

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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July 2, 2020

**106109** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v SELVIN CUNNINGHAM

**108721** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v SELVIN R. CUNNINGHAM

Affirmed.

Michelle J. Sheehan, J., Mary J. Boyle, P.J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *App.R. 26(B) application for reopening; R.C. 2945.75; corrupting another with drugs; Pelfrey; jury verdict form; degree of the offense; mandatory fine.*

*Although the jury verdict form did not state that the drug appellant furnished to the victim was heroin or specify the degree of appellant's offense of corrupting another with drugs, the jury verdict form did not run afoul of R.C. 2945.75 because heroin is not an "additional element" contemplated by the statute. Appellant fails to demonstrate his counsel was ineffective in failing to file an affidavit of indigency before the trial court imposed a mandatory fine at his resentencing hearing.*

**107996** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DARIUS HEREFORD

**108480** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DARIUS HEREFORD

Affirmed.

Anita Laster Mays, P.J., Larry A. Jones, Sr., J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *R.C. 2929.19(B), R.C. 2929.15(B), sentencing, community control violation advisement.*

*Appellant received sufficient notice of the potential prison term for violating community control sanctions at the initial sentencing. A trial court is not required to renotify the defendant at an intervening hearing. State v. Howard, Slip Opinion No. 2020-Ohio-3195.*

*The purpose of the statutory advisements "is to make the offender aware before a violation of the specific prison term what he or she will face for a violation." Howard at ¶ 22, quoting State v. Brooks, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, ¶ 33.*

*Howard reconciles Brooks with State v. Fraley, 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995. Fraley held that: (1) a court sentencing an offender at a revocation hearing "sentences the*

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offender anew and must comply with the relevant sentencing statutes” (Howard at ¶ 19, quoting Fraley at ¶ 17); and (2) “a trial court can cure its failure to notify an offender at his initial sentencing hearing of the potential, specific prison term if it provides that notice at a revocation hearing that occurs before the revocation hearing at which the trial court imposes the prison term.” Howard at ¶ 15.

Howard rejects the argument that Brooks, Fraley, and R.C. 2929.19(B) should be construed to mean that notice must be provided “at the sentencing hearing [immediately preceding the one at which community control is revoked and a prison sentence is imposed].” Id. at ¶ 22.

<b>108333</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MARSHALL WILLIAMS			

Affirmed.

Mary Eileen Kilbane, J., Eileen T. Gallagher, A.J., and Anita Laster Mays, J., concur.

**KEY WORDS:** *Vindictive sentence, Crim.R. 11, group plea, dual representation, conflict of interest, ineffective assistance of counsel, indigency affidavit, joint plea.*

*Defendant and his spouse were represented by the same counsel at a group plea with defendants in unrelated cases and at the sentencing hearing. The trial court did not impose a vindictive sentence. The trial court’s procedure at the group-plea hearing complied with Crim.R. 11. The trial court did not have a duty to inquire about counsel’s dual representation of a husband and wife. Defendant failed to show prejudice resulting from counsel’s failure to file an indigency affidavit to waive mandatory fine or from counsel’s dual representation of defendant and his spouse.*

<b>108347</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v SAMUEL TAYLOR			

Affirmed.

Eileen T. Gallagher, A.J., Anita Laster Mays, J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Ineffective assistance of counsel; lesser included offense; reckless homicide; felony murder; felonious assault; prosecutorial misconduct; closing argument.*

*Defendant was not denied of his right to effective assistance of counsel even though trial counsel did not object to autopsy photographs, comments in the state’s closing argument, and did*

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**not request a jury instruction on a lesser included offense of reckless homicide where the photographs were admissible, the state's closing arguments were appropriate, and a jury instruction on reckless homicide was not warranted under the facts of the case.**

**Appellant's felonious assault and felony murder conviction were supported by sufficient evidence and by the manifest weight of the evidence where witnesses testified that appellant cut the victim's head and the victim bled to death.**

**108440** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE A.B.M.

Affirmed.

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

***KEY WORDS: R.C. 3109.051(G), notice of intent to relocate, R.C. 3109.04, best interest of child, jurisdiction pending appeal, stay of execution, enforcement of judgment, judicial contempt power, denial of objections to parent relocation.***

***The juvenile court had jurisdiction pending appeal to enforce the parenting order that contained a custody determination based on the R.C. 3109.04 best interest of the child factors and set forth a visitation schedule to take effect upon the anticipated filing of the mother's notice of intent to relocate. There was no stay of execution in place.***

***The denial of appellant's objections was not an abuse of discretion. Appellant's objections to relocation exceeded the scope of R.C. 3109.051(G) and attempted to relitigate the grant of relocation.***

***The trial court had authority to exercise its contempt powers. The trial court's denial of appellant's motion for contempt, attorney fees, and sanctions did not constitute an abuse of discretion.***

**108778** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v MONTREA DONALDSON

Affirmed.

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

***KEY WORDS: Court costs; financial sanctions; indigent; prison term.***

***Trial court did not abuse its discretion when it ordered an indigent***

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(Case 108778 continued)

**defendant to pay court costs even though the defendant was also required to serve a mandatory seven-year prison term.**

**108786** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v DARNELL EATMON, JR.

Affirmed.

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

**KEY WORDS: Material witness; R.C. 2937.16; R.C. 2937.18; R.C. 2941.48; recognizance; Crim.R. 48(B); personal service.**

***The trial court's dismissal of the indictment without prejudice was not an abuse of discretion. The state was granted a continuance for additional time to secure material witnesses. The state failed to use the additional time to attempt to obtain personal service on the material witnesses or otherwise directly contact the witnesses and was still not prepared to proceed to trial after the eight-week continuance had expired. The state also failed to provide a sworn affidavit or testimony demonstrating probable cause that warrants were necessary to procure the witnesses.***

**108826** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JOVONA STEVENSON

Affirmed.

Raymond C. Headen, J., Mary J. Boyle, P.J., and Frank D. Celebrezze, Jr., J., concur.

**KEY WORDS: Felonious assault; accident; jury instruction; abuse of discretion.**

***The trial court did not abuse its discretion by denying defendant's request for an accident jury instruction where the record did not support the jury instruction.***

**108874** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
TARA HOFFMAN v MICHAEL CHESELKA, JR. LLC

Affirmed.

Gene Donofrio, J., Cheryl L. Waite, J., and Carol Ann Robb, J., concur.\*  
(\*Sitting by assignment: Judges of the Seventh District Court of Appeals)

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(Case 108874 continued)

**KEY WORDS: Civil; verbal settlement agreement; breach; motion to enforce settlement agreement; issues waived for appellate review.**

**108948** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
GRACETECH INC., ET AL. v THEODORE A. PEREZ, ET AL.

Reversed and remanded.

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

**KEY WORDS: Receivership, R.C. 2735.05, Creditor's Statutory Application for Examination, abuse of discretion.**

***The trial court erred in denying the appellant's Creditor's Statutory Application for Examination pursuant to R.C. 2735.05 because the trial court misapplied the meaning of "creditor" in R.C. 2735.05 and abused its discretion.***

**109035** BOARD OF TAX APPEALS H ADMIN APPEAL  
SHELBY HERSH v CUYAHOGA COUNTY BOARD OF REVISION, ET AL.

Affirmed.

Michelle J. Sheehan, J., Kathleen Ann Keough, P.J., and Mary Eileen Kilbane, J., concur.

**KEY WORDS: BTA; tax appeal; reasonable and lawful; R.C. 5713.04; forced sale; HUD; arm's-length transaction; rebuttable presumption.**

***The BTA's decision was reasonable and lawful. The property owner failed to rebut the presumption that the HUD sale was not an arm's-length transaction where the property owner provided no testimony concerning the facts and circumstances of the sale and condition of the property or reliable evidence or market data to show that no higher price could be obtained.***

**109045** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v KENNETH GULLEY

Affirmed.

Kathleen Ann Keough, P.J., Michelle J. Sheehan, J., and Mary Eileen Kilbane, J., concur.

**KEY WORDS: Harassment with a bodily fluid; R.C. 2921.38(B); R.C. 2921.38(F); sufficiency of evidence; flight instruction;**

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(Case 109045 continued)

**apprehension; prejudicial error; other acts evidence; Evid.R. 404(B).**

**Defendant's conviction for harassment with a bodily fluid in violation of R.C. 2921.38(B) was supported by sufficient evidence; R.C. 2921.38(F) is an affirmative defense to the crime of harassment with a bodily fluid, not an element of the offense; the trial court properly gave a flight instruction because the evidence demonstrated that the defendant was aware he was a person of interest in a criminal investigation and took affirmative steps to avoid apprehension; there was no prejudicial error in not instructing the jury that the flight instruction applied only to the theft offense and not to all counts; other acts evidence was properly admitted to set forth the defendant's plan and intent; photographs were properly admitted to corroborate testimony that defendant spit on everyone standing around a police cruiser.**

<b>109129</b>	JUVENILE COURT DIVISION	F	CIVIL C.P.-JUV, DOM, PROBATE
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IN RE E.S.

Affirmed.

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

***KEY WORDS: R.C. 2945.67(A); right to appeal order granting motion to dismiss; Juv.R. 24; discovery violation.***

***Pursuant to R.C. 2945.67(A), the state had a right to appeal juvenile court's order dismissing case for failure to produce recording of 911 call. Where the state did not produce recording of a 911 call that contained material, exculpatory evidence until the adjudicatory hearing, resulting in prejudice to the respondent, juvenile court did not abuse its discretion in dismissing case with prejudice based on the state's discovery violation.***