

December 7, 2023

**111726** DOMESTIC RELATIONS F Civil C.P.-Juv, Dom, Probate  
ZSUZSANNA HERTZFELD v ROBERT HERTZFELD, JR.

Affirmed in part, reversed in part, and remanded.

Eileen T. Gallagher, J., and Michelle J. Sheehan, J., concur; Anita Laster Mays, A.J., concurs in part, concurs in judgment only in part, and dissents in part (with separate opinion).

**KEY WORDS:** *Divorce; abuse of discretion; marital debt; marital property; student loans; marital home; child support; spousal support; income; gross income; potential income; impute; voluntarily underemployed; competent and credible evidence.*

*The trial court abused its discretion by failing to award husband a one-half share of the equity in the marital home. The court did not abuse its discretion by requiring husband to pay half of the marital debts associated with the portion of a loan used to pay for household expenses. The trial court did not abuse its discretion by finding the husband voluntarily underemployed, but abused its discretion by imputing income to him that was not supported by competent and credible evidence. The trial court did not abuse its discretion by denying husband's request for spousal support. The trial court did not abuse its discretion in calculating wife's annual income for support purposes.*

**112182** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v MICHAEL BENNETT

Affirmed.

Kathleen Ann Keough, P.J., and Mary J. Boyle, J., concur; Sean C. Gallagher, J., concurs (with separate opinion).

**KEY WORDS:** *Ineffective assistance of counsel; R.C. 2929.19(B)(1)(b); consecutive sentences; firearm specifications; R.C. 2929.14(C)(1)(a); separate acts.*

*Trial counsel was not ineffective even though he did not mention the mitigating factors set forth in R.C. 2929.19(B)(1) to the trial court prior to sentencing because the statute does not impose such a burden on trial counsel and counsel's argument was sufficient; trial counsel was not ineffective for not objecting to the imposition of consecutive sentences on firearm specifications attendant to felonies that were committed as separate acts because under R.C. 2929.14(C)(1)(a), the trial court was required to impose consecutive sentences.*

## CASE DECISION LIST

**112301** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v MICHAEL C. DUNN

**112916** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v MICHAEL C. DUNN

Affirmed in part, modified in part, and remanded.

Michael John Ryan, J., and Eileen A. Gallagher, P.J., concur; Michelle J. Sheehan, J., concurs in judgment only in part and dissents in part (with separate opinion).

**KEY WORDS:** *Gross sexual imposition; sexual imposition; force; breaking and entering; sufficiency of evidence; manifest weight of the evidence; speedy trial.*

*The evidence was insufficient to support a gross sexual imposition conviction against the first victim because it lacked the element of force. Although the defendant grabbed or gripped the victim's breast, it was done over her clothing, he did not manipulate her clothing, he did not tell her to do anything or prevent her from doing something, and he did not threaten her. The defendant's action of grabbing the victim's breast was merely the force of the act itself. However, the evidence was sufficient to support a sexual imposition conviction, which does not require force; the gross sexual imposition is modified to sexual imposition. The sexual imposition conviction is not against the manifest weight of the evidence.*

*The evidence was sufficient to support a gross sexual imposition conviction against the second victim. The element of force was demonstrated through the circumstances surrounding the sexual conduct, which included the defendant previously committing unwelcome sexual contact with the defendant and the victim trying to get away from him as he trespassed on her property. The convictions for gross sexual imposition and breaking and entering were not against the manifest weight of the evidence.*

*The defendant's statutory speedy trial rights were not violated. The triple count provision of the speedy trial statute did not apply to the time the defendant was in custody under this case and another separate case; Dunn had three different attorneys throughout the proceedings, which caused delay; numerous pretrials were continued at the defendant's request; the defense never responded to the state's reciprocal discovery request; and the court's administrative Covid protocols caused delay.*

**112347** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v CHRISTOPHER NEAL

## CASE DECISION LIST

Affirmed and remanded.

Sean C. Gallagher, J., and Michelle J. Sheehan, J., concur; Anita Laster Mays, A.J., concurs in judgment only.

**KEY WORDS:** *Involuntary manslaughter; drug possession; consecutive sentence; findings; R.C. 2929.14(C)(4); R.C. 2953.08(G)(2); clear and convincing; mandatory fine; affidavit of indigency; R.C. 2929.18(B)(1); Reagan Tokes Law; indefinite sentence.*

*Affirmed the sentences imposed in appellant's three underlying cases. The trial court made all the required consecutive-sentence findings under R.C. 2929.14(C)(4), and the consecutive sentences were upheld under R.C. 2953.08(G)(2)'s clear-and-convincing standard. The trial court did not abuse its discretion in imposing a mandatory fine after appellant filed an affidavit of indigency under R.C. 2929.18(B)(1). Rejected constitutional challenges to the Reagan Tokes Law.*

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| <b>112452</b>                            | ROCKY RIVER MUNI. | C | Criminal Muni. & City |
| CITY OF WESTLAKE v SHANE P. STEVENS RIOS |                   |   |                       |

Affirmed.

Sean C. Gallagher, J., Kathleen Ann Keough, P.J., and Mary J. Boyle, J., concur.

**KEY WORDS:** *Misdemeanor sentence; abuse of discretion; community control sanctions.*

*The municipal court did not abuse its discretion in imposing a five-year term of community control sanctions for the defendant's aggravated menacing conviction, which was based on the defendant's brandishing of a firearm during a road-rage encounter with three juveniles who were riding their bicycles. Affirmed.*

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| <b>112476</b>  | COMMON PLEAS COURT | E | Civil C.P.-Not Juv,Dom Or Prob |
| PLATINUM RESTORATION CONTRACTORS, INC. v FOWAZ SALTI |                    |   |                                |

Reversed and remanded.

Sean C. Gallagher, J., Mary Eileen Kilbane, P.J., and Michael John Ryan, J., concur.

**KEY WORDS:** *Civ.R. 60(B); motion for relief; breach of contract; abuse of discretion; pro se; trial date; notice; docket; Civ.R. 60(B)(1); excusable neglect; Civ.R. 60(B)(5); catchall; inexcusable neglect; attorney withdrawal; prejudice.*

*Reversed the trial court's decision to deny appellant's motion for relief from judgment under Civ.R. 60(B). The trial court abused its*

## CASE DECISION LIST

(Case 112476 continued)

**discretion in denying the motion. Although the failure to keep informed of the progress of an ongoing case does not qualify as excusable neglect under Civ.R. 60(B)(1), relief from judgment was warranted under the catchall provision of Civ.R. 60(B)(5) for inexcusable neglect when it appeared the trial court permitted the withdrawal of appellant's attorney, who admittedly lacked experience and time to handle the matter, without ensuring appellant was insulated from prejudice, and the record demonstrated appellant was unable to retain new counsel and did not receive any court notices thereafter, including notice of the trial date.**

**112538** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v FRANK EVANS

Vacated and remanded.

Michael John Ryan, J., Eileen T. Gallagher, P.J., and Emanuella D. Groves, J., concur.

**KEY WORDS: Reagan Tokes Law; nunc pro tunc entry.**

***In July 2023, the Ohio Supreme Court issued its decision in State v. Hacker, Slip Opinion No. 2023-Ohio-2535, finding the Reagan Tokes Law constitutional and determining the law does not violate the separation-of-powers doctrine, the right to a jury trial, and the right to due process. The arguments presented in this case do not present novel issues or any new theory challenging the constitutional validity of any aspect of the Reagan Tokes Law left unaddressed by the Ohio Supreme Court's decision in Hacker. Accordingly, pursuant to Hacker, appellant's challenge to the constitutionality of the Reagan Tokes Law is without merit.***

***Issuing a nunc pro tunc entry to impose an indefinite sentence under the Reagan Tokes Law not imposed at the sentencing hearing is improper. The trial court's nunc pro tunc entry is vacated and the matter is remanded for resentencing.***

**112546** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v ANDRE WALKER

Affirmed.

Lisa B. Forbes, J., Anita Laster Mays, A.J., and Michelle J. Sheehan, J., concur.

**KEY WORDS: Consecutive sentences; necessary to protect the public.**

***The trial court did not err in ordering appellant's sentences to run consecutively. The court made the requisite findings, and the findings are supported by the record. Judgment affirmed.***

## CASE DECISION LIST

**112609** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v ERIC COLEMAN

Vacated and remanded.

Michelle J. Sheehan, J., Anita Laster Mays, A.J., and Sean C. Gallagher, J., concur.

**KEY WORDS:** *Sentence; consecutive-sentence findings; prosecutor's statement at sentencing hearing.*

*While the prosecutor's reference to the DNA report at the sentencing hearing may have gone beyond the count appellant pleaded guilty to, we will presume that a trial court considered only the relevant, material, and competent evidence in arriving at its judgment, unless the contrary affirmatively appears from the record.*

*While the trial court is not required to give a "word for word recitation" of the language of the statute when making the findings for an imposition of consecutive sentences, the findings made by the trial court here fall short of what is mandated by R.C. 2929.14. Accordingly, the imposition of consecutive sentences in this case is contrary to law.*

**112643** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
IRVING J. FRANKLIN REALTY, INC. v CITY OF EAST CLEVELAND

Affirmed.

Sean C. Gallagher, J., Mary Eileen Kilbane, P.J., and Lisa B. Forbes, J., concur.

**KEY WORDS:** *Due process; notice; hearing; waiver; written demand; timely; public nuisance; demolition; ordinance; interpretation; de novo; liberal; meaningful; predeprivation hearing; East Cleveland, Ohio, Code of Ordinances 1313.07(c).*

*Affirmed judgment of the trial court awarding judgment in favor of the plaintiff and against the City of East Cleveland on the plaintiff's claim for a violation of due process and the city's counterclaim for demolition costs. The plaintiff complied with the city's ordinance pertaining to the right to appeal a public nuisance notice, no waiver of due process rights occurred, and the city never afforded the plaintiff any meaningful opportunity to be heard.*

## CASE DECISION LIST

**112648** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
WILBER HAWKINS, ET AL. v K&D MANAGEMENT, LLC

Affirmed.

Mary J. Boyle, J., Kathleen Ann Keough, P.J., and Sean C. Gallagher, J., concur.

**KEY WORDS:** *Summary judgment; genuine issue of material fact; common carrier; R.C. 5321.04; strict liability; negligence per se; prior notice.*

*Judgment affirmed. Plaintiffs seek to impose strict liability on K&D, as a common carrier under R.C. 5321.04, because of the injuries they sustained while passengers in their apartment complex's elevator. This proposition, however, is not supported by the law. Rather, to survive summary judgment, plaintiffs must prove that K&D had prior notice of Elevator No. 1's mechanical issues at the time of the incident to establish K&D's negligence per se under R.C. 5321.04. Plaintiffs offered no such evidence. Therefore, plaintiffs failed to create a genuine issue of material fact and reasonable minds can come to but one conclusion - summary judgment in K&D's favor is proper.*

**112728** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
STATE OF OHIO v OSIRIS ALI

Affirmed.

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

**KEY WORDS:** *Motion to vacate void judgment; void sentence; voidable sentence; direct appeal; res judicata.*

*Defendant was convicted in 2006 and sentenced to several life sentences. Defendant's convictions were affirmed in 2007. Sixteen years after his direct appeal, defendant filed a motion to vacate a void judgment arguing error in his sentence. An error in a criminal sentence is voidable, not void. Defendant did not argue that the trial court lacked subject-matter or personal jurisdiction on appeal. An error in a criminal sentence is voidable, not void. State v. Henderson, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 43. As such, defendant's motion to vacate void judgment was properly denied on the basis of res judicata.*

## CASE DECISION LIST

**112828** JUVENILE COURT DIVISION F Civil C.P.-Juv, Dom, Probate

IN RE: D.G.

Affirmed.

Michelle J. Sheehan, P.J., Lisa B. Forbes, J., and Mary J. Boyle, J., concur.

**KEY WORDS:** *Permanent custody; child's wishes; best interest of the child.*

*Clear and convincing evidence supports the trial court's finding that the child cannot be placed with mother within a reasonable time or should not be placed with mother and that permanent custody is in the best interest of the child. Although there is a good relationship between mother and the child, the factors against a grant of permanent custody are outweighed by the factors in favor of it. This is the third time the child was in the agency's temporary custody due to mother's substance abuse, chronic lack of housing, and failure to meet his medical needs. The best interest of the child requires permanency and a safe and secure environment. Accordingly, the trial court's decision granting permanent custody is affirmed.*

**112918** JUVENILE COURT DIVISION F Civil C.P.-Juv, Dom, Probate

IN RE: A.F., ET AL.

Affirmed.

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

**KEY WORDS:** *Permanent custody; "reasonable efforts;" manifest weight; best interest of the child; unsworn statement or testimony.*

*Trial court properly determined that public services children's agency made reasonable efforts to reunite Mother with her children where they developed a case plan and supervised visits with Mother for nearly three years.*

*Juvenile court's decision to grant permanent custody of the children to CCDCFS was supported by the manifest weight of the evidence where there was clear and convincing evidence that the children had been in agency custody for nearly three years, Mother failed to remedy the conditions that required removal of the children, and permanent custody was in the children's best interests.*

*Although each child is unique, the court's best interests analysis applied to all three children because they were close in age and had similar needs.*