

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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January 11, 2024

**112298** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
BERKUT, INC. v DEVOLVER CORP.

Affirmed in part, reversed in part, and remanded.

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

**KEY WORDS:** *Breach of contract; subcontract; condition precedent; payment; affirmative defense; anticipatory breach; Civ.R. 8(A); Civ.R. 15(B); counterclaim; manifest weight; repudiation; damages.*

*The trial court's decision to award judgment in favor of plaintiff-appellee on its breach-of-contract claim and on defendant-appellant's counterclaim was affirmed in part and reversed in part. The trial court did not err in awarding judgment in appellee's favor on a breach-of-contract claim for failing to pay for material and labor provided on a subcontract project when the parties' payment schedule agreement did not include any conditions precedent to final payment as argued by appellant. The trial court erred in awarding damages against appellant upon a claim for anticipatory breach of a second contract that was not set forth in any pleading or tried by express or implied consent of the parties. The trial court's decision against appellant on its counterclaim for breach of contract was not against the manifest weight of the evidence. The trial court's damages award was upheld in part, and the case was remanded to vacate the improperly awarded damages.*

**112521** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v BRANDON MINIFEE

Reversed and remanded.

Lisa B. Forbes, J., and Mary Eileen Kilbane, P.J., concur; Sean C. Gallagher, J., dissents (with separate opinion).

**KEY WORDS:** *Motion for leave to file motion for new trial; newly discovered evidence; witness recantation; Crim.R. 33(A)(6); unavoidably prevented; clear and convincing proof.*

*A trial witness's recantation of testimony can be newly discovered evidence if the court finds that the new testimony is credible and if the new testimony would materially affect the outcome of the new trial. The only eyewitness to the shooting recanted her testimony that the victim did not have a gun that night. In an affidavit, she stated that not only did the victim have a gun on the night in question, he fired first at the defendant before the defendant fired back. This witness also explained in the affidavit why she lied on*

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**the witness stand at trial. Because the defendant was unavoidably prevented from discovering the fact that this witness would one day change her mind and decide to recant her testimony, the trial court abused its discretion by denying the defendant's motion for leave to file a motion for new trial.**

**112540** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v MICEY STIVER

Affirmed and remanded.

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

**KEY WORDS: Forcible rape; kidnapping; Amber Alert; allied offenses; R.C. 2941.25; merger; waiver; consecutive sentences; R.C. 2929.14(C)(4); Reagan Tokes Law.**

***The defendant agreed that the offenses to which he pleaded guilty were separate for the purposes of R.C. 2941.25, and as a result, waived his right to challenge the merger issue in the direct appeal. In addition, the defendant failed to demonstrate that consecutive-sentence findings were clearly and convincingly not supported by the record. Affirmed.***

**112563** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
STATE OF OHIO v HAROLD KENNEDY

Affirmed.

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

**KEY WORDS: Postconviction; petition; untimely; ineffective assistance; trial counsel; exculpatory; disclose; bias; jurisdiction; res judicata; waiver; unavoidably prevented; discovery; recusal; prejudice.**

***The trial court did not err in denying the defendant's untimely and successive petition for postconviction relief because the claims were barred by res judicata or otherwise failed to satisfy the jurisdictional requirements of R.C. 2923.23(A).***

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**112574** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v TIMOTHY M. LEWIS, SR.

Affirmed.

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

**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 does not find that the record clearly and convincingly fails to support the trial court's consecutive- sentence findings.**

**112582** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v STEVEN ELKINS

Affirmed.

Lisa B. Forbes, J., Kathleen Ann Keough, A.J., and Eileen T. Gallagher, J., concur.

**KEY WORDS:** *Consecutive sentences; findings; support in record; aggregate sentence.*

**The trial court made the required consecutive-sentence findings and those findings are not unsupported by the record. Further, appellant's argument that running his two prison sentences concurrently resulted in an excessive aggregate sentence is not well taken. Judgment affirmed.**

**112593** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v WILLIAM DEW

Affirmed.

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

**KEY WORDS:** *Rape; rape-shield law; R.C. 2907.02(D); confrontation; Boggs hearing; sufficiency; age; Crim.R. 33; recanting; communications.*

**Sufficient evidence was presented supporting defendant's conviction for rape of a child under the age of 13. Viewing the victim's testimony in favor of the state, a rational trier of fact could find that the testimony demonstrated that at the time of the rape, the victim was less than 13 years of age. Trial court did not abuse**

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its discretion in finding, after a Boggs hearing, that the defendant failed to prove that the victim's prior allegations of sexual activity were fabrications or totally unfounded; the evidence fell within R.C. 2907.02(D) protection and thus, not admissible under the rape-shield statute. Defendant's Crim.R. 33 motion for a new trial was properly denied because no direct evidence was presented that the victim recanted her testimony or accusations; the source of the evidence was from the sworn testimony of two individuals who believed they received communications from the victim.

**112605** DOMESTIC RELATIONS F Civil C.P.-Juv, Dom, Probate

K.K.S. v M.M.J.

Affirmed.

Kathleen Ann Keough, A.J., Mary Eileen Kilbane, J., and Lisa B. Forbes, J., concur.

**KEY WORDS:** *Domestic violence protection order; magistrate's decision; timely; objections; transcript; Civ.R. 65.1; Loc.R. 27.*

*Domestic relations court did not abuse its discretion in adopting the magistrate's decision and refusing to address the merits of petitioner's objections, including evidentiary rulings, because petitioner failed to timely file the transcript of the magistrate's hearing as required by Civ.R. 65.1 and Loc.R. 27 of the domestic relations court. Because domestic relations court did not consider the transcripts, this court cannot consider the transcripts submitted on appeal.*

**112606** COMMON PLEAS COURT A Criminal C.P.

STATE OF OHIO v TYRONE LEEGRAND, II

Dismissed.

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

**KEY WORDS:** *Nunc pro tunc; appellate mandate; final appealable order.*

*A nunc pro tunc entry, correcting the trial court's clerical omission in the original sentencing entry based on the appellate mandate from a direct appeal, is not an order from which a defendant can file another appeal. Dismissed.*

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**112763** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v TREMAINE JOHNSON

Affirmed and remanded.

Mary Eileen Kilbane, J., Kathleen Ann Keough, A.J., and Lisa B. Forbes, J., concur.

**KEY WORDS:** *Drug possession; trafficking; consecutive sentences; R.C. 2929.14(C)(4); nunc pro tunc; divested of jurisdiction; clerical error.*

*The trial court's R.C. 2929.14(C)(4) findings were clearly and convincingly supported by the record such that consecutive sentences were not improper. The trial court was divested of jurisdiction when appellant filed a timely notice of appeal, and therefore, the trial court's subsequent nunc pro tunc entry is a nullity. Upon remand, the trial court shall issue a nunc pro tunc entry to correct the clerical error in the original sentencing journal entry.*

**112846** COMMON PLEAS COURT E Civil C.P.-Not Juv, Dom Or Prob  
YAGOUR GROUP, LLC DBA PERFECTION LANDSCAPES v KEVIN CIPTAK, ET AL.

Affirmed.

Anita Laster Mays, P.J., Kathleen Ann Keough, A.J., and Michael John Ryan, J., concur.

**KEY WORDS:** *Breach of contract; noncompetition agreement; side work; absence of assignments of error; App.R. 16(A)(3); App.R. 12(A)(1)(b); bench trial; manifest weight of the evidence; lost profits; reasonable certainty.*

*Appellant's brief contained no assignments of error as required for appellate review under App.R. 12(A)(1)(b) and App.R. 16(A)(3). Even if appellant's "issues presented for review" were treated as assignments of error, appellant showed no reversible error. Trial court's determinations that appellee was damaged as a result of appellant's breach of noncompetition agreement and that evidence of appellant's profits from performing prohibited side work was, under the particular facts and circumstances at issue, a reasonable measure of appellee's lost profits resulting from appellant's breach of the noncompetition agreement were supported by competent, credible evidence and were not against the manifest weight of the evidence.*

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**112941** JUVENILE COURT DIVISION F Civil C.P.-Juv, Dom, Probate  
IN RE G.C.B.

Affirmed.

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

**KEY WORDS:** *Appellant's brief does not comport with App.R.16(A)(7); no transcript filed, presume regularity.*

*The appellant did not participate in proceedings, yet challenged violations of due process and fair trial without any legal authority; failure to prosecute dismissal of motions, affirmed.*

**113023** JUVENILE COURT DIVISION F Civil C.P.-Juv, Dom, Probate  
IN RE: C.H.

Affirmed.

Frank Daniel Celebrezze, III, P.J., Eileen T. Gallagher, J., and Sean C. Gallagher, J., concur.

**KEY WORDS:** *Termination of parental rights; permanent custody; R.C. 2151.414; clear and convincing evidence; manifest weight of the evidence; child abandoned; R.C. 2151.011.*

*The juvenile court's finding that appellant had abandoned her child was not against the manifest weight of the evidence. The trial court did not err in terminating Mother's parental rights and awarding permanent custody to the agency.*