

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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**February 10, 2022**

**110114** DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE  
KATHLEEN PERRY O'NEAL v KENNETH JOSH O'NEAL

Affirmed in part, reversed in part, and remanded.

Lisa B. Forbes, J., Mary J. Boyle, P.J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Divorce; abuse of discretion; Civ.R. 75(M); mandatory disclosure; marital property; retirement assets; financial misconduct.*

**Domestic relations court's division of property and spousal support awards affirmed in part and reversed in part in this divorce case. Retirement assets are marital property only from the date of marriage. Husband's financial misconduct should be taken into consideration in the distributive award of marital property or an adjustment in the amount of spousal support.**

**110520** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v SAMIYAH BOND

Vacated and remanded.

Michelle J. Sheehan, P.J., Emanuella D. Groves, J., and Mary J. Boyle, J., concur.

**KEY WORDS:** *R.C. 2152.10 and 2152.12; mandatory transfer; Crim.R. 11; strict compliance.*

**Appellant's case was transferred from juvenile court to the general division of the common pleas court. Ohio's juvenile mandatory transfer procedures, R.C. 2152.10 and 2152.12, have been determined to be constitutional. Further, the trial court properly conducted a colloquy with appellant on the record and determined that her waiver of a probable cause hearing was made knowingly, intelligently, and voluntarily. Appellant's plea after transfer of the case was invalid because the trial court did not strictly comply with Crim.R. 11(C).**

**110522** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v NASIM NICHOLSON

Affirmed.

Kathleen Ann Keough, J., Frank D. Celebrezze, Jr., P.J., and Mary Eileen Kilbane, J., concur.

(Case 110522 continued)

**KEY WORDS:** Participating in a criminal gang; R.C. 2923.42(A); sufficiency of evidence; manifest weight of the evidence; jury instructions; prejudice; curative instruction; Reagan Tokes Law.

Defendant's conviction for participating in a criminal gang in violation of R.C. 2923.42(A) was supported by sufficient evidence and not against the manifest weight of the evidence where the evidence demonstrated (1) the existence of a criminal gang, (2) defendant's active participation in the gang, (3) defendant's knowledge of the gang's pattern of criminal activity, and (4) defendant's purposeful promotion, furtherance, or assistance with the gang's commission of criminal acts. The trial court did not commit plain error by not instructing the jury on aggravated robbery, robbery, or discharge over a roadway where no evidence of these offenses was produced at trial. The defendant was not prejudiced by the admission of improper evidence where defense counsel invited the error, and the remedy requested by defense counsel, a curative instruction given during the general jury charge, was adopted by the trial court in full. Defendant was properly sentenced under the Reagan Tokes Law where the conduct for which he was found guilty occurred after the effective date of the law.

<b>110526</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ANDRE DA VONNE PHILLIPS			

Dismissed.

Mary Eileen Kilbane, J., Frank D. Celebrezze, Jr., P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Frivolous; motion to withdraw; appointed; appellate court; assigned error; waiver of jury trial; R.C. 2945.05; Crim.R. 23; ineffective assistance of counsel; confusion; plea agreement; Crim.R. 11.*

*The potential assignments of error in the Anders brief have no merit and would have been wholly frivolous because: (1) Phillips executed a knowing, intelligent, and voluntary waiver of his right to a jury trial, (2) defense counsel's actions were not deficient and, therefore, there was no basis for a claim of ineffective assistance of counsel, and (3) the trial court strictly complied with Crim.R. 11's constitutional requirements and substantially complied with the rule's nonconstitutional notifications so that defendant's guilty plea was made knowingly, intelligently, and voluntarily. Therefore, counsel's motion to withdraw was granted.*

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**110562** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
CHRISTINA FABEC, ET AL. v FREDERICK & BERLER, LLC, ET AL.

Affirmed.

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

**KEY WORDS:** *Legal malpractice; damages, third-party claims; malicious conduct.*

*Defendant attorneys did not inform their client and her husband of a settlement offer in their client's case. Client later settled the case for a greater amount than the settlement offer. Client, her husband, and their opponent in the underlying litigation filed suit alleging legal malpractice. The trial court properly granted summary judgment to legal malpractice defendants because client and her husband could not show damages caused by alleged legal malpractice of defendants. Further, the third-party legal malpractice failed because no objective evidence showed defendants acted with malice.*

**110563** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v ALTON PARKER

Affirmed.

Cornelius J. O'Sullivan, Jr., J., Eileen A. Gallagher, P.J., and Eileen T. Gallagher, J., concur.

**KEY WORDS:** *Lesser included jury instruction; abuse of discretion; rape; sexual battery; defendant's claim of victim consent; complete defense.*

*A trial court's determination of whether to give a requested lesser-included instruction is reviewed for an abuse of discretion.*

*The question of whether a particular offense should be submitted to the jury as a lesser-included offense involves a two-tiered analysis. The first tier is a purely legal question under which it is determined whether one offense is generally a lesser-included offense of the charged offense. Under the second tier, the trial court considers the evidence and determines whether a jury could reasonably find the defendant not guilty of the charged offense, but guilty of the lesser-included offense. Sexual battery under R.C. 2907.03(A)(2) is not a lesser-included offense of rape under R.C. 2907.02(A)(2).*

*Sexual battery under R.C. 2907.03(A)(1) is a lesser-included offense of rape under R.C. 2907.02(A)(2).*

*Where a defendant claims that the victim consented to the sexual conduct no instruction on the lesser-included offense is warranted. The jury would have to choose between a complete defense, and therefore acquittal, or the commission of the crime of rape.*

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**110571** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
STATE OF OHIO v LEELIN J. MILLER

Affirmed.

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

**KEY WORDS:** *Leave; new trial; hearing; abuse of discretion; newly discovered; Crim.R. 33(A)(6); Crim.R. 33(B); unavoidably prevented; reasonable time; eyewitness testimony; recantation; actual innocence; postconviction relief; untimely; R.C. 2953.23(A)(1).*

*The trial court did not abuse its discretion in denying appellant's motion for leave to file new trial motion based on newly discovered evidence or in denying the motion for leave without an evidentiary hearing. Appellant did not show that he was unavoidably prevented from discovering the purported newly discovered evidence of an eyewitness's statement recantation of his trial testimony or that he requested leave to file his motion for new trial within a reasonable period of time. Appellant's claim of actual innocence was rejected. Appellant's untimely petition for postconviction relief was properly denied.*

**110589** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JEREMIAH NIEVES

Dismissed.

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

**KEY WORDS:** *Sentence; community-control sanctions; violation; sentence served; underlying conviction; moot.*

*Defendant's appeal of his imposed sentence is moot where the defendant served the sentence in its entirety and he did not appeal the underlying conviction.*

**110602** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
ACE STEVENS, ET AL. v LITTLE STARS EARLY LEARNING CENTER LLC, ET AL.

Affirmed.

Frank D. Celebrezze, Jr., P.J., Kathleen Ann Keough, J., and Mary Eileen Kilbane, J., concur.

**KEY WORDS:** *Motion for judgment on the pleadings; Civ.R. 12; question of law; de novo; cross-claim; pro se litigant; App.R. 12; App.R. 16; motion to withdraw as counsel; plain error; right to*

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(Case 110602 continued)

**counsel; negligence; injury; proximate cause; negligent hiring; breach of contract; hostile work environment; wrongful termination.**

The trial court did not commit plain error in granting the motion to withdraw from appellant's representation filed by the attorneys for the childcare center. Appellant did not have a right to counsel in the civil proceedings in the trial court. The assertions and allegations in appellant's cross-claims cannot be read to have pled any actionable claims against the childcare center, or the childcare center's owner, manager, or employees. Accordingly, the trial court properly granted the childcare center's motion for judgment on the pleadings.

**110606** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v GAIL GARDNER

Affirmed.

Michelle J. Sheehan, J., Anita Laster Mays, P.J., and Emanuella D. Groves, J., concur.

**KEY WORDS: Domestic violence; self-defense; sufficiency; manifest weight; court costs.**

*Self-defense claims are generally an issue of credibility and whether the state disproves any of the elements of self-defense is left to the trier of fact to decide. Having carefully reviewed the entirety of the evidence presented at trial, we cannot say the trier of fact lost its way or created a manifest miscarriage of justice in finding appellant guilty of domestic violence despite her claim of self-defense.*

**110730** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN THE MATTER OF: G.B.

Affirmed.

Eileen A. Gallagher, P.J., Eileen T. Gallagher, J., and Cornelius J. O'Sullivan, Jr., J., concur.

**KEY WORDS: Modification of shared-parenting plan; move; designation of residential parent for school purposes; R.C. 3109.04(E)(1)(a); R.C. 3109.04(E)(2)(b); best interest of the child; consideration of child's wishes; R.C. 3109.04(F)(1)(b).**

*Juvenile court did not abuse its discretion in designating mother the residential parent for school purposes and modifying the parties' parenting-time schedule after mother moved. Designation of residential parent for school purposes and modification of parenting time in shared-parenting plan was governed by R.C. 3109.04(E)(2)(b) not 3109.04(E)(1)(a). Child's wishes were not*

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(Case 110730 continued)

**controlling; record reflects that juvenile court properly considered child's wishes in determining what was in child's best interest. The record supported the juvenile court's determination that it was in child's best interest to designate mother as the residential parent for school purposes.**