

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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March 21, 2019

**106584** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v KIECHAUN NEWELL

Affirmed.

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

**KEY WORDS:** *Crim.R. 16(B)/discovery; Brady violation; abuse of discretion; polygraph examination; DNA evidence; motion for mistrial; R.C. 2929.14(C)(4)/consecutive sentences; manifest weight; ineffective assistance of counsel; cumulative error doctrine.*

*The trial court did not err in denying appellant's motion for mistrial or for failing to sanction appellee for alleged misconduct. There was no Brady violation where evidence of the polygraph test was disclosed during trial and appellant failed to show that the evidence was material to a finding of guilt or that it would have caused a different outcome. The information about the visit to the crime scene also failed to meet the criteria for a Brady violation. The failure to test appellant's DNA standard did not rise to the level of a Brady violation where there was no other DNA evidence recovered from the crime scene to compare to; and appellant failed to provide support for his claims of police misconduct.*

*The trial court made the necessary findings and incorporated those findings into the sentencing journal entry.*

*Appellant provided no detailed argument or citations to support his contention that there was insufficient evidence to convict him on the aggravated murder, murder, felonious assault, kidnapping, and one- and three-year firearm and criminal gang activity counts; sufficient evidence was presented to support conviction on all other counts, and the evidence was not against the manifest weight of the evidence.*

*Appellant failed to show that his trial counsel's representation fell below a reasonable standard of performance.*

*The doctrine of cumulative error does not apply here where appellant's other assignments of error are meritless.*

**106897** PARMA MUNI. C CRIMINAL MUNI. & CITY  
CITY OF SEVEN HILLS v LUCY MCKERNAN

Reversed; vacated.

Eileen A. Gallagher, J., and Mary J. Boyle, P.J., concur; Michelle J. Sheehan, J., dissents with separate opinion.

**KEY WORDS:** *Misdemeanor; no contest plea; R.C. 2937.07;*

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(Case 106897 continued)

**explanation of the circumstances; facts supporting all essential elements.**

**Where explanation of the circumstances did not include facts supporting all of the essential elements of offenses at issue, trial court erred in finding defendant guilty of these offenses under R.C. 2937.07. Defendant's convictions vacated; defendant discharged.**

**106923** DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE  
AMY GUY, f.k.a., AMY SHOREY v JAMES D. SHOREY

Affirmed.

Peter M. Handwork, J.,\* and Kathleen Ann Keough, J., concur; Sean C. Gallagher, P.J., concurs with separate opinion.

\*(Sitting by assignment: Judge Peter M. Handwork, retired, of the Sixth District Court of Appeals).

**KEY WORDS: Separation agreement; divorce decree; contempt; purge.**

***Court that found a contemnor in violation of obligations contained in separation agreement incorporated into divorce decree did not err by altering the other party's rights in the separation agreement as condition for the contemnor to purge contempt.***

**106971** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v IDRISSA AIDARA

Reversed and remanded.

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

**KEY WORDS: Motion for mistrial; Crim.R. 43(A)/ex parte communication; transcript; witness testimony.**

***It was error where the trial court communicated with the jury outside the presence of appellant.***

***It was an abuse of discretion where the trial court provided the trial transcript to the jury during deliberations.***

**107001** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v CARDELL DOYLE

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Reversed in part, vacated in part, and remanded.

Sean C. Gallagher, P.J., Eileen A. Gallagher, J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *Unduly suggestive identification; Evid.R. 901; authentication; manifest weight of the evidence; speedy trial; void sentence.*

*The trial court did not rely on what was deemed an unduly suggestive in-court identification during a bench trial. Further, the evidence admitted at trial was properly authenticated and identified in the record and the conviction is not against the weight of the evidence. The sentence imposed for a firearm specification attendant to a merge offense is void.*

<b>107048</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v EARL BANKS			

Affirmed.

Larry A. Jones, Sr., J., Mary Eileen Kilbane, A.J., and Mary J. Boyle, J., concur.

**KEY WORDS:** *Modification of sentence; R.C. 2929.14(C)(4)/consecutive sentences.*

*There is no necessity for modification of appellant's sentence. Although the trial court made a verbal miscalculation of appellant's sentence during the sentencing hearing, the correct sentence was entered on the record and in the court's sentencing entry.*

*There was no retaliation against appellant where he was resentenced on remand. The trial court complied with R.C. 2929.14(C)(4) where it recited its findings at the sentencing hearing and incorporated those finding in the sentencing judgment entry. Additionally, appellant's sentence was less than the prior sentence.*

<b>107073</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MICHAEL RILEY			

Affirmed.

Patricia Ann Blackmon, P.J., Anita Laster Mays, J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *Murder; felonious assault, attempted murder; discharge of a firearm on or near premises; improperly handling firearms of a motor vehicle; having a weapon while under disability; firearm specifications; sufficiency of the evidence; manifest weight of the evidence; motion to strike.*

*Convictions associated with drive-by shooting supported by sufficient evidence and not against the manifest weight of the evidence when defendant's action was caught on video surveillance cameras.*

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**107089** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DARNELL WHITFIELD

Vacated and remanded.

Mary Eileen Kilbane, A.J., Eileen T. Gallagher, J., and Sean C. Gallagher, J., concur.

**KEY WORDS:** *Crim.R. 11(C)(2)(a); failure to advise of postrelease control.*

*Crim.R. 11(C)(2)(a) provides in pertinent part that the court shall not accept a plea of guilty or no contest without first addressing the defendant personally and determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved.*

*The requirements of Crim.R. 11(C)(2)(a) are nonconstitutional, and thus, this court reviews “to ensure substantial compliance” with this rule. Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that “the defendant subjectively understands the implications of his plea and the rights he is waiving.”*

*When the trial court does not “substantially comply” with Crim.R. 11(C)(2)(a), a reviewing court must then determine whether the trial court partially complied or failed to comply with this rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect.*

*As repeatedly recognized by the Ohio Supreme Court, a defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue. The test for prejudicial effect is whether the plea would have otherwise been made.*

*Whitfield was sentenced on offenses committed after the effective date of Senate Bill 2; he was subject to postrelease control. The trial court made no mention of postrelease control at the plea hearing. Because the trial court completely failed to comply, the plea must be vacated, and a showing of prejudice is not required. As a result of the trial court’s complete failure to properly advise and impose upon Whitfield the requisite period of postrelease control, his pleas must be vacated.*

**107108** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
ESTATE OF JEROME R. MIKULSKI, ET AL. v CENTERIOR ENERGY CORPORATION

Reversed and remanded.

Mary J. Boyle, P.J., Eileen A. Gallagher, J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *Class action, abuse of discretion, Civ.R. 23, mandate rule, law-of-the-case doctrine, predominance, standing, injury, breach of fiduciary duty.*

*The trial court was not “mandated” to only allow plaintiffs “to amend their class definition to include only those who overpaid their taxes[.]” The trial court erred in certifying plaintiffs’ subclass because the issue of how the defendants’ alleged misstatement affected each individual’s tax liability predominates over questions common to the subclass members. The trial court erred in certifying plaintiffs’ class because the class’s alleged informational injury is not sufficient to confer standing and warrant class certification.*

**107112** DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE  
ELIZABETH A. VAIL v LINDSEY N. STRING

Affirmed.

Eileen A. Gallagher, J., Anita Laster Mays, P.J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *Motion to show cause; separation agreement; obligation to pay college expenses; integration clause; settlement agreement; contract interpretation; ambiguity; integration; contempt; prejudgment interest; R.C. 1343.03(A); due and payable; attorney fees; R.C. 3109.05(C); R.C. 3105.73(B).*

*Trial court did not err in determining that subsequent settlement agreement was not intended to abrogate father’s obligation to share in the costs of his daughter’s college education set forth in separation agreement incorporated in divorce decree. Trial court did not abuse its discretion in refusing to hold father in contempt for failing to pay his share of his daughter’s college expenses where although father was aware his daughter was attending college, there was no evidence he was informed of the amount of the expenses he was obligated to pay. Trial court did not abuse its discretion in determining that father’s obligation to pay his share of daughter’s college expenses became “due and payable” upon her graduation for purposes of prejudgment interest award under R.C. 1343.03(A). Mother was not entitled to recover her attorney fees under R.C. 3109.05(C) and the trial court did not abuse its discretion in denying the parties’ mutual requests for attorney fees and legal expenses under R.C. 3105.73(B) where both parties were responsible for the voluminous, protracted litigation in the case.*

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**107159** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JAVIER B. COTTO

Affirmed.

Raymond C. Headen, J., Sean C. Gallagher, P.J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Mandatory fine; R.C. 2929.18(B); R.C. 2929.19; drug trafficking; indigent; motion to waive.*

*The imposition of a mandatory fine was not clearly and convincingly contrary to law where the court considered the defendant's future ability to pay the fine and concluded that the defendant was not indigent and unable to pay the fine.*

**107182** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JOSEPH ATWATER

Affirmed.

Mary Eileen Kilbane, A.J., Frank D. Celebrezze, Jr., J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *Sexually violent predator specification and first-time sexually violent offender.*

*The present law allows for the inclusion of a sexually violent predator specification in the indictment of one being charged for the first time with a sexually violent offense. As a result, the inclusion of the sexually violent predator specification in the indictment is permissible.*

**107187** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v ERIC COPELAND

Affirmed.

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

**KEY WORDS:** *Allied offenses; plain error; having a weapon while under disability; R.C. 2923.13(A)(2); felonious assault; R.C. 2903.11(A)(2); merger; possess; separate and distinct animus; ineffective assistance; court costs; waive; any time; prejudice; R.C. 2947.23; indigent; reasonable probability.*

*No plain error occurred because the offenses of having a weapon while under disability in violation of R.C. 2923.13(A)(2) and felonious assault in violation of R.C. 2903.11(A)(2) are not subject to*

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merger. The decision to possess the weapon prior to actually using it involves a separate and distinct animus. No ineffective assistance of counsel was shown with regard to retained counsel's failure to pursue a waiver of court costs, which pursuant to R.C. 2947.23(C) may be done after sentencing. Further, where the trial court was informed that the defendant may be indigent for purposes of appointing appellate counsel but imposed costs anyway, the record did not demonstrate a reasonable probability that the trial court would have waived the court costs.

**107193** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
SIMONE MCGREE v GATEWAY HEALTHCARE CENTRE, LLC, ET AL.

Reversed.

Sean C. Gallagher, P.J., Larry A. Jones, Sr., J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *R.C. 4123.90; workers' compensation; retaliatory discharge; wrongful termination; public policy; exclusive; injury; previous employer; prior employment.*

*The plain language of R.C. 4123.90 is limited to an employer who retaliates against an employee for pursuing a workers' compensation claim against "that employer." Because McGree's workers' compensation claim was in regard to an injury with a previous employer and she did not claim that she was terminated for pursuing a workers' compensation claim against Gateway, or claim to have suffered an injury occurring in the course of and arising out of her employment with Gateway, she failed to establish a claim for retaliatory discharge or wrongful discharge in violation of public policy under the Ohio Workers' Compensation Act.*

**107204** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JOSEAN D. NAVARRO

Affirmed.

Eileen A. Gallagher, J., Sean C. Gallagher, P.J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *R.C. 2929.18(B)(1); mandatory fine; ability to pay; affidavit of indigency; trial court determination; hearing.*

*Where a defendant does not file an affidavit alleging indigence and an inability to pay a mandatory fine, and where the trial court does not determine that the defendant is indigent and unable to pay the fine, pursuant to R.C. 2929.18(B)(1), the court does not err by imposing the fine. A defendant has no due process right to a hearing on a motion to waive a mandatory fine imposed pursuant to R.C. 2929.18(B)(1).*

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**107205** DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE  
RAYMOND E. SMITH v KARYN DENISE SMITH

**107373** DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE  
RAYMOND E. SMITH v KARYN DENISE SMITH

Affirmed.

Patricia Ann Blackmon, J., Eileen T. Gallagher, P.J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *Disqualification of counsel, conflict of interest, motion to strike.*

*Court's disqualification of trial counsel affirmed because it is a conflict of interest to simultaneously represent a client in a domestic relations proceeding and a GAL in that domestic relations proceeding in the GAL's personal matter.*

**107243** CLEVELAND MUNI. C CRIMINAL MUNI. & CITY  
CITY OF CLEVELAND v THOMAS JONES

Affirmed.

Mary J. Boyle, J., Mary Eileen Kilbane, A.J., and Larry A. Jones, Sr., J., concur.

**KEY WORDS:** *Manifest weight, sufficiency, lack of transcript.*

*Because appellant failed to file a transcript of the lower court proceedings, we are unable to analyze his assignments of error contesting the manifest weight and sufficiency of the evidence, presume regularity, and affirm the trial court's judgment.*

**107249** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v BROOKE WILLIAMS

Affirmed in part and reversed in part.

Patricia Ann Blackmon, P.J., Anita Laster Mays, J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *Aggravated burglary; R.C. 2911.11; assault; R.C. 2903.13; venue; R.C. 2901.12.*

*Appellant's convictions for aggravated burglary was against the manifest weight of the evidence; appellant's conviction for assault was not against the manifest weight of the evidence; trial court properly denied motion for acquittal based upon claimed lack of proof of venue.*



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**107275** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MICHAEL JONES

Affirmed; remanded.

Kathleen Ann Keough, J., Eileen T. Gallagher, P.J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Felony guilty plea; Crim.R. 11(C)(2)(a); nonconstitutional rights; maximum penalty; totality of circumstances; substantial compliance; prejudice; knowingly, voluntarily, and intelligently made.*

*Defendant's guilty plea to rape was knowingly, voluntarily, and intelligently made where the totality of the circumstances demonstrated he understood that by pleading guilty to rape, he would be subject to certain restrictions and obligations as a Tier III sex offender. The trial court's advisement demonstrated substantial compliance with the nonconstitutional advisement regarding the maximum penalty for the offense as required by Crim.R. 11(C)(2)(a) and thus, to vacate his plea, defendant was required to show he suffered prejudice as a result of the trial court's advisement, which he did not do.*

**107279** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MICHAEL FERRICCI

Affirmed and remanded.

Patricia Ann Blackmon, P.J., Anita Laster Mays, J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *R.C. 2929.15; double jeopardy; collateral estoppel.*

*Following defendant's acquittal for kidnapping with a sexual motivation specification, and a mistrial on a rape charge, retrial on the rape charge was not barred by the collateral estoppel principle of double jeopardy.*

**107326** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v ERIC G. WILSON

Dismissed.

Kathleen Ann Keough, J., Mary J. Boyle, P.J., and Patricia Ann Blackmon, J., concur.

**KEY WORDS:** *Dismiss; jurisdiction; R.C. 2505.02.*

*Because the assignment of error and argument raised do not relate to the subject of the interlocutory appeal upon which this court has*

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(Case 107326 continued)

**jurisdiction, the appeal must be dismissed.**

**107368** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v CAMERIN WALKER

Affirmed.

Eileen T. Gallagher, P.J., Kathleen Ann Keough, J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Felony sentence; R.C. 2929.12; seriousness and recidivism factors; juvenile delinquency adjudications; criminal record; consistent.*

*Defendant's sentence was not contrary to law where court considered seriousness and recidivism factors outlined in R.C. 2929.12 and sentence was supported by the record.*

**107626** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
AGATHA MARTIN WILLIAMS v BUREAU OF SENTENCING & COMPUTATION

Affirmed.

Mary Eileen Kilbane, A.J., Mary J. Boyle, J., and Larry A. Jones, Sr., J., concur.

**KEY WORDS:** *R.C. 2967.193(D)(5) and earned credit.*

*R.C. 2967.193(D)(5) determines the amount of credit an inmate is entitled for each month of successful participation and completion of educational programming. R.C. 2967.193(D)(5) provides:*

*Except as provided in division (C) of this section, if the most serious offense for which the offender is confined is a felony of the third, fourth, or fifth degree or an unclassified felony and neither division (D)(2) nor (3) of this section applies to the offender, the offender may earn one day of credit under division (A) of this section if the offender committed that offense prior to September 30, 2011, and the offender may earn five days of credit under division (A) of this section if the offender committed that offense on or after September 30, 2011.*

*It is undisputed from the record that the bill of information that charged Williams with one count of forgery, four counts of grand theft, and one count of theft, indicated that the offenses were committed against her client between December 2007 and February 2011. Therefore, based on the plain reading of R.C. 2967.193(D)(5), because Williams committed the charged offenses prior to September 30, 2011, she is entitled to one day of earned credit per month for successful participation and completion of educational programming.*

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**107627** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
AGATHA MARTIN WILLIAMS v WARDEN BRADENSHAWN HARRIS

Affirmed.

Larry A. Jones, Sr., J., Mary Eileen Kilbane, A.J., and Mary J. Boyle, J., concur.

**KEY WORDS:** *Petition for habeas corpus; jurisdiction; community control; Civ.R. 12(B)(6) — motion to dismiss; void sentence; failure to timely respond; res judicata.*

*The trial court did not lack jurisdiction therefore appellant's sentence was not void; appellant had an alternative remedy available for her claim and habeas corpus was not the proper avenue; on a prior appeal, the appellate court ruled that the sentence package utilized by the trial court was proper and that appellant was well advised of the details and conditions of her community control — appellant's claims in this appeal are barred by the doctrine of res judicata.*

*Appellee's motion to dismiss went unopposed where appellant failed to respond in a timely manner; the motion was not treated as a motion for summary judgment and the trial court's granting appellee's motion to dismiss was proper.*

**107692** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: KI. B., ET AL.

Affirmed.

Michelle J. Sheehan, J., and Eileen A. Gallagher, J., concur; Patricia Ann Blackmon, P.J., concurs in judgment only.

**KEY WORDS:** *Parental right; permanent custody; best interest of the child; domestic violence.*

*Clear and convincing evidence supports the finding made by the trial court under R.C. 2151.414(B)(1)(a) that appellant mother's children cannot be placed with her within a reasonable time or should not be placed with her. Clear and convincing evidence also supports the trial court's finding that it is in the best interest of the children to grant permanent custody to CCDCFS.*

**107697** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v GARRETT HUGHES, JR.

Dismissed.

Larry A. Jones, Sr., P.J., Michelle J. Sheehan, J., concurs in judgment only with separate opinion;  
Kathleen Ann Keough, J., concurs in judgment only and with the separate opinion.

***KEY WORDS: Marsy's Law; standing.***

***Although Marsy's Law expanded the rights of victims of crime, it does not make a victim a party to a criminal case. Appellant lacks standing to bring this appeal.***