

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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**November 1, 2018**

**104267** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v ASA J. ASADI-OUSLEY

Reversed, vacated, and remanded.

Eileen T. Gallagher, J., and Larry A. Jones, Sr., J., concur; Mary Eileen Kilbane, P.J., dissents with separate opinion.

**KEY WORDS:** *App.R. 26; reopen; statute of limitations; tolling; conceal; identity; avoid prosecution; ineffective assistance; trial counsel; appellate counsel; motion to dismiss; vacate; prejudice.*

*Appellant was prejudiced by the failure of appellate counsel to assign as error that trial counsel was ineffective in failing to file a motion to dismiss a count of felonious assault, when the six-year statute of limitations period had expired prior to the filing of the indictment.*

**106157** CLEVELAND MUNI. C CRIMINAL MUNI. & CITY  
CITY OF CLEVELAND v JASON DARGO

Affirmed.

Frank D. Celebrezze, Jr., J., Melody J. Stewart, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Motion to suppress; field sobriety tests; NHTSA standards; substantial compliance; probable cause.*

*Trial court erred in sustaining prosecutor's objection to appellant's counsel's closing arguments. However, such error was harmless and appellant failed to demonstrate how he was prejudiced by the trial court's ruling. Trial court did not err in denying the motion to suppress because the trooper's evaluation and administration of the field sobriety tests substantially complied with NHTSA standards.*

**106301** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v ANDRE D. BOYNTON

Affirmed.

Kathleen Ann Keough, J., Tim McCormack, P.J., and Anita Laster Mays, J., concur.

**KEY WORDS:** *Self-representation; untimely; warnings; removed from courtroom; sufficiency of evidence.*

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(Case 106301 continued)

**Defendant's convictions for numerous sex offenses against juveniles was supported by sufficient evidence, even though defendant was in prison at the time of the offenses, where thousands of recorded telephone conversations between defendant and his accomplice demonstrated that defendant conspired with the accomplice and facilitated the commission of the offenses by telling her how to get the young children in her car, what sexual assaults to perform on them, and what pictures and videos to take of the sexual assaults. Defendant's day-of-trial request to represent himself was untimely and therefore properly denied; defendant was properly removed from the courtroom during trial because he ignored numerous warnings that he would be removed if he continued to disrupt the proceedings.**

**106319** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MICHAEL BUEHNER

Reversed and remanded.

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

**KEY WORDS: Motion for leave to file motion for new trial; Crim.R. 33; motion for new trial; Brady; material; unavoidably prevented; newly discovered evidence; exculpatory evidence; reasonable probability; postconviction relief; ineffective assistance of counsel.**

**Denial of motion for leave to file a motion for new trial without a hearing was an abuse of discretion where the state failed to disclose exculpatory evidence in pretrial. However, because it was unclear whether the exculpatory evidence would have changed the outcome of the trial, the case was remanded for a hearing on the motion for new trial.**

**106391** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
U.S. BANK NATIONAL ASSOCIATION v PATRICK J. O'MALLEY, ET AL.

Dismissed.

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

**KEY WORDS: Final appealable order; magistrate's decision; objections; Civ.R. 53(D)(4)(d); R.C. 2501.02.**

**Appeal dismissed for lack of a final, appealable order due to trial court's failure to rule on all timely objections to the magistrate's decision.**

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**106453** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JAMES D. BOYD, III

Affirmed in part, reversed in part, and remanded.

Anita Laster Mays, J., Melody J. Stewart, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Ineffective assistance of counsel, manifest weight of the evidence, allied offenses.*

*The appellant has failed to demonstrate how there is a reasonable probability that he would have been found not guilty had it not been for trial counsel's actions or failure to act. The appellant's convictions were not against the manifest weight of the evidence because the evidence was substantial enough for a jury to reasonably conclude that all of the elements of the alleged crime have been proved beyond a reasonable doubt. The appellant's convictions for kidnapping and aggravated robbery should merge for the purpose of sentencing because the offenses were not committed with separate animus or motivation.*

**106570** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v KASSIUS WILLIAMS

Affirmed in part; vacated in part; and remanded.

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

**KEY WORDS:** *Guilty plea; Crim.R. 11; psychiatric diagnosis; learning disability; prescription drugs; ineffective assistance of counsel; breakdown; attorney-client relationship; consecutive sentences.*

*Defendant entered guilty pleas knowingly, intelligently, and voluntarily even though he had a learning disability and suffered from post-traumatic stress disorder where record shows defendant understood the proceedings and trial court complied with Crim.R. 11.*

*Defendant failed to establish claim of ineffective assistance of counsel where defendant acknowledged he was satisfied with his lawyer's efforts but was disappointed that they did not give him a copy of a motion that was intended for "counsel only" by the prosecutor.*

*Consecutive sentences were contrary to law where the court failed to make necessary findings before imposing consecutive sentences and because the court failed to specify whether the findings applied to the defendant, his codefendant, or both.*

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**106617** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
BRYAN PAULLOZZI, ET AL. v PARKVIEW CUSTOM HOMES, LLC, ET AL.

Reversed and remanded.

Mary J. Boyle, P.J., Sean C. Gallagher, J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Arbitration clause, impossibility, severability, fraud.*

*The trial court erred when it found that the arbitration clause was unenforceable under the doctrine of impossibility based on the fact that the identified arbitrator was no longer in business. The arbitration clause was not impossible to perform because the clause did not identify the arbitrator as the “exclusive” arbitrator, and the portion of the clause identifying the arbitrator could be severed from the remainder of the clause. Further, we must remand the case for the trial court to issue findings of fact as to whether the arbitration provision was induced by fraud.*

**106625** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
J. K. v D.F. A.

Affirmed.

Tim McCormack, P.J., Sean C. Gallagher, J., and Patricia Ann Blackmon, J., concur.

**KEY WORDS:** *Civil stalking protection order; menacing by stalking; R.C. 2903.211; R.C. 2903.214; pattern of conduct; prior restraint.*

*The trial court did not abuse its discretion in issuing a civil stalking protection order where the petitioner established the elements of menacing by stalking by a preponderance of the evidence. The language of the protection order was not unconstitutionally vague and does not unconstitutionally restrict the respondent’s speech.*

**106634** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
RICHARD MORAN v MICHAEL A. LEWIS

Affirmed.

Sean C. Gallagher, J., Mary J. Boyle, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *GPS; invasion of privacy; Civ.R. 12(C); judgment on the pleadings.*

*The trial court did not err in granting judgment in favor of the defendant because in order to properly plead an invasion of privacy*

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(Case 106634 continued)

**claim premised on the invasion into another's seclusion, at a minimum, there must be allegations demonstrating an intrusion, physical or otherwise, into another's solitude or private affairs.**

**106644** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
DITECH FINANCIAL LLC v MURRAY KUDROFF, ET AL.

Reversed and remanded.

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

**KEY WORDS: Motion for sanctions; hearing; R.C. 2323.51; frivolous conduct; abuse of discretion.**

**Judgment reversed and remanded. The trial court abused its discretion by denying defendants' motion for sanctions without a hearing when the record evidences frivolous conduct and an arguable basis exists for an award of sanctions.**

**106679** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v O'SHANE C. SMITH

Affirmed.

Anita Laster Mays, J., Tim McCormack, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS: Abuse of discretion, indigent, mandatory fine, R.C. 2925.03(D)(1).**

**The trial court did not abuse its discretion when it determined that the appellant was not indigent. The trial court considered the appellant's present ability to pay the mandatory fine, in accordance with R.C. 2925.03(D)(1), and assessed that the appellant was in good financial standing.**

**106717** CLEVELAND MUNI. C CRIMINAL MUNI. & CITY  
CITY OF CLEVELAND v BLANCHARD E. JONES, JR.

Vacated and remanded.

Kathleen Ann Keough, J., Tim McCormack, P.J., and Anita Laster Mays, J., concur.

**KEY WORDS: Plea; no contest; factual basis; explanation of circumstances; R.C. 2937.07**

**The explanation of circumstances requirement in a no contest plea**

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(Case 106717 continued)

**occurs at the time of the plea and prior to the trial court's determination of guilt. A previously held suppression hearing or an explanation at a subsequent sentencing hearing does not satisfy the factual basis requirement under R.C. 2937.07.**

**106731** CLEVELAND MUNI. C CRIMINAL MUNI. & CITY  
CITY OF CLEVELAND v ROBERT CARABALLO

Vacated.

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

**KEY WORDS: Sufficiency; fare-evasion.**

**Sufficient evidence was not provided at trial that appellant evaded paying the required transit fare. The trial court's judgment of guilty was not proper.**

**106828** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v TERRELL GRAY

Affirmed.

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

**KEY WORDS: Murder, aiding and abetting jury instruction, consecutive sentences.**

**The state presented sufficient evidence to support appellant's convictions stemming from his active participation in a drive-by shooting. His convictions were not against the manifest weight of the evidence. The trial court's jury instruction on aiding and abetting was appropriate as appellant's convictions were based on complicity. The record supported the trial court's findings in favor of consecutive sentences as the shooting resulted in the death of two people.**

**106905** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
C. S. v J. M., SR.

Affirmed.

Tim McCormack, P.J., Sean C. Gallagher, J., and Patricia Ann Blackmon, J., concur.

**KEY WORDS: Civil stalking protection order; menacing by stalking;**

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(Case 106905 continued)

**R.C. 2903.211; R.C. 2903.214; motion to modify; abuse of discretion; voluntary dismissal; App.R. 28; res judicata.**

**Appellant's challenge to the trial court's granting of a protection order is barred by res judicata where the appellant voluntarily dismissed an earlier appeal of the order. The trial court did not abuse its discretion in denying a motion to modify a protection order where it was not shown that a change in circumstances rendered the order inequitable.**

**106984** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v TERRANCE J. WALTER

Affirmed.

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

**KEY WORDS: *Crim.R. 33(B); motion for leave; motion for new trial; untimely; unavoidable delay; clear and convincing proof; evidentiary hearing.***

***The trial court did not abuse its discretion when it denied defendant's motion for leave to file a motion for new trial without an evidentiary hearing. The trial court could determine from the face of defendant's motion that the defendant obtained the evidence on which he based his motion for new trial over four years prior to filing his motion for leave. Therefore, the defendant did not clearly and convincingly prove that he was unavoidably prevented from filing his motion timely.***

**107123** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v EZEKIEL Z ABERNATHY

Vacated and remanded.

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

**KEY WORDS: *Crim.R. 11, mandatory consecutive sentences, conceded error.***

***State concedes that the trial court failed to substantially comply with Crim.R. 11 when it did not advise the defendant that any prison sentence imposed on failure to comply must be served consecutively to any other prison term.***

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**107219** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE

IN RE: A.J.M.

Affirmed.

Sean C. Gallagher, J., Melody J. Stewart, P.J., and Mary J. Boyle, J., concur.

***KEY WORDS: Permanent custody; parental rights; continuance; discretion; R.C. 2151.414(B); R.C. 2151.414(E); chemical dependency, sibling, R.C. 2151.414(D); best interest; competent, credible evidence.***

***Trial court did not abuse its discretion in determining that permanent custody of the child should be awarded to a children services agency and in denying mother's request for continuance of the permanent custody hearing.***