

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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July 18, 2019

**107211** SHAKER HTS. MUNI. C CRIMINAL MUNI. & CITY  
CITY OF UNIVERSITY HEIGHTS v TYREE ALLEN

Affirmed.

Anita Laster Mays, J., Mary J. Boyle, P.J., and Frank D. Celebrezze, Jr., J., concur.

**KEY WORDS:** *R.C. 2937.35, surety bond, R.C. 2937.36(C), bond forfeiture notice, show cause hearing, Civ.R. 60(B), motion to vacate judgment.*

*The trial court did not err by denying the appellant surety's motion to vacate the bond forfeiture judgment. Appellant failed to demonstrate prejudice by the trial court's 11-day delay in issuing the show cause hearing notification as required by R.C. 2937.36. Appellant failed to appear at the hearing or request a continuance and does not dispute receipt of the notification. The 15-day statutory notification of bond forfeiture is not a statute of limitations that divests the trial court of jurisdiction.*

**107225** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
AMERICAN SURFACE SOLUTIONS, L.L.C. v NICHOLAS NORTH AMERICA, ET AL.

Reversed and remanded.

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

**KEY WORDS:** *Continuance; trial; abuse of discretion.*

*Trial court abused its discretion in denying appellants' motion to continue the trial when no previous continuance of trial was requested, the case had been pending for approximately one year, appellants did not cause any delay during the pendency of the action and fully defended the action, the request to continue was not made for purposes of delay, the principal defendant settled with the plaintiff on the eve of trial, and the failure to grant the continuance resulted in an ex parte trial against the corporation.*

**107307** PROBATE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
KEYBANK NATIONAL ASSOCIATION v JEFFREY B. FIRESTONE, ET AL.

Affirmed.

Eileen T. Gallagher, P.J., and Frank D. Celebrezze, Jr., J., concur; Raymond C. Headen, J., concurs

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in judgment only.

**KEY WORDS:** *Declaratory judgment; adopted; adult; trust; beneficiary; descendant; child; retroactive; intent; inter vivos; living; will; stranger to the adoption; remedial; substantive.*

**The trial court did not err in declaring that R.C. 3107.15(A)(3) is constitutional as applied to the Trust and operates to exclude adult adoptees as beneficiaries of the inter vivos trust.**

**107374** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DELVONTE PHILPOTTS

Affirmed.

Michelle J. Sheehan, J., Mary Eileen Kilbane, A.J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Second Amendment; Heller; constitutionality of R.C. 2923.13(A)(2); having weapons while under disability; facial challenge; as-applied challenge; intermediate scrutiny; due process.*

**Ohio's General Assembly acted within the constitutional parameters set forth by the United States Supreme Court in *District of Columbia v. Heller* in prohibiting individuals under indictment for a felony offense of violence from ownership of firearms. R.C. 2923.13(A)(2), which temporarily separates firearms from such individuals, is narrowly tailored to serve a significant governmental interest in curtailing gun violence and it leaves open alternative means of exercising such an individual's Second Amendment right. R.C. 2923.13(A)(2) is constitutional on its face and as applied to Philpotts.**

**107407** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v NATHANIEL SIMPSON

Affirmed.

Eileen T. Gallagher, P.J., Anita Laster Mays, J., and Frank D. Celebrezze, Jr., J., concur.

**KEY WORDS:** *Sufficiency; manifest weight; evidence; knowingly; serious physical harm; credibility; trier of fact; motion; new trial; newly discovered evidence; ineffective assistance; prejudice; evidence; foundation; admission; test message; no-contact order; discretion; sentence; community control; condition.*

**Defendant's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. The trial court did not abuse its discretion in denying defendant's motion for new trial without an evidentiary hearing. Defense counsel did not render ineffective assistance of counsel by failing to set forth the proper foundation for the introduction of certain text message**

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**correspondences between the defendant and the victim. The trial court did not abuse its discretion in fashioning a sentence that included a no-contact order that was designed to rehabilitate, administer justice, and ensure defendant's good behavior.**

**107427** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MERLIN T. JOHNSON

Affirmed in part, reversed in part and remanded.

Patricia Ann Blackmon, J., concurs; Eileen T. Gallagher, P.J., concurs with separate opinion; Mary J. Boyle, J., concurs in judgment only.

**KEY WORDS: *Crim.R. 29; manifest weight of the evidence; allied offenses; R.C. 2941.25; aiding and abetting; R.C. 2923.03; ineffective assistance of counsel.***

***Trial court did not err in denying defendant's motion for judgment of acquittal of aggravated murder; aggravated robbery; and other offenses; convictions were not against the weight of the evidence; evidence indicated that appellant aided and abetted in the commission of the shooting; felonious assault conviction must be merged with aggravated murder conviction.***

**107638** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
EWAN DACRES v SETJO, LLC, ET AL.

Affirmed.

Anita Laster Mays, J., Eileen T. Gallagher, P.J., and Frank D. Celebrezze, Jr., J., concur.

**KEY WORDS: *R.C. 2711.01, arbitration, R.C. 2711.02, stay of trial pending arbitration, economic duress, procedural and substantive unconscionability.***

***The trial court's grant of appellee's motion to stay the proceedings pending arbitration is supported by the record. Appellant has failed to demonstrate the presence of economic duress that would invalidate the enforceability of the arbitration agreement or that the agreement is unconscionable.***

**107654** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JOHNATHAN SMITH

Affirmed.

Frank D. Celebrezze, Jr., J., Sean C. Gallagher, P.J., and Anita Laster Mays, J., concur.

**KEY WORDS:** *Plea agreement; breach.*

*Appellant breached the terms of the plea agreement with the state when he refused to testify on behalf of the state at his codefendant's trial. As a result of appellant's breach, the state was relieved of its reciprocal duties under the plea agreement.*

**107685** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MICHAEL L. SHINE

Affirmed.

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

**KEY WORDS:** *Crim.R. 32.1/motion to withdraw plea; res judicata; request for transcript; presumption of regularity; postrelease control; R.C. 2929.18(A)(3)(a)/imposition of fine.*

*Only the portion of appellant's sentence where the trial court failed to impose statutorily mandated postrelease control is void thereby making appellant's motion to withdraw a postsentence motion. Appellant failed to demonstrate a manifest injustice.*

*Under Crim.R. 11, appellant's plea of guilty was a complete admission of guilt. The state did not have to prove a mens rea component on the charges.*

*The fines imposed were within the statutory limit.*

*Appellant failed to file a direct appeal where all of his claims could have been raised. They are now barred by the doctrine of res judicata.*

**107691** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v CHARLES GOODEN

Affirmed.

Anita Laster Mays, J., Mary Eileen Kilbane, A.J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *Crim.R. 32.1, presentence guilty plea withdrawal, R.C. 2953.08(G), felony sentencing, R.C. 2929.11, R.C. 2929.12, court costs.*

*While Crim.R. 32.1 states that a presentence motion to withdraw a guilty plea may be liberally allowed, the trial court's denial of appellant's motion is not an abuse of discretion in this case and meets the elements of State v. Peterseim, 68 Ohio App.2d 211, 213-214, 428 N.E.2d 863 (8th Dist.1980). The trial court's sentence is within the mandatory range and is clearly and convincingly supported by the record. A remand to address the sole question of waiving court costs is not required. An appellant may request a waiver directly.*

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**107694** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v ARNALDO ORTIZ-VEGA

Affirmed.

Michelle J. Sheehan, J., Mary J. Boyle, P.J., and Sean C. Gallagher, J., concur.

**KEY WORDS:** *Rape; R.C. 2907.02(A)(2); kidnapping; R.C. 2905.01(A)(4); manifest weight of the evidence; credibility; victim's testimony; Evid.R. 607(A); impeach; cross-examination; abuse of discretion; contradicts; prejudice; consecutive sentence; R.C. 2929.14(C); findings; supported by the record.*

*Ortiz-Vega's convictions for rape and kidnapping were not against the manifest weight of the evidence. The victim testified that Ortiz-Vega repeatedly and forcefully assaulted her through oral, digital, and vaginal intercourse, despite her efforts to stop him. The factfinder found the victim's testimony more credible than Ortiz-Vega's testimony, which it was free to do, and the victim's testimony was also supported by other evidence. The trial court did not abuse its discretion in allowing the prosecutor to inquire of Ortiz-Vega's prior marriages and his prior testimony that he and the victim engaged in premarital sex while Ortiz-Vega was still married to his now-former wife. The questioning was a proper challenge to Ortiz-Vega's credibility on cross-examination where Ortiz-Vega's testimony contradicted the victim's testimony. Moreover, Ortiz-Vega cannot demonstrate that he was prejudiced by the cross-examination in light of the evidence against him. In imposing a consecutive sentence, the trial court made the statutorily mandated consecutive-sentence findings and the record supports the findings.*

**107732** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: B.P., ET AL.

**107735** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: B.P., ET AL.

Affirmed.

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

**KEY WORDS:** *Permanent custody; admission; competency; Juv.R. 4(B)(3); R.C. 2151.281(C); guardian ad litem; final appealable order; adjudicatory hearing; R.C. 2151.414(E); continuance; manifest weight; competent, credible evidence; best interest; temporary custody.*

*In the case of each child, the trial court's decision to award permanent custody of the child to the Cuyahoga County Division of Children and Family Services and to terminate parental rights was affirmed. Mother's admission to the amended complaint was*

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entered at an adjudicatory hearing, and the adjudication order was not appealed. The existence of any one of the factors set forth in R.C. 2151.414(E) requires the court to enter a finding that the child cannot be placed within a reasonable time or should not be placed with either parent. The trial court's decision was supported by competent, credible evidence and was not against the manifest weight of the evidence. The trial court did not abuse its discretion in denying father a continuance.

**107777** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DON M. HEARD

Affirmed.

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

**KEY WORDS:** *Conviction; sentence; rape; force; duress; fear; credibility; inconsistent; defer; sufficient; manifest weight; ineffective assistance of counsel; trial strategy; trial preparation; witness; interview; cross-examination; cumulative error.*

*Appellant's rape conviction was supported by sufficient evidence and was not against the manifest weight of the evidence. Defense counsel was prepared for trial and effectively cross-examined the state's witnesses. Defense counsel did not render ineffective assistance of counsel by calling the victim's mother as a defense witness. The doctrine of cumulative error does not apply when the alleged errors are found to be meritless.*

**107822** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
PROFESSIONAL BANK SERVICES, ET AL. v MICHEL F. ABBOUD, ET AL.

Affirmed.

Anita Laster Mays, J., Sean C. Gallagher, P.J., and Frank D. Celebrezze, Jr., J., concur.

**KEY WORDS:** *Motion for relief from default judgment, proper service.*

*The trial court did not err or abuse its discretion in overruling appellant's motion for relief from the default judgment because the appellant was properly served with the summons and complaint.*

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**107892** DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE

Y.H. v C.C.

Affirmed.

Eileen T. Gallagher, P.J., Anita Laster Mays, J., and Frank D. Celebrezze, Jr., J., concur.

***KEY WORDS: Burden of proof; proof beyond a reasonable doubt; preponderance of the evidence; domestic violence civil protection order; modification; evidence.***

***Trial court's judgment extending term of domestic violence civil protection order was supported by competent credible evidence where husband admitted he violated the terms of the protection order and wife was still in fear of husband.***

***Court could consider evidence of text messages husband sent to wife in violation of CPO because they were relevant to determining if a violation occurred.***