

March 2, 2023

**111274** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v GARRY F. SMITH

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

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

**KEY WORDS:** *Sixth Amendment; Confrontation Clause; nontestimonial statements; testimonial statements; primary purpose test; ongoing emergency; body camera footage; manifest weight of the evidence; felonious assault; R.C. 2903.11(A)(1); R.C. 2903.11(A)(2); domestic violence; R.C. 2919.25(A); indefinite sentence; Reagan Tokes Law; right to jury trial; Crim.R. 23(A); R.C. 2945.05; jury waiver.*

*Declarant's statements to police officer relating to March 2020 incident, made while in the custody of EMS personnel, receiving medical care in the back of an ambulance, were testimonial and admission of police officer testimony and body camera footage of such statements violated the Confrontation Clause where the primary purpose of the interrogation was to document past events for a later criminal investigation or prosecution. Trial court's improper admission of statements was not harmless error and affected defendant's substantial rights where evidence that remained once the improperly admitted evidence was removed from consideration was insufficient to support defendant's convictions relating to March 2020 incident.*

*Convictions for felonious assault and domestic violence relating to December 2020 incident were not against the manifest weight of the evidence.*

*Constitutional challenges to indefinite sentencing provisions of Reagan Tokes Law overruled based on State v. Delvallie, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.).*

*Where jury waivers complied with all applicable statutory and common law requirements, temporary suspension of jury trials or other limits on the scheduling of jury trials due to COVID-19 did not violate Sixth Amendment or invalidate waiver of right to jury trial.*

**111364** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v DEANDRA DE MARRIO CHISOLM

Affirmed.

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

## CASE DECISION LIST

(Case 111364 continued)

**KEY WORDS:** Murder; felonious assault; sufficiency of the evidence; mens rea; purposely; knowingly; manifest weight; circumstances surrounding; accident.

The state presented sufficient evidence of the requisite mens rea for both murder and felonious assault. The jury's verdict of guilty for murder and felonious assault was not against the manifest weight of the evidence when the death investigator said that the victim's gunshot could be consistent with a self-inflicted wound because both suicide and accidental shooting were ruled out as the manner of the victim's death based on the circumstances surrounding the death.

**111453** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v LAWRENCE BERRY

Affirmed.

Mary J. Boyle, J., Lisa B. Forbes, P.J., and Michael John Ryan, J., concur.

**KEY WORDS:** *Guilty plea, Crim.R. 11, maximum penalty, charge; charges; maximum, aggregate sentence, July 1998 amendment to Crim.R. 11; State v. Johnson, 40 Ohio St.3d 130, 532 N.E.2d 1295 (1988); State v. Bishop, 156 Ohio St.3d 156, 2018-Ohio-5132, 124 N.E.3d 766; State v. Dangler, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286.*

*Judgment affirmed. The change from "charge" to "charges" under the 1998 amendment to Crim.R. 11(C)(2)(a) did not disturb Johnson's holding. While the plurality in Bishop distinguished Johnson, it did not overrule Johnson when it had an opportunity to do so. Our continued application of the Ohio Supreme Court's holding in Johnson is consistent with prior decisions from this court as well as other Ohio appellate courts. As a result, a trial court is not required to advise a defendant of the maximum, aggregate of all prison terms for all the offenses at the time of the guilty plea for discretionary, consecutive sentences. With regard to the plea, we find that trial court complied with Crim.R. 11(C)(2) when it advised Berry of the maximum penalties he faced for each charge to which he pled guilty.*

**111511** CLEVELAND HTS. MUNI. G Civil Muni. & City  
WENDY S. ROSETT v CORTNI HOLMES, ET AL.

Affirmed.

Michael John Ryan, J., Frank Daniel Celebrezze, III, P.J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *Forcible entry and detainer; unopposed motion for*

## CASE DECISION LIST

(Case 111511 continued)

**summary judgment; motion not ruled on deemed denied; failure to file transcript; regularity presumed.**

**A trial court may not automatically grant a motion for summary judgment on the sole ground that it was unopposed. Rather, the trial court is required to find that the movant has demonstrated that there is no genuine issue as to any material fact and reasonable minds could conclude that judgment must issue as a matter of law.**

**A motion that is not ruled on is deemed denied.**

**Appellant's failure to file a transcript to support his or her objections to a magistrate's decision, as well as on appeal, requires the trial court and appellate court to presume the regularity of the proceedings.**

<b>111532</b>	COMMON PLEAS COURT	E	Civil C.P.-Not Juv,Dom Or Prob
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KHADIJA SMITH v JAVITCH BLOCK LLC, ET AL.

Affirmed.

Eileen T. Gallagher, J., and Frank Daniel Celebrezze, III, P.J., concur; Mary Eileen Kilbane, J., concurs in judgment only (with separate opinion).

**KEY WORDS: Arbitration; agent; principal; contract; nonsignatory; class waiver; stay; compel; demand; enforce; mandate.**

***The nonsignatory agent does not have the authority to enforce the arbitration provision based on the express and limiting terms of the contract. The trial court did not err in denying the agent's renewed motions to stay, compel binding arbitration, and strike class allegations.***

<b>111536</b>	COMMON PLEAS COURT	A	Criminal C.P.
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STATE OF OHIO v DANIEL SLATER

Affirmed.

Eileen A. Gallagher, P.J., Mary Eileen Kilbane, J., and Eileen T. Gallagher, J., concur.

**KEY WORDS: Speedy trial; statutory right; R.C. 2945.71; guilty plea; waiver; constitutional right; Barker v. Wingo; Barker; aggravated vehicular assault; R.C. 2903.08(A)(1)(a); operating a vehicle while under the influence; OVI; R.C. 4511.19(A)(1)(g); ineffective assistance of counsel; motion to suppress; blood draw.**

***The defendant waived his statutory speedy-trial right under the Ohio Speedy Trial Act by pleading guilty. After balancing the Barker factors - Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33***

(Case 111536 continued)

**L.Ed.2d 101 (1972) - there was no violation of the defendant's constitutional right to a speedy trial. While the 20-month delay between the defendant's arrest and his guilty plea was presumptively prejudicial, the vast majority of that delay was attributable to the defendant, the defendant never asserted his right to a speedy trial and there was no actual prejudice to the defense from the delay.**

**The defendant claimed that his trial counsel was ineffective for not moving to dismiss the indictment on speedy-trial grounds and for not filing a motion to suppress blood-draw evidence. The defendant did not challenge the validity of his plea or argue that his plea was less than knowing or voluntary and therefore he presented no basis to reverse his convictions. Moreover, by pleading guilty, the defendant waived an ineffective-assistance claim based on the Ohio Speedy Trial Act. There was no constitutional speedy-trial violation, so a motion to dismiss on that ground would have been meritless. Finally, not filing a motion to suppress is not ineffective assistance per se. We affirm the defendant's convictions.**

**111545** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v MARK FRY

Affirmed.

Mary Eileen Kilbane, J., Frank Daniel Celebrezze, III, P.J., Kathleen Ann Keough, J., concur.

**KEY WORDS: Law-of-the-case doctrine; reviewing court; subsequent proceedings.**

***The defendant-appellant's appeal is without merit under the law-of-the-case doctrine where his sole assignment of error was argued and decided in a previous appeal.***

**111552** COMMON PLEAS COURT A Criminal C.P.  
STATE OF OHIO v MATTHEW W. LETNER

Affirmed.

Anita Laster Mays, A.J., Eileen A. Gallagher, J., and Mary J. Boyle, J., concur.

**KEY WORDS: R.C. 2907.22; promoting prostitution; prison attire during trial; manifest weight of the evidence.**

***The record does not support that appellant was compelled to wear prison attire during trial or that he was prejudiced thereby. Appellant's conviction for promoting prostitution was not against the manifest weight of the evidence.***

## CASE DECISION LIST

**111553** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
FIDELITY BANK, N.A. v  
UNKNOWN HEIRS AT LAW, LEGATEES, DEVISEES OF KENNETH F. BOWYER, ET AL.

Affirmed.

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

**KEY WORDS:** *Foreclosure; motion for reimbursement of advances; confirmation decree; abuse of discretion.*

*Trial court did not abuse its discretion in denying appellant-bank's untimely motion for reimbursement of advances because the motion was filed after the trial court entered a decree confirming the sale of the foreclosed property, even though such motions must be filed before the decree of confirmation to allow (1) the court to examine the accuracy of the fees prior to confirming the sale and (2) the mortgagor to dispute the fees in the confirmation proceedings and on appeal from the confirmation decree.*

**111632** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
ED SNYDER, JR. v NORTHCOAST RESEARCH HOLDINGS, LLC

Affirmed.

Anita Laster Mays, A.J., and Michael John Ryan, J., concur; Michelle J. Sheehan, J., dissents (with separate opinion).

**KEY WORDS:** *Civ.R. 56; summary judgment; contract.*

*The trial court's grant of summary judgment in favor of appellee was not in error where the contract language was not ambiguous and supported the position of appellee.*

**111733** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
PATRICE LIVELY v JOHN REULBACH

**111884** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
PATRICE LIVELY v JOHN REULBACH

Reversed and remanded.

Mary J. Boyle, J., Anita Laster Mays, A.J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Dismissal; without prejudice; with prejudice; abuse of discretion; notice; final, appealable order.*

## CASE DECISION LIST

(Case 111884 continued)

**Judgment reversed and remanded. The trial court abused its discretion when it dismissed Lively's complaint. The trial court's dismissal without prejudice, in the instant case, effectively served as a dismissal with prejudice. Furthermore, there is nothing in the record upon which to conclude that Lively received notice of the trial court's intent to dismiss her complaint and that Lively's conduct or her counsel's conduct warranted a dismissal of the complaint.**

**111822** JUVENILE COURT DIVISION F Civil C.P.-Juv, Dom, Probate  
IN RE JANE DOE

Reversed and remanded.

Mary Eileen Kilbane, J., Anita Laster Mays, A.J., and Frank Daniel Celebrezze, III, J., concur.

**KEY WORDS: Allocation for parental rights and responsibilities; Civ.R. 12(B)(6); notice; opportunity to respond; failure to state a claim upon which relief can be granted.**

**The court erred when it sua sponte dismissed appellant's complaint for allocation of parental rights and responsibilities without providing notice of the court's intention to dismiss and an opportunity to respond.**

**111824** JUVENILE COURT DIVISION F Civil C.P.-Juv, Dom, Probate  
IN RE K.J.

Affirmed.

Michael John Ryan, J., Frank Daniel Celebrezze, III, P.J., and Michelle J. Sheehan, J., concur.

**KEY WORDS: Default judgment; motion to vacate; certified mail returned unclaimed; service by ordinary mail.**

**A trial court cannot render judgment against a defendant over whom it has no personal jurisdiction. A court does not acquire personal jurisdiction over a defendant unless and until the defendant is properly served with the complaint and summons or the defendant makes an appearance in the case.**

**If service sent through certified mail is returned marked "unclaimed," the civil rules allow a serving party to use ordinary mail service. When ordinary mail is not returned marked "failure of delivery," service is deemed complete.**

**Where the plaintiff follows the civil rules governing service of process, courts presume that service is proper unless the defendant rebuts this presumption with sufficient evidence of**

(Case 111824 continued)

**nonservice. To rebut the presumption of proper service, the movant must produce evidentiary-quality information demonstrating that he or she did not receive service. If the movant's motion to vacate contains allegations of operative facts that would warrant relief, the trial court should grant a hearing on the motion.**

**Appellant did not submit evidentiary-quality information to corroborate his contention that he was not served. Although he stated that he was "willing to attest" that he had not received service, he failed to submit to an affidavit averring to that. Further, the documentation appellant did submit was not evidentiary quality.**

**The trial court did not abuse its discretion in denying appellant's motion to vacate without holding a hearing.**

<b>111842</b>	COMMON PLEAS COURT	A	Criminal C.P.
STATE OF OHIO v VICTOR L. SANTANA			

Affirmed.

Eileen T. Gallagher, J., Anita Laster Mays, A.J., and Michelle J. Sheehan, J., concur.

**KEY WORDS: Reagan Tokes Law; felony; sentence; constitutional challenge; separation of powers; jury trial; due process; indefinite sentence.**

**Defendant-appellant failed to demonstrate plain error in raising constitutional challenge to Reagan Tokes Law where he failed to raise any new arguments not previously held by this court to be constitutional.**

<b>111926</b>	BEDFORD MUNI.	G	Civil Muni. & City
K&D MANAGEMENT, LLC v JAMES THOMAS			

Affirmed.

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

**KEY WORDS: Motion to vacate; void judgment; Civ.R. 4.1; service; certified mail; rebuttable presumption.**

**Trial court did not abuse its discretion in denying appellant's motion to vacate void judgment because the evidence in the record demonstrates that the appellee presumptively complied with Civ.R. 4.1 by serving appellant at an address where appellant was reasonably anticipated to be, and the certified mail was signed for by a legal occupant of the premises and returned. Appellant failed to rebut the presumption with sufficient evidence that service was not perfected.**

## CASE DECISION LIST

**111938** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
MANISHA G. PATEL, ET AL. v ATULKUMAR G. PATEL, ET AL.

Affirmed.

Anita Laster Mays, A.J., Eileen A. Gallagher, J., and Mary J. Boyle, J., concur.

**KEY WORDS:** *Civ.R. 56; summary judgment; res judicata; App.R. 11.1; Loc.App.R. 11.1; accelerated docket; App.R. 11.1(E); brief and conclusionary decision.*

**The trial court's grant of summary judgment on the ground of res judicata is affirmed.**

**112023** COMMON PLEAS COURT E Civil C.P.-Not Juv,Dom Or Prob  
SHAWN WEILER v THE OSBORN ENGINEERING COMPANY, ET AL.

Reversed and remanded.

Eileen T. Gallagher, J., and Eileen A. Gallagher, P.J., concur; Mary Eileen Kilbane, J., concurs (with separate opinion).

**KEY WORDS:** *Judgment; pleadings; amend; complaint; timely; moot; procedure; tortious interference.*

**The trial court erred by granting the defendant's motion for judgment on the pleadings because the motion was filed before the complaint was amended pursuant to Civ.R. 15(A).**

**112112** JUVENILE COURT DIVISION F Civil C.P.-Juv, Dom, Probate  
IN RE: C.B., ET AL.

Reversed and remanded.

Eileen A. Gallagher, P.J., and Mary J. Boyle, J., concur; Michelle J. Sheehan, J., dissents (with separate opinion).

**KEY WORDS:** *Permanent custody; termination of parental rights; motion for continuance; abuse of discretion.*

**Trial court abused its discretion in denying mother's motion for continuance of permanent custody hearing.**