

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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November 29, 2018

**105203** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v LINDSEY CURRY

Affirmed.

Anita Laster Mays, J., and Melody J. Stewart, P.J., concur; Mary J. Boyle, J., concurs in judgment only with separate opinion.

**KEY WORDS:** *Child endangering, R.C. 2919.22(A), loco parentis, custody and control, tampering with evidence, R.C. 2921.12(A)(1), weapon while under disability, R.C. 2923.13, misdemeanor assault R.C. 2903.13(B), sufficiency of the evidence, manifest weight of evidence, R.C. 2929.41, lawful sentence.*

*In a circumstantial case involving the accidental shooting of two minor victims who, along with appellant were sleeping in the living room area of the children's home also occupied by their babysitter, parents, and siblings, the evidence is sufficient to support appellant's conviction for child endangering and is supported by the manifest weight of the evidence. Appellant had custody and control of the children.*

*Appellant's convictions for tampering with evidence, having a weapon while under disability and misdemeanor assault were supported by sufficient evidence and were not against the manifest weight of the evidence. According to the evidence introduced at trial, though no gun shot residue was located on appellant's clothing, gun shot residue was found on appellant's hands indicating that he had fired, handled or acted to secret a weapon that had recently been fired.*

*Appellant's concurrent sentence to a three-year term of prison on two counts followed by community control sanctions including house arrest and electronic monitoring on two separate counts was not unlawful.*

**106136** CLEVELAND MUNI. C CRIMINAL MUNI. & CITY  
CITY OF CLEVELAND v TYRONE M. DANIELS

Affirmed in part; vacated in part; remanded.

Frank D. Celebrezze, Jr., J., and Tim McCormack, P.J., concur; Larry A. Jones, Sr., J., dissents with separate opinion.

**KEY WORDS:** *Failure to comply; notice of violation; Cleveland Codified Ordinance Section 3103.25(e); waiver of counsel; Crim.R. 44; no contest plea; waiver of right to counsel; maximum penalties; R.C. 2929.24(A)(1); complaint; Crim.R. 8(A); Crim.R. 12(C)(2); failure to raise objection.*

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**Appellant expressly tendered a plea of no contest; however, he did not knowingly, intelligently, and voluntarily waive his right to counsel. Thus, the portion of appellant's sentence imposing jail time is vacated. There was a factual basis to support the conviction for the failure to comply offense, and the trial court properly informed appellant of the maximum penalties associated with the 42-count complaint. Appellant waived the right to argue any defect in the complaint because he failed to raise any objection in the trial court.**

**106390** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v LYNDA SYKES

Reversed and remanded.

Eileen T. Gallagher, P.J. and Kathleen Ann Keough, J., concur; Sean C. Gallagher, J., concurs with separate opinion.

**KEY WORDS: Judicial release; eligible; offender; mandatory; contract; plea agreement; agreed-upon sentence; sentencing; negotiated; modification; contrary to law.**

**Where the mandatory nature of the agreed-upon sentence is an express condition of the plea agreement, it becomes a binding contractual term that renders the offender ineligible for judicial release under R.C. 2929.20(A). The trial court erred by granting judicial release to an ineligible offender.**

**106509** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
J. S. v D. L.

Affirmed.

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

**KEY WORDS: Domestic violence civil protection order, R.C. 3113.31, Civ.R. 65.1.**

**Appellant, who was incarcerated at the time the full hearing on a domestic violence civil protection order against him was conducted, did not have a constitutional right to be present for the hearing. Appellant had adequate time to seek a continuance of the hearing or retain counsel. Appellant was prohibited from challenging factual findings made by the magistrate below because he failed to provide the domestic relations court with a transcript of the proceedings to support his objections.**

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**106546** LYNDHURST MUNI. G CIVIL MUNI. & CITY  
DEUTSCHE BANK NATIONAL TRUST COMPANY v SHIRLEY LOVETTE, ET AL.

Affirmed.

Anita Laster Mays, J., Melody J. Stewart, P.J., and Patricia Ann Blackmon, J., concur.

**KEY WORDS:** *R.C. 1923.01; jurisdiction of forcible entry and detainer action; R.C. 1923.02; color of title; R.C. 1923.04; three-day notice to leave premises; R.C. 5321.01(A) definition of tenant; R.C. 5321.03(A)(4); eviction of holdover tenant; R.C. 5321.17(B); 30-day notice to terminate periodic tenancy; expiration of lease.*

*The trial court did not err in granting a writ of restitution where appellant lacked color of title or other valid possessory interest; the appellee bank held title to the property; the underlying lease between appellant and the prior owner expired and no evidence existed of a periodic tenancy.*

*A notice to leave premises that contained the requisite R.C. 1923.04(A) statutory language and was served by appellee bank 30 days prior to filing the forcible entry and detainer action was sufficient to invoke the trial court's jurisdiction where no written lease or periodic tenancy existed between the parties.*

**106639** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DARYL BURKS

Affirmed and remanded.

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

**KEY WORDS:** *Extortion; R.C. 2905.11; intimidation of a crime victim; R.C. 2921.04; pandering obscenity; R.C. 2907.32; speedy trial; R.C. 2945.71; R.C. 2945.72; sufficiency; manifest weight; allied offenses; R.C. 2941.25; consecutive sentences; R.C. 2929.14; R.C. 2953.08; vindictiveness; contrary to law.*

*Appellant's statutory and constitutional speedy trial rights were not violated. Appellant's convictions for extortion, intimidation of a crime victim, and pandering obscenity were supported by sufficient evidence and are not against the manifest weight of the evidence. The extortion and intimidation of a crime victim offenses were committed separately and with separate animus, thus, the trial court did not err by failing to merge the offenses for sentencing purposes. The trial court did not err in imposing consecutive sentences, and there is no evidence in the record indicating that the trial court imposed consecutive sentences in order to punish appellant for exercising his constitutional right to trial.*

*The trial court failed to incorporate its R.C. 2929.14(C)(4)*

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**consecutive sentence findings into its sentencing journal entry.  
The matter is remanded to the trial court to issue a nunc pro tunc  
sentencing entry incorporating the consecutive sentence findings.**

**106647** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DWONE E. MOORE

Affirmed.

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

**KEY WORDS: *Crim.R. 29/Sufficiency; prosecutorial misconduct;  
maximum sentence.***

***Appellant removed the victim's money from her wallet without her  
permission and returned it only after the victim fought with  
appellant. Sufficient evidence was submitted that appellant's  
actions constituted theft.***

***Appellant failed to show that but for the prosecutor's statements  
made during closing argument the outcome of the trial would have  
been different.***

***Appeal as to maximum sentence is moot because appellant is only  
challenging length of his sentence and he has completed his  
sentence.***

**106685** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
CITY OF CLEVELAND v STATE OF OHIO

Dismissed.

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

**KEY WORDS: *R.C. 2505.02/final appealable order; motion to  
intervene; App.R. 4/timely notice of appeal.***

***The trial court's denial of intervenor-appellant's motion to intervene  
was a final, appealable order and intervenor-appellant failed to file  
its notice of appeal in the 30-day required time period.***

**106709** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JERMAINE KING

Affirmed.

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

**KEY WORDS:** *Guilty plea; trial court; presentence; motion to withdraw; plea agreement; competent; counsel; medication; knowing; voluntary; intelligent; hearing; full and fair consideration; impartial.*

*Defendant was represented by highly competent counsel at the time of the plea, was given a full Crim.R. 11 hearing before entering his pleas, was afforded a complete and impartial hearing on his motion to withdraw, and the trial court gave full and fair consideration to the plea withdrawal request. The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.*

**106714** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
RAYCO MANUFACTURING, INC. v MURPHY, ROGERS, SLOSS & GAMBEL

Affirmed in part, reversed in part and remanded.

Eileen A. Gallagher, A.J., and Mary J. Boyle, J., concur; Melody J. Stewart, J., concurs in part and dissents in part (with separate opinion).

**KEY WORDS:** *Motion to enforce settlement agreement; advisory jury; Civ.R. 39(C)(1); standard of proof; presumption of regularity; witness-advocate rule; Ohio Prof.Cond. R. 3.7(a); motion for attorney fees incurred to enforce settlement agreement.*

*Regardless of whether a preponderance of the evidence or a clear and convincing evidence standard applied, trial court's finding that parties entered into an enforceable settlement agreement that resolved client's legal malpractice claim against attorneys was supported by sufficient competent, credible evidence. Trial court did not err in allowing appellees' counsel to serve as both witnesses and advocates at the hearing on motion to enforce settlement agreement where jury had only an advisory role, matters as to which counsel testified were not in dispute and trial court was well aware of the different roles assumed by appellees' counsel at the hearing and was not likely to be confused or misled by the lawyers' dual capacities. Trial court erred in denying appellees' motion to recover attorney fees incurred to enforce settlement agreement.*

**106752** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v BERNARD COMBS

Affirmed.

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

**KEY WORDS:** *Drug trafficking; sentence; concurrent; fourth- and fifth-degree felonies; R.C. 2929.11, 2929.12, and 2953.08; clear and*

(Case 106752 continued)

**convincing evidence; merger; allied offenses; R.C. 2941.25.**

**Judgment affirmed. Trial court's concurrent sentence of 18 months in prison for fourth- and fifth-degree felony convictions was proper. The trial court properly considered both R.C. 2929.11 and 2929.12 when sentencing the defendant. In doing so, the trial court expressly considered the defendant's PSI, the nature of the offenses involved, his criminal history, and what the defendant stated at the sentencing hearing. Under these circumstances, the defendant has not shown by "clear and convincing evidence that the record does not support the sentence." The defendant pled to three counts of drug trafficking with each count listing a different type of drug. Because these offenses are not similar in import or significance, the trial court properly found that these offenses do not merge for purposes of sentencing.**

<b>106755</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ROBERT M. HUTCHINSON			

Affirmed.

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

**KEY WORDS: *Crim.R. 25(B); sentence contrary to law; Crim.R. 32(A)(1).***

***The trial court did not err in allowing the administrative judge to preside over the appellant's sentencing hearing while the original judge on record was out on medical leave. Crim.R. 25(B) provides that if for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge designated by the administrative judge may perform those duties. However, Crim.R. 25(B) does not prohibit an administrative judge from designating himself as "another judge" within the meaning of Crim.R. 25(B), so as to complete the duties of one unable to perform. The trial court also did not err in sentencing the appellant because the sentence was not contrary law and was supported by the record. The trial court also provided the appellant an opportunity for allocution in accordance with Crim.R. 32(A)(1).***

<b>106765</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JAMAL MOBLEY			

Affirmed.

Sean C. Gallagher, J., Tim McCormack, P.J., and Frank D. Celebrezze, Jr., J., concur.

**KEY WORDS: *Juvenile; mandatory bindover; reverse bindover; R.C.***

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**2152.12; R.C. 2152.121(B)(3); attempted murder; felonious assault; plea agreement.**

**Appellant's conviction and sentence for felonious assault were affirmed where juvenile court and common pleas court followed the required procedure for a mandatory bindover and a reverse bindover when attempted murder charge was nolle as part of a plea agreement.**

**106798** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v CARL A. NELSON, SR.

Affirmed.

Eileen A. Gallagher, A.J., Melody J. Stewart, J., and Mary J. Boyle, J., concur.

**KEY WORDS: Motion to vacate; consecutive sentences.**

**Appellant's challenge to his consecutive sentences was barred by res judicata because the issue had been raised and addressed in a prior appeal.**

**106805** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
FANGER & ASSOCIATES LLC v AMEN ABUAUN

Reversed and remanded.

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

**KEY WORDS: Breach of a legal services contract; motion for involuntary dismissal; Civ.R. 41(B)(2); independent expert testimony; reasonable and necessary; block billing; evidence to determine amount of contractual prejudgment interest.**

**Trial court did not err in denying client's motion for involuntary dismissal of law firm's claims to recover unpaid attorney fees and expenses. Law firm was not required to present independent expert testimony establishing that amounts billed were reasonable and necessary where there was no evidence to suggest that client had ever expressed dissatisfaction with the fees charged during the tenure of attorney-client relationship or that attorney had not kept client apprised of the status of the case. Trial court's determination that law firm was entitled to recover \$65,189.00 in attorney fees and expenses on its breach of contract claim was supported by competent, credible evidence. Judgment reversed to the extent it included award of \$37,692.45 in prejudgment interest on unpaid monthly balances. Although law firm was entitled to simple interest on unpaid monthly balances under terms of legal services contract,**

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**law firm presented insufficient evidence upon which amount of contractual prejudgment interest could be calculated.**