## April 25, 2019

**106316** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
HSBC BANK USA, NATIONAL ASSOCIATION v THOMAS P. SURRARRER, ET AL.

Dismissed.

Mary Eileen Kilbane, A.J., Mary J. Boyle, J., and Larry A. Jones, Sr., J., concur.

***KEY WORDS: Foreclosure sale; decree of confirmation; dismiss; moot; distribution of proceeds.***

***Judgment dismissed. The appeal is moot because the homeowners never posted the required bond when they sought their stay from the decree of foreclosure. Additionally, the homeowners did not seek a stay or post the required bond after they filed their separate appeal from the decree of confirmation. Subsequently, the property has been sold, the order of confirmation has been carried out, and the proceeds from the sheriff's sale have been distributed. Thus, there is no relief that can be afforded to the homeowners and their appeal is moot.***

**106937** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
FIREMAN'S FUND INSURANCE COMPANY v HYSTER-YALE GROUP, INC.

Affirmed.

Patricia Ann Blackmon, P.J., Michelle J. Sheehan, J., and Raymond C. Headen, J., concur.

***KEY WORDS: Insurance; duty to defend.***

***Trial court properly applied Ohio law to insurance dispute; trial court could look beyond the allegations of the complaint in determining the duty to defend where insurer obtained extrinsic evidence in discovery that injury/occurrence did not occur during the policy period.***

**107237** COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JAILYN BLANTON

Affirmed.

Mary Eileen Kilbane, A.J., Frank D. Celebrezze, Jr., J., and Michelle J. Sheehan, J., concur.

***KEY WORDS: Merger; allied offenses; R.C. 2941.25; separate victims; discharge of firearm at or near prohibited premises; victim is public at large; consecutive sentence; R.C. 2953.08(G)(2); R.C. 2929.14.(C)(4).***

(Case 107237 continued)

**Judgment affirmed. Defendant's convictions for attempted felonious assault and discharging a firearm at or near a prohibited premises do no merge for purposes of sentencing because these offenses were committed against separate victims (the specific victim of the felonious assault and the public at large). Defendant's consecutive sentence was proper because the trial court encompassed each of the required findings under R.C. 2929.14(C)(4). Furthermore, defendant's sentence is not contrary to law.**

**107253** COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v GARY SANDERS

Affirmed in part, modified in part, and remanded.

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

***KEY WORDS: Speedy trial; R.C. 2945.71; tolling of speedy trial time; R.C. 2945.72(D), (H); failure to respond to demand for discovery; continuance to secure trial attendance of key witness; domestic violence; R.C. 2919.25(D); enhancing element; R.C. 2945.75(A)(2); defect in verdict form; strict compliance; plain error.***

***Defendant's statutory and constitutional speedy trial rights were not violated. Defendant's failure to respond to state's demand for discovery tolled speedy trial time under R.C. 2945.72. Speedy trial time was also tolled where trial court granted reasonable and necessary continuances of the trial date to secure the attendance of the state's key witness by bench warrant. Where the verdict form did not include a finding that prior conviction for attempted abduction involved a family or household member, the prior conviction did not elevate the domestic violence offense to a third-degree felony under R.C. 2919.25(D) and 2945.75(A)(2). Defendant's conviction for domestic violence reduced from a third-degree felony to a fourth-degree felony to conform to the verdict form; sentence vacated and case remanded for resentencing on offense as a fourth-degree felony.***

**107257** CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v DONTE E. JONES

Affirmed.

Michelle J. Sheehan, J., Frank D. Celebrezze, Jr., P.J., and Raymond C. Headen, J., concur.

***KEY WORDS: OVI; motion to suppress; probable cause for traffic stop; reasonable suspicion for sobriety tests; probable cause to arrest.***

(Case 107257 continued)

**The trial court properly denied appellant's motion to suppress because the trooper had probable cause to stop appellant's vehicle; had a reasonable, articulable suspicion of appellant's intoxication to subject him to field sobriety tests; and also had probable cause to arrest him.**

**107270** COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v THERESA ROESKY

Reversed and remanded.

Larry A. Jones, Sr. J., Mary Eileen Kilbane, A.J., and Mary J. Boyle, J., concur.

***KEY WORDS: R.C. 2911.12(A)(3)/burglary; sufficiency; manifest weight.***

***There was insufficient evidence presented at trial to substantiate that appellant aided and abetted in the burglary.***

**107338** COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RONALD D. JONES

Affirmed.

Mary J. Boyle, P.J., Patricia Ann Blackmon, J., and Kathleen Ann Keough, J., concur.

***KEY WORDS: Allied offenses of similar import; R.C. 2941.25; consecutive sentences; R.C. 2929.14(C)(4).***

***The trial court did not err when it failed to merge the defendant's sexual battery and attempted rape convictions because the offenses involved separate acts committed on separate days. The trial court also did not err when it imposed consecutive sentences because it made the required findings under R.C. 2929.14(C)(4) to impose consecutive sentences, and the record supported the findings.***

**107356** COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v HALLE BUSEK

Affirmed.

Mary Eileen Kilbane, A.J., Larry A. Jones, Sr., J., and Raymond C. Headen, J., concur.

***KEY WORDS: Right to speedy trial; R.C. 2945.71(C)(2); 270 days;***

(Case 107356 continued)

**motion to dismiss on speedy trial grounds; subsequent charges; same facts.**

**Judgment affirmed. Trial court's grant of defendant's motion to dismiss on speedy trial grounds was proper. Here, defendant was cited and pled guilty to possession of drug paraphernalia in municipal court. At the time of the traffic stop, the highway patrolman identified the pills as oxycodone (Schedule II) and the defendant admitted that the pills were Percocet. Defendant was subsequently charged in common pleas court with drug possession almost a year later. Because the subsequent drug possession charge arose from facts that related to the original charge, the speedy trial clock for the underlying charges herein arose when the defendant was indicted in municipal court and her statutory speedy trial rights were violated when she was later indicted with drug possession.**

**107366** CLEVELAND MUNI. G CIVIL MUNI. & CITY

EROL FOSTER v ANGELA BENSON, ET AL.

Affirmed in part, modified in part, and remanded.

Mary J. Boyle, P.J., Patricia Ann Blackmon, J., and Kathleen Ann Keough, J., concur.

***KEY WORDS: Notice of service, lack of prosecution, failure to record, manifest weight, sufficiency, lack of transcript, damages award.***

***The trial court did not violate plaintiffs' due process rights when it proceeded to trial in their absence because the docket reflected that plaintiffs' attorney received notice of the hearing. The trial court's failure to make findings regarding plaintiffs' absence was not error, and the trial court did not err in not recording the proceedings because under Civ.R. 53(D)(7) it was plaintiffs' responsibility to retain a private court reporter if they desired one.***

***Further, plaintiff Foster failed to file a transcript or appropriate substitute, and therefore, we presume regularity of the lower court's proceedings and find that the trial court's judgment in favor of Benson was supported by sufficient evidence and was not against the manifest weight of the evidence.***

***Finally, the trial court's damages award to Benson on her counterclaim against Foster was proper, but the trial court erred in awarding damages to Thomas, because he did not file a counterclaim.***

**107369** COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v LACYNTHIA A. TIDMORE

Affirmed in part, vacated in part, and remanded.

Eileen A. Gallagher, J., Mary Eileen Kilbane, A.J., and Michelle J. Sheehan, J., concur.

***KEY WORDS: Imposition of consecutive sentences; R.C. 2929.14(C)(4); contrary to law; complete proportionality finding; consideration of alleged, uncharged criminal conduct during sentencing.***

***Imposition of consecutive sentences was contrary to law where trial court failed to make finding that consecutive sentences are not disproportionate to the danger defendant poses to the public. Defendant was not deprived of due process or other constitutional rights based on trial court's alleged consideration of uncharged criminal conduct when imposing maximum sentences. Consecutive sentences vacated; case remanded for trial court to again consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4) and, if so, to make all of the required findings on the record and incorporate those findings into its sentencing journal entry.***

**107443** EUCLID MUNI. G CIVIL MUNI. & CITY
LINDA FREEMAN v TODD DEEGAN MGMT. INC., ET AL.

Affirmed.

Mary Eileen Kilbane, A.J., Larry A. Jones, Sr., J., and Raymond C. Headen, J., concur.

***KEY WORDS: Res judicata.***

***Under the doctrine of res judicata, a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the same transaction or occurrence that was the subject matter of a previous action. The Ohio Supreme Court has identified four elements necessary to bar a claim under the doctrine of res judicata: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) the second action involves the same parties or their privies as the first; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of the transaction or occurrence that was the subject matter of the previous action.***

***In Deegan's second cause of action for money damages, Freeman signed a consent entry agreeing to judgment in Deegan's favor for $700 to be paid in monthly installments. The consent entry was reduced to a final judgment on March 2, 2016. The record indicates that Freeman made an installment payment on April 11, 2016 in the amount of $35, which is a clear indication that matter had been***

(Case 107443 continued)

**addressed and resolved. As a result, Freeman is barred from asserting or relitigating this claim in the present action.**

**107481** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE EX REL. OC LORAIN FULTON, LP v CITY OF CLEVELAND, OHIO

Affirmed.

Patricia Ann Blackmon, P.J., Kathleen Ann Keough, J., and Michelle J. Sheehan, J., concur.

***KEY WORDS: Constitutional law; partial takings claims.***

***The trial court properly determined that the city's denial of conditional-use approval, though reversed in a prior appeal, did not constitute a compensable partial "taking" under the proper standard.***

**107484** COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CHRISTOPHER M. RODRIGUEZ, (a.k.a. CHRISTOPHER M. RODRIQUEZ)

Affirmed.

Mary Eileen Kilbane, A.J., and Raymond C. Headen, J., concur; Larry A. Jones, Sr., J., concurs in judgment only.

***KEY WORDS: Consecutive Sentences.***

***Pursuant to R.C. 2929.14(C)(4), in order to impose consecutive sentences, the trial court must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender, that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and that at least one of the following also applies:***
***(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease control for a prior offense.***
***(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.***
***(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.***

***The court must make the statutory findings as stated above at the***

(Case 107484 continued)

**sentencing hearing and incorporate those findings into its sentencing entry. The trial court must make the statutory findings on the record before imposing consecutive sentences on a defendant.**

**In imposing the sentence, the trial court specifically noted that it found that consecutive sentences were necessary to protect the public from future crimes and to punish Rodriguez. The trial court also stated that it found the sentences were not disproportionate to the seriousness of the conduct and the danger Rodriguez posed to the public.**

**In addition, the trial court stated it found at least two of the multiple offenses were committed as part of one or more courses of conduct, and that the harm caused by these offenses was so great or unusual that no single prison term would adequately reflect the seriousness of Rodriguez's conduct.**

**Based on the foregoing, we are satisfied the trial court made the requisite statutory findings to impose consecutive sentences.**

**107512** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE

IN RE: G.W.

Affirmed and remanded.

Eileen A. Gallagher, J., Frank D. Celebrezze, Jr., P.J., and Kathleen Ann Keough, J., concur.

***KEY WORDS: Motion to modify temporary custody to permanent custody; termination of parental rights; R.C. 2151.414; Sup.R. 48; Juv.Loc.R. 18; guardian ad litem's failure to submit written final report; clear and convincing evidence; inability to place child with parents within a reasonable time; best interest of the child.***

***Juvenile court did not abuse its discretion in considering the guardian ad litem's oral report and recommendation that permanent custody of child be granted to the agency notwithstanding his failure to file a written report as required under Sup.R. 48 and Juv.Loc.R. 18. Mother did not object to the guardian ad litem's failure to file a written report below and mother's counsel had an opportunity to question the guardian ad litem regarding his recommendation. Competent, credible, clear and convincing evidence supported the juvenile court's findings that child could not be placed with mother within a reasonable time or should not be placed with mother and that award of permanent custody to agency was in the best interest of the child.***

**107565** COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v LARRY COLLINS

Dismissed.

Mary Eileen Kilbane, A.J., Larry A. Jones, Sr., J., and Kathleen Ann Keough, J., concur.

***KEY WORDS: Anders.***

***Anders outlines the procedure counsel must follow to withdraw because of the lack of any meritorious grounds for appeal. In Anders, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact and request permission to withdraw.***

***This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. Counsel must also furnish the client with a copy of the brief, and allow the client sufficient time to file his or her own brief, pro se.***

***Once appellate counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If we determine that the appeal is wholly frivolous, we may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or we may proceed to a decision on the merits if state law so requires.***

***Collins's appointed counsel reviewed the record and concluded he could not make any meritorious arguments on Collins's behalf. Nevertheless, counsel presented the following potential issue for our Anders review: the trial court erred in its reliance on a 2006 competency evaluation as a basis for imposing consecutive sentences.***

***Following our independent review of the entire record, we find that no meritorious argument exists and that an appeal would be wholly frivolous. As a result, counsel's request to withdraw is granted, and the appeal is dismissed.***

**107794** LAKEWOOD MUNI. C CRIMINAL MUNI. & CITY
CITY OF LAKEWOOD v ANNA G. HOOPES

Dismissed.

Kathleen Ann Keough, J., Sean C. Gallagher, P.J., and Frank D. Celebrezze, Jr., J., concur.

***KEY WORDS: Minor misdemeanor; fines; dismiss.***

***Where a defendant has paid her court costs and fines and there is no evidence or allegation that she will experience any collateral***

(Case 107794 continued)

**disability or that her paying of the fine and costs were involuntary, the appeal will be dismissed.**