence admitted at trial, and defendants are unable to demonstrate that but for the jury's actions, a strong probability exists that the outcome of the case would have been different. Defendants are not entitled to an evidentiary hearing for a meritless claim.

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106090 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DOMINIQUE R. SCOTT

Affirmed.

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

KEY WORDS: *Consecutive sentences; firearm specification; failure to comply; R.C. 2929.14(C)(1)(a); R.C. 2921.331.*

Trial court does not err by not making R.C. 2929.14(C)(4) findings before ordering consecutive sentences for firearm specifications and failure to comply violation where defendant admits operation of motor vehicle caused a substantial risk of serious physical harm to persons or property.

106094 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
EDWARD GRAHAM, ET AL. v CITY OF LAKEWOOD, ET AL.

Affirmed.

Patricia Ann Blackmon, J., Mary J. Boyle, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Subject matter jurisdiction, mootness, standing, failure to state a claim upon which relief can be granted; taxpayers lawsuit; specific performance; injunction; writ of mandamus; breach of contract; intended third-party beneficiary; breach of fiduciary duty; breach of express trust; breach of constructive trust; unjust enrichment; promissory estoppel; fraud; conspiracy; alter ego liability; tortious interference with contract; leave to amend complaint.*

Dismissal of complaint to prevent the closing of Lakewood Hospital affirmed for lack of subject matter jurisdiction due to mootness, lack of standing, and failure to state a claim upon which relief can be granted.

106707 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ANTONIO TOBIAS

Vacated in part, and remanded.

Eileen A. Gallagher, A.J., Tim McCormack, J., and Eileen T. Gallagher, J., concur.

KEY WORDS: *Conceded error; consecutive sentences; one-year firearm specifications; same act or transaction.*

Trial court erred in imposing consecutive sentences for two

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(Case 106707 continued)

one-year firearm specifications where the two underlying felonies were committed as part of the same act or transaction. Sentence vacated with respect to firearm specifications; case remanded for resentencing with respect to firearm specifications only.