

CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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December 28, 2023

110811 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v JOSEPH MCALPIN

Affirmed.

Eileen A. Gallagher, J., Kathleen Ann Keough, P.J., and Michelle J. Sheehan, J., concur.

KEY WORDS: *Motion for leave to file motion for new trial; new trial; Crim.R. 33(A)(6); death penalty; aggravated murder; location data; location history; Google; Google Takeout; digital forensics; cell phone; abuse of discretion; unavoidably prevented; reasonable diligence; clear and convincing evidence.*

The trial court's order denying an untimely filed motion for new trial should be construed as denying the defendant's later-filed motion for leave to file a new-trial motion, under the unique facts and circumstances of this case. It was not an abuse of discretion for the trial court to deny the motion for leave without a hearing where the defendant was not unavoidably prevented from discovering the grounds upon which the motion would be based in a timely manner. Specifically, the defendant wished to make his motion based on location data maintained by Google and a summary of that data created by Google. The summary was available to the defendant before trial, simply by logging into the defendant's Google account. The location data maintained by Google could have been obtained through a Google Takeout request. These facts were apparent from the affidavit of a defense forensic expert whose opinion was submitted in support of the new-trial motion.

The expert's opinion also confirmed that the state was not in possession of the evidence upon which the motion was based, such that there could potentially be a meritorious suppression argument. Additionally, the defendant had access to the services of a digital-forensics expert before trial. There is no reason apparent from the record as to why the defendant could not have logged into his own account before trial or requested a complete copy of his account data from Google - or directed his appointed counsel or digital-forensic expert to do so on his behalf. Judgment affirmed.

112045 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v JASON BOUYER

Affirmed.

Emanuella D. Groves, J., Anita Laster Mays, A.J., and Mary Eileen Kilbane, J., concur.

KEY WORDS: *Sixth Amendment; bills of particulars; mistrial; erroneous evidence; plain error; verdict forms; victim-impact*

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testimony; record to refresh recollection; veracity testimony; sufficiency of the evidence; sexually violent predator specification hearing.

Appellant failed to establish he was prejudiced by state's multiple bills of particulars ("BOP") where the BOPs identified the alleged conduct and the relevant time frames, and he failed to identify how the lack of information in the state's BOPs prejudiced his defense.

The trial court did not abuse its discretion when it failed to declare a mistrial after the state introduced a victim's video statement. Ultimately, the video contained inadmissible evidence of other acts testimony; however, the trial court's curative instruction and refusal to submit the evidence to the jury was sufficient to cure the error.

The verdict forms did not improperly refer to other counts, nor did they require the jury to make findings as to other counts in order to determine the verdict. The jury instructions that accompanied the verdict forms properly explained the law and only referenced other counts without requiring the jury to make findings. Appellant failed to establish that any error in the verdict forms rose to the level of plain error.

Appellant failed to establish that improper victim-impact testimony was admitted. The very limited testimony that was admitted that qualified as victim-impact testimony was harmless beyond a reasonable doubt.

The trial court erred when it allowed the state to refresh the recollection of a defense witness with recorded jail phone calls on the record in front of the jury. However, those calls related to tangential matters, and appellant failed to establish that, but for their admission, the result of the trial would have been different.

Improper testimony claiming the veracity of the witness did not prejudice the appellant. Preliminarily, several witnesses' testimony indirectly bolstered a victim's testimony, but did not directly claim that she was telling the truth. It was error for the trial court to allow testimony of one witness who testified she believed the victim. However, appellant has failed to establish that but for this testimony the outcome would have been different.

Sufficient evidence was presented to support appellant's conviction for sexual battery.

Finally, appellant waived a challenge to the trial court's verdicts on the sexually violent predator specifications. Appellant did not object to the verdict nor did appellant raise plain error to this court to challenge the conviction.

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112160 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v DUANE GIBSON

Affirmed.

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

KEY WORDS: *Motion for leave for a new trial.*

The trial court did not abuse its discretion in denying appellant's motion for leave to file a motion for a new trial without a hearing because the documents appellant submitted in support of the motion on their face did not demonstrate he was unavoidably prevented from a timely discovery of the new evidence.

112225 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v ROBERT SHEPARD

Affirmed.

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

KEY WORDS: *R.C. 2901.01(A), aggravated murder, sufficiency and manifest weight of the evidence, Evid.R. 801, hearsay, R.C. 2923.03, aiding and abetting.*

Appellant's convictions are affirmed. The state presented sufficient circumstantial evidence that the appellant aided and abetted others in committing aggravated murder. The convictions are not against the manifest weight of the evidence. Statements offered into evidence to explain a law enforcement officer's criminal investigation including anonymous tips are not hearsay.

112346 PARMA MUNI. C Criminal Muni. & City
CITY OF BROADVIEW HEIGHTS v PHILLIP WASELESKI

Affirmed and remanded.

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

KEY WORDS: *Evidence; sufficiency; manifest weight; abuse of discretion; cross-examination; relevant; authenticate; expert; lay opinion; contamination; chain of custody; criminal mischief.*

Defendant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. The trial court did not abuse its discretion by limiting the scope of defense counsel's

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cross-examination of a city witness, or by permitting city witnesses to offer lay opinions that were rationally based on their own perceptions and helpful to the determination of a fact in issue. The city satisfied the low threshold burden for authenticating surveillance-video footage.

112469	COMMON PLEAS COURT	E	Civil C.P.-Not Juv,Dom Or Prob
STATE OF OHIO v A.L.H.			

Affirmed.

Frank Daniel Celebrezze, III, P.J., Michelle J. Sheehan, J., and Eileen T. Gallagher, J., concur.

KEY WORDS: Application to seal records; R.C. 2953.32; abuse of discretion; evidentiary burden on applicant; legitimate reasons for sealing; outweigh state's interest; evidence or testimony required; rehabilitated; statements of counsel not evidence; nature of the offense; position of trust.

The trial court properly denied appellant's application to seal records because he failed to submit evidence to support his application.

112472	COMMON PLEAS COURT	A	Criminal C.P.
STATE OF OHIO v KENNETH NORRIS, JR.			

112871	COMMON PLEAS COURT	A	Criminal C.P.
STATE OF OHIO v KENNETH NORRIS, JR.			

Vacated and remanded.

Anita Laster Mays, A.J.; Kathleen Ann Keough, J., concurs in judgment only (with separate opinion); Mary J. Boyle, J., concurs in judgment only.

KEY WORDS: R.C. 2953.08(G)(2); consecutive-sentence review; R.C. 2929.14(C)(4); consecutive sentences.

After conducting a thorough review of the record, this court finds that the trial court failed to make the requisite disproportionate findings prior to imposing consecutive sentences.

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112597 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v RORELL DICKERSON

Reversed and vacated.

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

KEY WORDS: *Ohio Bureau of Motor Vehicles; BMV Form 2610; request to protect confidentiality of residence address; R.C. 4501.271; Ohio Adm.Code 4501:1-12-03; tampering with records; R.C. 2913.42(A)(1); forgery; R.C. 2913.31(A)(3); judicial notice; Evid.R. 201; other-acts evidence; Evid.R. 404(B)(2); absence of accident or mistake; reasonable notice; sufficiency of the evidence; manifest weight of the evidence.*

Defendant's convictions for tampering with records and forgery based on defendant's submission of vehicle registrations that listed his work address rather than his residence after he filed a facially incomplete and inaccurate BMV Form 2610 request to protect confidentiality of residence address were not supported by sufficient evidence.

112777 COMMON PLEAS COURT A Criminal C.P.
STATE OF OHIO v MENOKKA NEALY

Affirmed.

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

KEY WORDS: *Reagan Tokes.*

Appellant's argument that the Reagan Tokes Law is unconstitutional was overruled in State v. Hacker, Slip Opinion No. 2023-Ohio-2535. Appellant's arguments do not present any issue not addressed by Hacker.