November 3, 2022

110770	CLEVELAND MUNI.	C	Criminal Muni. & City

CITY OF CLEVELAND v BRIDGET MCGERVEY

Vacated and remanded.

Eileen T. Gallagher, J., Michelle J. Sheehan, P.J., and Mary Eileen Kilbane, J., concur.

KEY WORDS: Record; transcript; recording; competency; sealed; regularity; prejudice; App.R. 9; bench trial; review.

Defendant was materially prejudiced by the trial court's failure to record the majority of the trial proceedings. The defendant has demonstrated that a request was made at trial that the proceedings be recorded or that objections were made to the failures to record, an effort was made on appeal to comply with App.R. 9 and to reconstruct what occurred or to establish its importance, and material prejudice resulted from the failure to record the proceedings at issue.

110791	COMMON PLEAS COURT	A	Criminal C.P.

STATE OF OHIO v PHILLIP PIERCE

Affirmed.

Kathleen Ann Keough, P.J., Eileen A. Gallagher, J., and Cornelius J. O'Sullivan, Jr., J., concur.

KEY WORDS: Rape; hearsay; Confrontation Clause; jail calls; Evid.R. 801; allied offenses; rape; kidnapping; Reagan Tokes Law.

Even if the officer's testimony contained hearsay statements, defendant's substantial rights were not affected and no miscarriage of justice occurred by the admission of the testimony because the victim testified that the defendant physically assaulted and raped her, and caused the physical injuries depicted in the photographs. Even if this court determined that a detective's testimony constituted inadmissible hearsay when she interpreted the defendant's jail calls, the testimony was merely duplicative of the jail calls themselves, which were properly admitted into evidence under Evid.R. 801(D)(2)(a) - admissions by a party-opponent. Offenses of rape and kidnapping were not allied offenses because the defendant engaged in conduct that created a substantially greater risk of harm to the victim by preventing her from leaving the bedroom and then subjecting her to additional acts of violence.

110838 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob
MARIAH CRENSHAW v DENISE SERENA JONES

Reversed and remanded.

Cornelius J. O'Sullivan, Jr., J., Eileen A. Gallagher, P.J., and Gene A. Zmuda, J.,* concur.

*(Sitting by assignment: Gene A. Zmuda, J., of the Sixth District Court of Appeals.)

KEY WORDS: Motion for judgment on the pleadings; notice pleading.

Ohio is a notice-pleading state. Therefore, a plaintiff does not have to plead operative facts with particularity. The allegations in appellant's complaint were sufficient to survive a Civ.R. 12(C) motion for judgment on the pleadings.

110898 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob
MARIAH CRENSHAW v SHAWN L. HOWARD, SR.

Affirmed in part, reversed in part, and remanded.

Eileen A. Gallagher, P.J., Cornelius J. O'Sullivan, Jr., J., and Gene A. Zmuda, J.,* concur.

*(Sitting by assignment: Gene A. Zmuda, J., of the Sixth District Court of Appeals.)

KEY WORDS: Motion for judgment on the pleadings; Civ.R. 12(C); Civ.R. 8(A); defamation; R.C. 2739.01; telecommunications harassment; R.C. 2917.21(B)(1); R.C. 2307.60; request for indigent status; failure to recuse; R.C. 2701.03.

Trial court erred in granting defendant's motion for judgment on the pleadings. Construing all material allegations in the pleadings and all reasonable inferences that could be drawn therefrom in favor of plaintiff, it could not be said that plaintiff could prove no set of facts in support of her claims for defamation and telecommunications harassment that would entitle her to relief. Given the reversal of trial court's decision granting defendant's motion for judgment on the pleadings, trial court's denial of plaintiff's request for indigent status "for purposes of paying filing fees and court costs" was premature. Declined to address appellant's argument that trial judge's failure to recuse herself violated the Ohio Code of Judicial Conduct where appellant failed to file an affidavit of disqualification with the Ohio Supreme Court under R.C. 2701.03 or otherwise raise the issue below.

110951 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob
MARIAH S. CRENSHAW v CITY OF CLEVELAND POLICE DEPARTMENT, ET AL.

Affirmed.

Cornelius J. O'Sullivan, Jr., J., Eileen A. Gallagher, P.J., and Gene A. Zmuda, J.,* concur.

*(Sitting by assignment: Gene A. Zmuda, J., of the Sixth District Court of Appeals.)

KEY WORDS: Summary judgment; motion to dismiss; statute of limitations.

A motion to dismiss challenges the sufficiency of a complaint. A trial court therefore properly rules on a motion to dismiss prior to discovery being completed.

The motion to dismiss defendants sued in their official capacity was properly granted. A suit against an employee of a political subdivision in the employee's official capacity is an action against the entity itself. Because the claims against the defendants sued in their official capacities were redundant to the claims against the city, the claims against the defendants in their official capacities were properly dismissed.

Appellant's claim against the former employee whose records she sought was properly dismissed. Her claim could be brought only against the city, not the former employee.

The trial court properly granted the city's motion for summary judgment on the grounds that the action was time-barred. The alleged wrongdoing occurred in 2011, and appellant filed her action in 2021, outside of the five-year statute of limitations set forth in R.C. 149.351(E).

111096 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob
CUYAHOGA COUNTY LAND REUTILIZATION CORP., ET AL. v CITY OF CLEVELAND, ET AL.

Affirmed.

Emanuella D. Groves, J., Sean C. Gallagher, A.J., and Eileen A. Gallagher, J., concur.

KEY WORDS: Interpretation of ordinances; plain language; rule of the last antecedent; weight of the evidence.

Trial court did not err in finding that the C.C.O. authorized the City to assess a fee for review of ten-day notices of asbestos removal accompanied by a demolition permit. The Code explicitly authorizes the fee.

Trial court acted correctly in addressing the City's counterclaim when it determined that the City was only entitled to the fees when

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a ten-day notice was accompanied by a demolition permit application. C.C.O. 263.01(a)(6) allows a fee for the examination of plans and applications for the issuance of permits, not simply for the examination of plans and applications alone. The City did not have implied authority to assess the fees.

Furthermore, the trial court did not err when it awarded the City unpaid fees but limited those fees to fiscal year 2018. The City's evidence did not separate ten-day notices issued with a permit from those that were issued without a permit, making it impossible for the trial court to determine when a fee could be assessed. Appellants, however, did provide such a break down, but only for fiscal year 2018. Therefore, the trial court correctly determined that there was insufficient evidence to award fees to the City for fiscal years 2013 through 2017.

111119 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v SEAN T. HOSKIN

111120 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v SEAN T. HOSKIN

111121 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v SEAN T. HOSKIN

Affirmed in part, vacated in part, and remanded.

Lisa B. Forbes, J., Eileen A. Gallagher, P.J., and Michelle J. Sheehan, J., concur.

KEY WORDS: Murder; felonious assault; post-arrest silence; self-defense; merger of firearm specifications; consecutive sentences; sufficiency of the evidence.

Hoskin's murder, felonious assault, and associated offenses are affirmed. The state presented sufficient evidence to refute the defendant's claim of self-defense because he was at fault in creating the situation giving rise to the affray. Any reference to post-arrest silence was harmless due to the overwhelming evidence of guilt. The defendant's 4.5-year prison sentence for the firearm specification associated with the assault that merged into the murder was vacated because he was not sentenced for the underlying offense. The defendant's consecutive sentence was supported by clear and convincing evidence in the record.

111281 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob
MANISHA G. PATEL, ET AL. v DHARMADEV 2 LLC, ET AL.

Affirmed.

Lisa B. Forbes, J., Anita Laster Mays, P.J., and Emanuella D. Groves, J., concur.

KEY WORDS: Bench trial; Civ.R. 41(B)(2); motion to dismiss; App.R. 16(A)(7); lack of citation to authority.

Appellants failed to cite any legal authority to support their arguments. Accordingly, we decline to review their arguments pursuant to App.R. 16(A)(7). Judgment affirmed.

111318 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v ORLANDO BURGOS

Affirmed in part, vacated in part, and remanded.

Cornelius J. O'Sullivan, Jr., J., Sean C. Gallagher, A.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Aggravated burglary; burglary; domestic violence; postrelease control; merger; Reagan Tokes Law; plain error; sufficient evidence; manifest weight of the evidence.

The trial court committed plain error by imposing five years of mandatory postrelease control when appellant was subject to postrelease control for a period of up to five years, but not less than two years.

The trial court committed plain error by imposing a no-contact order, which is a community-control sanction, because it sentenced appellant to a prison term and not community-control sanctions.

The trial court committed plain error by not merging the aggravated burglary and burglary convictions at sentencing because they were committed with the same animus.

The trial court did not commit plain error by not merging the aggravated burglary and domestic violence convictions because they were separate acts.

The trial court did not commit plain error by sentencing appellant under the Reagan Tokes Act. This court has upheld the Act's constitutionality in the en banc decision State v. Delvallie, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.).

Appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence.

111335 COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob
STATE EX. REL., MARIAH CRENSHAW v CITY OF MAPLE HEIGHTS POLICE DEPARTMENT

Reversed and remanded.

Eileen A. Gallagher, P.J., Cornelius J. O'Sullivan, Jr., J., and Gene A. Zmuda, J.,* concur.

*(Sitting by assignment: Gene A. Zmuda, J., of the Sixth District Court of Appeals.)

KEY WORDS: Motion to dismiss; Civ.R. 12(B)(6); public records; Public Records Act; R.C. 149.43; mandamus; petition for a writ of mandamus; R.C. 2731.04; case caption; pleading deficiency; subject-matter jurisdiction; requisites for mandamus; adequate remedy; adequate remedy in the ordinary course of law; mandamus is not a substitute for an appeal; untimely appeal; notice of appeal.

The relator sought a writ of mandamus pursuant to the Public Records Act, as well as damages and fees, related to two public-records requests she made to the respondent.

The trial court dismissed her first petition based on noncompliance with R.C. 2731.04; she had failed to bring the action in the name of the state on relation of the person applying. The relator did not timely appeal this dismissal and we, therefore, cannot review it.

But where the relator filed a second, similar petition with the trial court - seeking the same public records as before but correcting the case caption to comply with the statute - it was error for the trial court to dismiss the petition at the motion-to-dismiss stage merely because the relator did not appeal the dismissal of her first petition. The trial court had reasoned that the relator's ability to appeal the earlier dismissal was an "adequate remedy in the ordinary course of law" precluding mandamus relief, but relators in mandamus cases under the Public Records Act need not establish the lack of an adequate remedy because the Act provides that mandamus is the appropriate remedy. Because the relator did not need to establish a lack of an adequate remedy, it was error for the trial court to dismiss her second petition for failure to do so.

In the absence of any citation to the Rules of Civil Procedure in the respondent's motion to dismiss, we construed the motion as asserting a failure to state a claim under Civ.R. 12(B)(6) because the movant argued for dismissal based on the alleged existence of an adequate remedy at law before answering the petition.

We did not need to consider in this appeal whether (1) the ability to seek leave to correct a mandamus petition's caption once a deficiency is raised or (2) the ability to appeal a dismissal for failure to properly caption a mandamus petition is an "adequate remedy" precluding relief through a subsequent, similar petition in contexts other than the Public Records Act.

111365 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v ADAM DYAL DAVIS

Affirmed.

Cornelius J. O'Sullivan, Jr., J., Sean C. Gallagher, A.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Attempted unlawful sexual conduct with a minor; R.C. 2923.02(A); importuning; R.C. 2907.07(D)(2); possessing criminal tools; R.C. 2923.24(A); manifest weight of the evidence; sufficiency of the evidence; jury question; transcript.

There was sufficient evidence to support appellant's convictions for attempted unlawful sexual conduct with a minor, importuning, and possessing criminal tools when appellant met an undercover detective posing as a 15-year-old child on an online dating app, sent sexually explicit text messages to her over the course of several days, and traveled to a Cleveland suburb to meet her. Further, the trial court did not abuse its discretion in declining to provide the jury a portion of the transcript during jury deliberation.

111500 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v ARTO D. GREEN, II

Affirmed in part and remanded.

Eileen T. Gallagher, J., Michelle J. Sheehan, P.J., and Mary Eileen Kilbane, J., concur.

KEY WORDS: Nunc pro tunc; clerical error; sentence.

Trial court made a clerical error in a sentencing entry that should be corrected with a nunc pro tunc judgment entry reflecting the actual sentence imposed on the defendant at the sentencing hearing.

111508 JUVENILE COURT DIVISION F Civil C.P.-Juv, Dom, Probate
IN RE: I.S.

Affirmed in part, vacated in part and remanded.

Eileen A. Gallagher, P.J., and Mary J. Boyle, J., concur; Eileen T. Gallagher, J., concurs in part and dissents in part (with separate opinion).

KEY WORDS: Neglect; protective supervision; medical care; medical treatment; surgery; patent ductus arteriosus; PDA; congenital heart defect; First Amendment; religious freedom; parental rights; life threatening; ill health; catheterization.

(Case 111508 continued)

The juvenile court's adjudication of neglect was supported by sufficient evidence where the agency presented medical evidence that (1) a minor - who was two years old and had Down syndrome - was experiencing several medical conditions including a congenital heart defect that were likely contributing to significant weight loss and a failure to thrive that the minor's pediatrician believed could be life threatening and (2) the minor's mother had not followed the medical recommendations of the minor's pediatrician by undergoing medical testing and consulting with specialists.

The juvenile court's dispositional order placing the minor under protective supervision and ordering the minor to undergo a catheterization procedure over his mother's objection was not an abuse of discretion where two teams of medical professionals - representing several relevant specialties and from two different hospital systems - opined that (1) the minor's congenital heart condition was putting additional stress on his organs and put the minor at significantly increased risk for developing chronic respiratory disease and (2) the condition could be fixed through a relatively non-invasive catheterization procedure. The minor's guardian ad litem had also advocated for the procedure as in the minor's best interest.

The child's mother objected to the procedure because her sincerely held religious beliefs forbid the procedure. We balanced the mother's fundamental interest in directing the upbringing of her child with the state's interest in protecting the health and wellbeing of the minor. In doing so, we considered all relevant factors, including but not limited to the following: (1) the nature and seriousness of the child's medical condition, (2) the effectiveness of the proposed intervention, (3) the invasiveness of the intervention and the risks to the child if the intervention is ordered and (4) the risks to the community if the intervention is not administered.

While ordering catheterization was not an abuse of discretion, the juvenile court's dispositional order contained an unreasonable deadline and seemingly allowed the child's heart condition to be remedied through open heart surgery. The evidence presented did not support the deadline or such an invasive procedure. We vacated these aspects of the order.