

CASE DECISION LIST

October 3, 2019

107212	COMMON PLEAS COURT STATE OF OHIO v ANTHONY METZ	A	CRIMINAL C.P.
107246	COMMON PLEAS COURT STATE OF OHIO v RICHARD A. TENNEY	A	CRIMINAL C.P.
107259	COMMON PLEAS COURT STATE OF OHIO v JAUSTIN BROWNING	A	CRIMINAL C.P.
107261	COMMON PLEAS COURT STATE OF OHIO v ANTHONY BERGANT	A	CRIMINAL C.P.

Affirmed in part, reversed in part and remanded.

Larry A. Jones, Sr., J.; Eileen T. Gallagher, P.J., and Sean C. Gallagher, J., concur in part and dissent in part with separate opinions.

KEY WORDS: *Rape; manifest weight; kidnapping; sufficiency; R.C. 2929.14/consecutive sentences; Crim.R. 29(A)/motion for acquittal; ineffective assistance of counsel; motion for continuance; sentencing; R.C. 2953.08(G)(2)(b).*

There was sufficient evidence to support appellants' convictions.

Appellants' felony convictions were not against the manifest weight of the evidence, and the trial court did not err in denying appellants' motion for acquittal.

Counsel's advisement to waive a jury trial is considered a tactical decision, not ineffective counsel; although plea negotiations must be communicated to a defendant, the negotiations are not required to be entered on the record. One of the appellants has failed to show that his counsel did not enter into plea negotiations on his behalf; appellant has not shown that the testimony of a potential witness that was not called to testify would have resulted in a different outcome where there was no indication as to what would have been that witness's testimony. Trial counsel did not fall below a reasonable standard of representation.

Where appellants' counsel was given an opportunity to delay the beginning of trial to serve subpoenas, but declined, it was not an abuse of discretion where the trial court denied the motion to continue midtrial.

The record does not support the trial court's findings for consecutive sentences.

CASE DECISION LIST

107678 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ALLIED DEBT COLLECTION OF VIRGINIA, LLC v NAUTICA ENTERTAINMENT, LLC, ET AL.

Affirmed in part, reversed in part, and remanded.

Michelle J. Sheehan, J., Eileen T. Gallagher, P.J., and Raymond C. Headen, J., concur.

KEY WORDS: *ESI; forensic image; discovery; discrepancy; altered email; history of noncompliance; procedural safeguards; protective protocol; search terms; confidential; privilege; Bennett v. Martin; abuse of discretion.*

The trial court did not abuse its discretion in compelling the forensic imaging of defendants-appellants' computers where the record demonstrated the discovery of a purportedly altered email chain and a history of noncompliance with the trial court's previous discovery orders. The trial court abused its discretion, however, in failing to establish the proper protocols that would allow plaintiff-appellee sufficient access to recover useful, relevant information while providing the defendants-appellants an opportunity to identify and protect privileged and/or confidential matter. The case is remanded with instructions for the trial court to establish proper protective protocols in its order compelling the forensic imaging of defendants-appellants' computers.

107806 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MORALES WILSON

Affirmed.

Raymond C. Headen, J., Frank D. Celebrezze, Jr., P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Rape; sexual battery; gross sexual imposition; kidnapping; voir dire; due process; abuse of discretion; impeachment; prior inconsistent statement; prearrest silence; ineffective assistance of counsel; cumulative error.*

The court did not abuse its discretion by controlling the manner in which voir dire was conducted, properly sustaining objections to confusing and compound questions, declining to exclude testimony responding to an allegedly leading question, and declining to exclude testimony referencing defendant's immigration and taxpayer status. Trial counsel was not ineffective for failing to exercise a peremptory challenge during voir dire, attempting to impeach a witness with a prior inconsistent statement, or failing to object to an allegedly leading question. Defendant was not denied due process.

CASE DECISION LIST

107817	CLEVELAND MUNI. CITY OF CLEVELAND v SAMMIE DEXTER, III	C	CRIMINAL MUNI. & CITY
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Affirmed.

Mary Eileen Kilbane, A.J., Sean C. Gallagher, J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Domestic violence; menacing; manifest weight; credibility; hearsay; right to present defense. Judgment affirmed.*

Defendant's convictions were not against the manifest weight of the evidence. The hearsay testimony defendant complained of was admissible as statements made for the purpose of medical treatment and, in a bench trial, the judge disregards improper hearsay evidence unless there is affirmative evidence in the record to the contrary. Defendant was not prohibited from presenting a defense because defendant and his witness both testified to the visitation order and the details relating to it, including the agreed pickup times and location.

107890	COMMON PLEAS COURT STATE OF OHIO v ANTHONY SILAGHI	A	CRIMINAL C.P.
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107895	COMMON PLEAS COURT STATE OF OHIO v ANTHONY SILAGHI	A	CRIMINAL C.P.
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107906	COMMON PLEAS COURT STATE OF OHIO v ANTHONY SILAGHI	A	CRIMINAL C.P.
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107911	COMMON PLEAS COURT STATE OF OHIO v ANTHONY J. SILAGHI	A	CRIMINAL C.P.
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Affirmed and remanded.

Anita Laster Mays, J., Mary J. Boyle, P.J., and Eileen A. Gallagher, J., concur.

KEY WORDS: *Consecutive sentences, R.C. 2929.14, probation violator, community control sanctions, R.C. 2929.15(B)(1)(c).*

The trial court did not err when it sentenced the appellant to serve consecutive sentences because the trial court complied with R.C. 2929.14. The trial court properly informed the appellant that he was a probation violator. The trial court properly sentenced the appellant to community control sanctions beyond the 180-day requirement of R.C. 2929.15(B)(1)(c) because the appellant committed a third-degree felony while on community control sanctions.

CASE DECISION LIST

107948 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v TIMMON GOHAGAN

Affirmed.

Mary J. Boyle, P.J., Patricia Ann Blackmon, J., and Eileen A. Gallagher, J., concur.

KEY WORDS: *Maximum sentence; consecutive sentences; R.C. 2953.08(G)(2); R.C. 2929.11; R.C. 2929.12; R.C. 2929.14(C)(4); consecutive-sentence findings; purposes and principles of felony sentencing; seriousness and recidivism factors; judicial bias.*

The defendant's sentence was affirmed. The record establishes that the trial court considered the purposes and principles of felony sentencing, the seriousness and recidivism factors, and made the required findings under R.C. 2929.14(C)(4) before imposing consecutive sentences. The record also supports the trial court's consecutive-sentence findings. Finally, the defendant did not overcome the presumption that the trial court was not biased against him.

107951 CLEVELAND MUNI. G CIVIL MUNI. & CITY
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v PERCY WILLIAMS III

Affirmed.

Frank D. Celebrezze, Jr., J., Eileen T. Gallagher, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: *Motion for relief from judgment; Civ.R. 60(B); breach of contract; settlement agreement; App.R. 9; App.R. 4; abuse of discretion.*

Appellant failed to demonstrate that he was entitled to relief from judgment pursuant to Civ.R. 60(B). Accordingly, the trial court did not abuse its discretion in denying appellant's motion for relief from judgment.

107977 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ULIIOUS BROOKS

Affirmed.

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

KEY WORDS: *Sufficiency of evidence; felonious assault.*

Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. When reviewing

(Case 107977 continued)

the sufficiency of the evidence to support a criminal conviction, an appellate court examines the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.

In the instant case, the state presented evidence that Brooks stabbed F.L. in the back; that she turned and saw that it was Brooks; and that she attempted to wrestle the knife away, but was stabbed again. The state also presented Brooks's motive for the stabbing: that F.L. identified as transgender. In addition, the state presented testimony from Officer Hinkle that F.L. identified Brooks as the assailant. Further, the state presented evidence that F.L. had to receive medical attention for her injuries.

We conclude, the above evidence, if believed, would convince the average mind of Brooks's guilt beyond a reasonable doubt.

107982 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DAVID A. WILKINS

Affirmed in part, vacated in part and remanded.

Eileen A. Gallagher, J., Mary Eileen Kilbane, A.J., and Mary J. Boyle, J., concur.

KEY WORDS: *R.C. 2953.08(G)(2); maximum sentences; clearly and convincingly contrary to law; R.C. 2929.11; R.C. 2929.12; consecutive sentences; R.C. 2929.14(C)(4); proportionality finding; conceded error; consideration of uncharged conduct in sentencing.*

Defendant's individual sentences were not clearly and convincingly contrary to law where individual sentences were within the statutory range and the trial court considered both the purposes and principles of felony sentencing in R.C. 2929.11 and the relevant sentencing factors in R.C. 2929.12 prior to sentencing defendant.

Record did not support defendant's claim that trial court improperly considered uncharged criminal conduct, including a cell phone video of another person overdosing in defendant's home and the weight of the drugs originally charged, when sentencing defendant; even if the trial court had considered that information when sentencing defendant, record clearly showed that sentences imposed were not based solely on that information.

State conceded that trial court failed to make the proportionality finding required for the imposition of consecutive sentences required by R.C. 2929.14(C)(4). Because trial court did not make the proportionality finding at the sentencing hearing, imposition of consecutive sentences was contrary to law. Consecutive sentences vacated and case remanded for trial court to consider whether sentences should be served consecutively and if so, to make all of the required findings on the record and incorporate those findings into its sentencing journal entry.

CASE DECISION LIST

107983 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
TOMIKA TATE v NATURAL NAILS

Affirmed.

Frank D. Celebrezze, Jr., J., Patricia Ann Blackmon, P.J., and Raymond C. Headen, J., concur.

KEY WORDS: *Negligence; causation; proximate cause; expert testimony; motion to dismiss; infection.*

The trial court did not err in granting defendant's oral motion to dismiss appellant's negligence action. Without expert medical testimony pertaining to the elements of defendant's breach of duty or proximate cause, appellant's negligence claim fails as a matter of law.

108107 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE A.H., ET AL.

Affirmed in part, reversed in part, and remanded.

Eileen A. Gallagher, J., Larry A. Jones, Sr., P.J., and Raymond C. Headen, J., concur.

KEY WORDS: *Motion to modify temporary custody to permanent custody; termination of parental rights; judicial bias; in camera interview of children; clear and convincing evidence; best interest of the child; R.C. 2151.414(D)(2); R.C. 2151.414(E); cannot be placed with parent within a reasonable time or should not be placed with parent.*

Record did not support mother's claim that trial court judge was biased against her based on statements the juvenile court judge made during her in camera interview of the children. There was no evidence that the juvenile court judge shirked her duty of impartiality, prejudged mother or predetermined the result before considering all the evidence presented at the permanent custody hearing.

Juvenile court erred in determining that termination of mother's parental rights was in the best interest of the children under R.C. 2151.414(D)(2) and in granting the agency permanent custody of the two children as to which mother challenged the granting of permanent custody. Record did not clearly and convincingly support the trial court's findings that mother had failed continuously and repeatedly to substantially remedy the conditions causing the children to be placed outside the children's home, that mother had not provided for the children's basic needs, that mother had demonstrated a lack of commitment to the children or that the children otherwise could not be placed with mother within a reasonable time or should not be placed with mother.

CASE DECISION LIST

108111 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MARY MACURA

Affirmed.

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

KEY WORDS: *Revocation of community control.*

Revocation of community control can result in a serious loss of liberty. Therefore, a probationer must be accorded due process at the revocation hearing. At a minimum, due process requires the defendant be provided: (1) written notice of the claimed violations; (2) disclosure of evidence against him; (3) opportunity to be heard and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a “neutral and detached” hearing body; and (6) a written statement by the factfinder of the evidence relied upon and reasons for revocation.

We have held that although written notice of claimed violations is preferred, oral notice of the violations may be sufficient if the oral statements explain the basis of the revocation proceedings, provide adequate notice to the probationer, and provide a record for appellate review of the revocation hearing.

In the instant case, Macura’s probation officer advised the trial court that Macura had not been reporting to the probation department as required and that when she finally reported to the department, she tested positive for opiates. Macura’s counsel acknowledged that Macura had failed to report as required and that she tested positive for opiates once she finally reported, but queried whether Macura could receive more drug treatment. Macura also addressed the alleged violations, stating that she had investigated getting the Vivitrol injection and was planning to discuss it with her probation officer.

Here, Macura suffered no prejudice because she had an opportunity to address the allegations and there was clear evidence that she did not report to the probation department as required and, that when she finally reported, she tested positive for opiates. As a result, there was no due process violation.

108175 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
Y. H. v C.C.

Affirmed.

Raymond C. Headen, J., Anita Laster Mays, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Divorce; incompatibility; complaint; due process; abuse of discretion.*

CASE DECISION LIST

(Case 108175 continued)

There was no error or abuse of discretion where the final divorce hearing began later than its scheduled time. The defendant's failure to attend the hearing cannot be attributed to the court. A typographical error in the divorce complaint did not render the complaint invalid. Both witnesses were properly sworn in. The court properly considered the complaint uncontested where, even though defendant communicated with the court and pointed out alleged errors in the complaint, he failed to file an answer or contest the allegations of incompatibility.

108344 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
US BANK TRUST NATIONAL ASSOCIATION AS TRUSTEE v
DERA J. COLLINS, AKA, DERA J. COLLINS-EWING, ET AL.

Affirmed.

Mary Eileen Kilbane, A.J., Mary J. Boyle, J., and Eileen A. Gallagher, J., concur.

KEY WORDS: Summary judgment; foreclosure action; note; and mortgage.

A motion for summary judgment in a foreclosure action must be supported by evidentiary materials that establish: (1) that the plaintiff is the holder of the note and mortgage or is a party entitled to enforce the instrument; (2) the relevant chain of assignments and transfers if the plaintiff bank is not the original mortgagee; (3) that the mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due.

U.S. Bank attached a copy of the note and its allonges to the complaint and to its motion for summary judgment. The bank also attached copies of the recorded assignments of the mortgage, which established a chain of assignments eventually leading to the assignment of the mortgage to U.S. Bank. In addition, it attached the affidavits of Newberry and Donovan, who averred Collins was in default, and U.S. Bank was in possession of the original note prior to the filing of the instant action.

The evidence established that U.S. Bank was both the holder of the note and the assignee of the mortgage at the time it filed its complaint. As a result, U.S. Bank had standing to bring this foreclosure action and the trial court properly granted summary judgment in its favor.

108498 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v SAMUEL REED, JR.

Vacated and remanded.

Mary J. Boyle, J., Mary Eileen Kilbane, A.J., and Eileen A. Gallagher, J., concur.

KEY WORDS: *Postconviction relief, void sentence, Crim.R. 43(A), allied offenses, postrelease control, R.C. 2929.03(A).*

The trial court erred in imposing sentences for counts that were merged with other counts and not allowing the state to elect on which counts it wished to sentence on. The defendant's sentences for Counts 2, 3, 4, 5, 7, and 8 are void and vacated and remanded for resentencing, at which the state is to elect which charges it wishes to have the defendant sentenced on. Additionally, the trial court failed to notify the defendant of the consequences of violating postrelease control, and its "25 years to life" sentence for aggravated murder was void because it failed to comport with R.C. 2929.03(A)'s language.

108561 ROCKY RIVER MUNI. G CIVIL MUNI. & CITY
AARON CALDWELL v ACTIVE TIME LLC

Affirmed.

Eileen A. Gallagher, J., Mary Eileen Kilbane, A.J., and Mary J. Boyle, J., concur.

KEY WORDS: *Magistrate decision; abuse of discretion; prejudice; record.*

Where an appellant fails to put forth an argument in support of its claim that the trial court erred by adopting a magistrate decision, this court will not find abuse of discretion. An appellant who claims that the trial court erred by denying or granting a motion bears the burden of demonstrating prejudice as a result of the purported error. Further, this court will not find error where an appellant fails to demonstrate the claimed error on the record.