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Court of Appeals, Eighth Appellate District

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October 22, 2020

107701 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DANA THOMAS

Affirmed.

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

KEY WORDS: *Ineffective assistance of counsel; motion to suppress; probable cause to arrest.*

The appellant was not rendered ineffective assistance of counsel for counsel's failure to file a specific motion to suppress arguing that appellant's Miranda rights were violated and there did not exist probable cause to arrest. The appellant effectively waived his Miranda rights when he voluntarily recorded his version of events to the police. Additionally, the police had probable cause to arrest appellant after appellant's DNA was found at the crime scene and matched through CODIS.

107827 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RICARDO LOZADA

Affirmed.

Sean C. Gallagher, P.J., and Kathleen Ann Keough, J., concur; Eileen A. Gallagher, J., concurs in judgment only.

KEY WORDS: *Guilty plea; knowing, voluntary, and intelligent; sentencing review; indicia of incompetency; hearing; R.C. 2945.371.*

The trial court did not err in deeming the defendant competent to stand trial after conducting a hearing on the morning of trial immediately after the first request for a competency evaluation was orally expressed, and the defendant has not demonstrated by clear and convincing evidence that his sentences were not supported by the record.

107985 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v AHMAD ALREFAEI

Affirmed in part, reversed in part, and remanded.

Eileen T. Gallagher, A.J.; Mary J. Boyle, J., concurs in judgment only with separate concurring opinion, and Sean C. Gallagher, J., concurs with separate concurring opinion and concurs with separate concurring in judgment only opinion.

KEY WORDS: *Photograph; authenticate; harmless error; abuse of discretion; sufficiency; domestic violence; child endangering; substantial risk; Marsy's Law; separation; cross-examination; bias.*

The trial court did not abuse its discretion in sustaining the prosecutor's objection to defense counsel's cross-examination on grounds of relevancy. The trial court did not violate defendant's right to a fair trial by denying his motion to separate the witnesses. Defendant's child endangering conviction was supported by sufficient evidence with respect to one child. However, the second child endangering conviction was supported by insufficient evidence. The failure to introduce a photograph containing a time stamp was harmless error.

108471 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
AARON JAMES BROCKLER v MICHAEL C. O'MALLEY, CUYAHOGA COUNTY PROSECUTOR

Reversed.

Lynne S. Callahan, P.J., Jennifer Hensel, J., and Thomas A Teodosio, J., concur.*
(*Sitting by assignment, Judges of the Ninth District Court of Appeals.)

KEY WORDS: *Mandamus, equity, estoppel, office, clear legal duty.*

108473 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
MARY ROBERTS v KND DEVELOPMENT 51, L.L.C., ET AL.

Affirmed.

Michelle J. Sheehan, J., Patricia Ann Blackmon, P.J., and Raymond C. Headen, J., concur.

KEY WORDS: *Arbitration; motion to stay; parties to the arbitration agreement; unconscionability; waiver.*

Appellant's claims regarding the validity of the arbitration agreement lack merit and the trial court properly granted appellee nursing home's motion to stay the proceedings and to enforce the arbitration agreement.

108607 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
NAIMAN FAMILY PARTNERS, LLC, ET AL. v DAVID SAYLOR

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Affirmed.

Patricia Ann Blackmon, P.J., Eileen A. Gallagher, J., and Raymond C. Headen, J., concur.

KEY WORDS: *Declaratory judgment; statute of limitations; intentional interference with business.*

The trial court properly dismissed claims for declaratory judgment, intentional interference with business, and conversion that was filed more than four years after claims accrued.

108943 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
DEBOIS, INC. DBA DBS FINANCIAL v DUANE GUY, ET AL.

Affirmed.

Mary Eileen Kilbane, J., and Anita Laster Mays, J., concur; Sean C. Gallagher, P.J., concurs in judgment only.

KEY WORDS: *Arbitration, waiver, abuse of discretion, enforceability, R.C. 2711.02.*

Appellants appealed the trial court's finding that they waived a contractual right to arbitrate Appellee's counterclaim. The trial court's decision was affirmed. There was no abuse of discretion where the trial court considered the totality of the circumstances, including Appellants' initiation and participation in the litigation before and after asserting the contractual right to arbitrate. The trial court did not rule that the arbitration agreement was unenforceable for possibly excluding class actions from arbitration. Accordingly, enforceability of the arbitration agreement was not properly before the court on appeal.

109043 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
BIPIN PATEL v STRATEGIC GROUP, LLC

Affirmed in part and vacated in part.

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

KEY WORDS: *Breach of contract; ambiguity; parol evidence; conversion; and alternate causes of action.*

The trial court did not err when it permitted the introduction of parol evidence to determine the parties' intent when they drafted ambiguous contract language that was susceptible to multiple interpretations. Where the trial court's judgment in favor of plaintiff-appellee's breach of contract claim was supported by competent, credible evidence and was not unreasonable, arbitrary, or unconscionable, the trial court's judgment and award was not in error. Conversion and breach of contract are alternate causes of

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action and a litigant may not recover under both theories. Once a trial court enters judgment on a breach of contract claim and grants a monetary award, any pending claims for conversion are moot. The trial court's entry of a judgment and award on plaintiff-appellee's conversion claim subsequent to a judgment and identical award to the same party on his breach of contract claim was vacated while the judgment and award for breach of contract were affirmed.

109090 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v ANTHONY DAMES

Affirmed.

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

KEY WORDS: Reagan Tokes; sentencing; constitutionality; Ohio Department of Rehabilitation and Correction; R.C. 2967.271(C); failure to object; forfeiture; plain error.

This is a challenge to the constitutionality of the Reagan Tokes Act. The appellant did not object at the trial-court level nor provide us with any plain error arguments. We have the discretion to review a challenge to the constitutionality of a statute even if the appellant does not object or argue plain error, but we declined to exercise it here for three reasons. First, we presume constitutionality of statutes and the Twelfth District has found Reagan Tokes to be constitutional. Second, the lower court did not have an opportunity to rule on the constitutionality of the statute so this record is not developed. Third, Dames failed to raise any plain error argument for us to review.

109099 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ZECHARIAH MCGUGAN v PATRICIA A. OLSZEWSKI

Affirmed.

Anita Laster Mays, P.J., Frank D. Celebrezze, Jr., J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Manifest weight of the evidence, jury award.

The jury's award for damages was not against the manifest weight of the evidence because the appellant has not demonstrated that the jury was under the influence of passion or prejudice.

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109103 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
MICHAEL J. MAYER v JANICE A. MAYER

Affirmed.

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

KEY WORDS: *Postdecree proceeding; motion to show cause; contempt order; abuse of discretion; separation agreement; attorney fees; R.C. 3105.73; financial misconduct; R.C. 3105.171; defer to trial court's conclusions with regard to parties' credibility.*

In postdecree proceedings, the trial court viewed the divorce decree and incorporated separation agreement as a contract, and found the terms clear and unambiguous. The trial court relied on the language within those documents to give effect to the parties' intent. On appeal, we deferred to the trial court's conclusions with regard to the parties' credibility. A review of the record demonstrated the trial court did not abuse its discretion when it ruled on appellee/cross-appellant's motion to show cause and request for attorney fees and appellant/cross-appellee's motion to compel reimbursement.

109126 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v LAMEER KIDD

Affirmed in part; reversed in part; and remanded.

Michelle J. Sheehan, J., Mary J. Boyle, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: *Crim.R. 43(A); right to be present at trial; Crim.R. 7(D); amendment of indictment; R.C. 2954.74, lesser included offense; R.C. 2919.27(D).*

A defendant waives his right to be present at the reading of the verdict where he was told to return to court, did not return to court, and his ankle monitor was found removed. It is proper to amend an indictment for aggravated burglary R.C. 2911.11(A)(1) to include the underlying offense of assault the state seeks to prove because the amendment does not change the nature or identity of the crime of aggravated burglary. It is error to amend an indictment charging a misdemeanor offense of domestic violence under R.C. 2919.25(A) to a misdemeanor offense of assault under R.C. 2903.13(A) where the crimes are of the same level offense. Evidence of violation of protective order was properly introduced under 2919.27(D) where the defendant was informed of the existence of the protection order by a law enforcement officer even though the count was dismissed by the state at the close of trial.

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109137 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
TERRY LEOTTA v GREAT LAKES PAIN MANAGEMENT CENTER, ET AL.

Affirmed.

Raymond C. Headen, J., and Eileen A. Gallagher, P.J., concur; Mary Eileen Kilbane, J., dissents with separate opinion.

KEY WORDS: *Civ.R. 12(B)(5); insufficiency of service of process; abuse of discretion; affirmative defense; waiver; footnote.*

The trial court did not abuse its discretion in granting defendants' motion to dismiss pursuant to Civ.R. 12(B)(5) because plaintiff did not dispute that she had failed to perfect service on a named defendant, and defendants had properly preserved their Civ.R. 12(B)(5) defense.

109143 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DARYON BOGARTY

Affirmed.

Eileen T. Gallagher, A.J., and Raymond C. Headen, J., concur; Eileen A. Gallagher, J., dissents (with separate attached opinion).

KEY WORDS: *Postrelease control; notification; presence; disruption; motion; withdraw; guilty plea; mandatory; probation; reasonable basis; maximum penalties.*

The trial court did not err by notifying defendant of his postrelease control obligations in his absence, where he was properly removed from the courtroom due to his disruptive behavior. The trial court did not abuse its discretion by denying defendant's presentence motion to withdraw his guilty plea.

109152 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MERLIN T. JOHNSON

Affirmed.

Frank D. Celebrezze, Jr., P.J., Larry A. Jones, Sr., J., and Raymond C. Headen, J., concur.

KEY WORDS: *Court costs; indigency; res judicata; ability to pay; R.C. 2947.23; ineffective assistance of counsel; plain error; allied offenses.*

The trial court did not commit plain error in ordering appellant to

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pay court costs. Appellant was not denied his constitutional right to effective assistance of counsel. The trial court did not commit plain error in resentencing appellant on the aggravated murder conviction on Count 1.

109176 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CLINTON MASON, III

Affirmed.

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

KEY WORDS: Sufficiency of the evidence, manifest weight of the evidence, ineffective assistance of counsel, and jury instructions.

The evidence was sufficient to convict the appellant of felonious assault because he caused serious physical harm to the victim. The appellant's conviction was not against the manifest weight of the evidence because the jury was presented with sufficient evidence that the appellant caused serious physical injury to the victim. Appellant was afforded effective assistance of counsel despite counsel's failing trial strategy. The trial court did not err by not providing the jury with instructions on simple assault because the evidence was sufficient to warrant a charge of simple assault.

109180 SOUTH EUCLID MUNI. C CRIMINAL MUNI. & CITY
CITY OF SOUTH EUCLID v ANTHONY DATILLO

Reversed and remanded.

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

KEY WORDS: Home-rule authority; R.C. Chapter 5707; R.C. Chapter 5713; occupancy permit; residential rental property owner, county property taxes; motion to dismiss; Canton test; unconstitutional; same subject matter; statewide-concern doctrine; and reasonable exercise of the city's police power.

Courts apply the Canton v. State, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, test to determine if an ordinance exceeds a municipality's home-rule authority. The trial court abused its discretion when it found a local ordinance unconstitutional because (1) the ordinance and state statute were not based upon the same subject matter, and (2) the ordinance's imposition of greater restrictions constituted a reasonable exercise of the city's police power for its public health, safety, and welfare.

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109209 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
DITECH FINANCIAL LLC v VAT MANAGEMENT, LLC, ET AL.

Affirmed.

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

KEY WORDS: *Foreclosure; confirmation; order; sale; distribution; proceeds; jurisdiction; pending appeal; stay; supersedeas bond.*

Affirmed the trial court's judgment confirming the sale of the foreclosed property and ordering the distribution of proceeds. The trial court had jurisdiction to proceed on the confirmation of sale while the foreclosure appeal was pending when no supersedeas bond was posted, and the court did not commit any abuse of discretion confirming the sale.

109222 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STEVE WILLIAMS v AVI FOOD SYSTEMS, INC., ET AL.

Reversed and remanded.

Raymond C. Headen, J., Frank D. Celebrezze, Jr., P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *R.C. 4511.21; assured clear distance; summary judgment; Civ.R. 56; genuine issue of material fact; reasonably discernible.*

The trial court improperly granted summary judgment for defendants where there was a genuine issue of material fact as to whether plaintiff was reasonably discernible pursuant to R.C. 4511.21.

109237 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
DEMETRIUS ROUSSEAU v SETJO, LLC, ET AL.

Affirmed and remanded.

Raymond C. Headen, J., Frank D. Celebrezze, Jr., P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: *Motion to stay proceedings; arbitration agreement; enforceability; four corners of the contract; intent of the parties.*

The language of the arbitration agreement presented clear evidence of the parties' intent not to be bound by the agreement until the document was signed by both parties. Therefore, the absence of one party's signature on the agreement rendered the arbitration

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agreement unenforceable and the trial court did not err when it denied defendants-appellants' motion to stay proceedings pending submission of plaintiff-appellee's claims to arbitration.

109284 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE D.H.

Affirmed.

Frank D. Celebrezze, Jr., J., Mary J. Boyle, P.J., and Michelle J. Sheehan, J., concur.

KEY WORDS: Sufficiency of juvenile delinquency complaint; Juv.R. 10; R.C. 2151.021; time; venue; R.C. 2901.12; allied offenses of similar import; merger; plain error; R.C. 2941.25; gross sexual imposition; rape; separate offenses.

Appellant was not denied due process because the indictment contained sufficient allegations regarding the conduct and time frame of the offenses. In addition, there was sufficient evidence presented at trial as to the time and location that the offenses occurred. The court did not commit plain error in declining to merge offenses because the rape count and the two counts of gross sexual imposition involved separate acts and were therefore not allied offenses of similar import.

109455 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v DARREN RAY

Affirmed.

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

KEY WORDS: Postconviction relief; community control; revocation; probable cause; preliminary hearing; res judicata; App.R. 4.

The trial court did not abuse its discretion in denying defendant's petition for postconviction relief where defendant's arguments were barred by res judicata and he failed to set out sufficient operative facts establishing substantive grounds for relief.

109482 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE A.R., ET AL.

Dismissed in part and affirmed in part.

Larry A. Jones, Sr., J., Mary J. Boyle, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *App.R. 5/delayed appeal; App.R. 4(B)(2)/post-judgment motion; jurisdiction; temporary custody; permanent and legal custody; in camera interview; case plan; R.C. 2151.28(B)/adjudicatory hearing; subpoena; abuse of discretion; reasonable efforts.*

Mother failed to file a timely notice of appeal pertaining to A.R., one of the minor children. This court lacks jurisdiction to hear an appeal regarding that minor child.

The record demonstrates that the agency used reasonable effort to reunify Mother with the minor child.

The second minor child was examined in camera; the GAL's report was subject to cross-examination; the minor child's interests were represented; and granting the motion to quash the subpoena was supported by the fact that requiring the minor child to testify at the hearing would have been traumatic for the minor child. There was no abuse of discretion, and Mother suffered no violation of her due process rights.