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June 3, 2021

109502 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v SURFIN PERCY

Affirmed in part, reversed in part, and vacated in part.

Eileen T. Gallagher, J., Lisa B. Forbes, P.J., and Emanuella D. Groves, J., concur.

KEY WORDS: *Consecutive sentences; fines; indigent; ability to pay; forfeiture; bill of particulars; prompt notice.*

Trial court failed to make findings required for the imposition of consecutive sentences.

Imposition of fines were affirmed where court considered indigent defendant's present and future ability to pay.

Trial court erred in granting forfeiture of property where state did not attach a forfeiture specification to charging instrument and failed to give the defendant prompt notice of its intent to seek forfeiture of property as required by R.C. 2981.04(A).

109533 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STEVE BENKOVITS v PETER BANDI, ET AL.

Affirmed.

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

KEY WORDS: *Summary judgment; marital interest; business entities; business interest; statute of limitations; jurisdiction; tortious interference; frivolous conduct; res judicata; issue preclusion; oral contract; discovery rule; R.C. 2305.07; R.C. 2305.09; R.C. 2923.34(J); equitable tolling; financial misconduct; R.C. 2323.51; justification; good faith.*

Affirmed trial court's decision to grant defendants summary judgment on the claims raised in the complaint and to grant plaintiff summary judgment on the counterclaims in a case arising from an agreed judgment entry of divorce that awarded plaintiff his former wife's marital interest in certain business entities, "whatever the interest may be." The doctrine of res judicata was not applicable to issues surrounding the enforceability of an oral contract for the sale of the ex-wife's interest in a corporation. The discovery rule did not apply to plaintiff's claim for breach of an oral contract, and the majority of the claims were barred by the applicable statutes of limitations, as was any claim for imposition of a constructive trust. To the extent the discovery rule applied to some of the claims, the evidence showed plaintiff became aware of his claims in 2011 during the course of the divorce proceedings, rendering claims in

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this matter untimely. The doctrine of equitable tolling was inapplicable. The trial court lacked jurisdiction over plaintiff's claims for financial misconduct with marital assets and for frivolous conduct. Summary judgment was properly granted in plaintiff's favor on the counterclaims for tortious interference with business relationships and frivolous conduct because plaintiff had justification for bringing his claims and acted in good faith reliance on the marital interest awarded to him in the judgment entry of divorce.

109543	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MATTHEW MILLER			

Reversed and remanded.

Lisa B. Forbes, J., and Michelle J. Sheehan, J., concur; Larry A. Jones, Sr., P.J., dissents with separate opinion.

KEY WORDS: Motion to dismiss for preindictment delay; DNA evidence; rape kit.

The trial court abused its discretion by granting defendant's motion for preindictment delay because the defendant failed to show that he suffered actual prejudice.

109567	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
JASON PERKOWSKI, ET AL. v RADOSTIN YONKOV			

Reversed and remanded.

Mary Eileen Kilbane, J.; Frank D. Celebrezze, Jr., J., concurs and concurs with the separate concurring opinion; Sean C. Gallagher, P.J., concurs with a separate concurring opinion.

KEY WORDS: Dismissal with prejudice; reversed; missing pretrial conference; failure to prosecute; Civ.R. 41(B); heightened abuse of discretion; decide cases on the merits.

Trial court abused its discretion by dismissing appellants' complaint with prejudice after their attorney missed case management conference. The case had been recently refiled because the first case was dismissed by the court for also missing a case management conference. While counsel's behavior is reprimandable, it does not rise to the extreme circumstances necessary to justify forever barring appellants from having their case decided on its merits. Therefore, the court abused its discretion in dismissing the case with prejudice.

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109664	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v DAVID FIELDS			

Affirmed.

Larry A. Jones, Sr., P.J., Michelle J. Sheehan, J., and Lisa B. Forbes, J., concur.

KEY WORDS: *Ineffective assistant of counsel; manifest weight.*

Appellant failed to make a prima facie case for race discrimination where there was only one Black juror on the panel. One Black potential juror was removed for cause and a second was removed on appellee's peremptory challenge. Appellant's counsel was not ineffective where he did not raise a Batson claim. The record does not show that the jury was affected by appellant's comment that the jury was racist or that appellant suffered prejudice, and it was therefore not ineffective of appellant's counsel to not request voir dire of the jury. Appellant's counsel's decision to not object to evidence and testimony admitted could be considered trial strategy and will not be second-guessed. Appellant has failed to overcome the burden that had trial counsel objected to the evidence and testimony the outcome of the trial would have been different. There was sufficient evidence to charge appellant as the getaway driver after the robbery. Appellant's counsel, where an objection to the trial court's jury instruction on flight would have been properly overruled, was not ineffective for not objecting to the instruction. Appellant's trial counsel's performance did not fall below a reasonable standard and was therefore not ineffective.

The jury was in the best position to weigh the credibility of the witnesses and the evidence presented to determine appellant's role in the robbery. Appellant's convictions are not against the manifest weight of the evidence.

109669	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
SYLVIA KOREY, TRUSTEE v PLANNING AND ZONING COMM. OF HUNTING VALLEY			

Affirmed in part; reversed in part; and remanded.

Eileen T. Gallagher, J., Lisa B. Forbes, P.J., and Emanuella D. Groves, J., concur.

KEY WORDS: *Administrative appeal; special-use permit; conditional-use permit; abuse of discretion; as applied; constitutional; de novo; hearing; reliable, probative and substantial evidence; zoning; residential property; dwelling; appropriate use; general keeping.*

The trial court's affirmation of the Commission's decision to deny appellant's request for a special-use permit is supported by reliable, probative, and substantial evidence in the record. The trial court erred by addressing the merits of appellant's as-applied constitutional challenge without permitting appellant to offer

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additional evidence in support of her claim that the ordinance is unconstitutional as applied to the subject property. The trial court erred by failing to provide appellant the opportunity to present her constitutional claim at a de novo hearing.

109712	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v DEVAUGHNTE RICE			

Affirmed.

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

KEY WORDS: Having weapons while under disability; possession; actual; constructive; sufficient; evidence; circumstantial; aid and abet; assist; lookout; manifest weight; credible.

Defendant's conviction for having weapons while under disability is supported by sufficient evidence and is not against the manifest weight of the evidence.

109740	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
RAYMOND GAROFOLO v WEST BAY CARE AND REHABILITATION CENTER, ET AL.			

Affirmed.

Eileen T. Gallagher, J., Lisa B. Forbes, P.J., and Emanuella D. Groves, J., concur.

KEY WORDS: Dismissal; with prejudice; failure to prosecute; heightened abuse-of-discretion standard.

Trial court properly dismissed plaintiff's complaint with prejudice for failure to prosecute where the plaintiff received notice that dismissal was a possibility, was given an opportunity to be heard, and failed to provide a justifiable reason for the delay in prosecution.

109788	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MARQUIS JACKSON			

Reversed and remanded.

Kathleen Ann Keough, J., Anita Laster Mays, P.J., and Mary Eileen Kilbane, J., concur.

KEY WORDS: R.C. 2945.39; civil commitment; retain jurisdiction; findings; dismissal.

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The trial court abused its discretion in denying defendant's motion for dismissal because the court did not make the requisite statutory findings pursuant to R.C. 2945.39(A)(2) to retain jurisdiction over the defendant during civil commitment.

109795 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
ZACHARY G. KUMAR, ET AL. v CONSTANTINE SEVASTOS, ET AL.

Affirmed.

Eileen A. Gallagher, J., Mary J. Boyle, A.J., and Lisa B. Forbes, J., concur.

KEY WORDS: *Summary judgment; negligence; assumption of the risk; recklessness; duty; sports; soccer; open and obvious; attendant circumstances.*

In a negligence action following an injury during a soccer game, summary judgment was appropriate for the defendant who participated in the game and slide tackled the plaintiff, another participant, causing him to collide with a boundary wall and sustain an injury. The defendant's slide tackle was a foreseeable and customary part of the sport. A sport participant assumes the inherent risks of the sport and cannot recover absent a showing that the defendant's actions were reckless or intentional. Here there was no evidence that the defendant intentionally or recklessly caused the injury.

Summary judgment was appropriate for the defendant-owner of the facility where the injury was sustained because the owner owed no duty to the plaintiff to warn him of any danger posed by an open-and-obvious boundary wall. Neither the slide tackle nor the boundary wall itself were attendant circumstances that created an exception to the open-and-obvious doctrine to the extent that neither were a significant distraction that would divert the attention of a reasonable person in the same situation and reduce the care exercised to avoid the hazard.

109936 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v A.F.

Affirmed.

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

KEY WORDS: *R.C. 2929.11 and R.C. 2929.12/sentencing; R.C. 2953.08(G)(2)/authority to vacate or modify sentence.*

The enumerated factors of R.C. 2929.11 and 2929.12 do not require the trial court to make specific factual findings on the record.

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Appellant's sentence is within the sentencing range, is not contrary to law, and the trial court, under current sentencing law, is not required to make any finding or analyze specific factors to support a maximum sentence. Under R.C. 2953.08(G)(2), absent finding clearly and convincingly that the record does not support the trial court's findings and the sentence is contrary to law, this court lacks authority to reverse or modify appellant's sentence.

110029	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MICHAEL A. STOKER			

Affirmed.

Mary J. Boyle, A.J., Anita Laster Mays, J., and Michelle J. Sheehan, J., concur.

KEY WORDS: *Keywords: Consecutive sentences; R.C. 2929.14(C)(4); domestic violence.*

The trial court did not err in ordering the defendant's sentence to run consecutively with his sentences in two other cases. The record supports the trial court's finding that consecutive sentences are not disproportionate to the seriousness of his conduct and the danger he poses to the public.