

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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**March 28, 2019**

**105953** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
CHARLES HUNT, ET AL. v CITY OF EAST CLEVELAND, ET AL.

Affirmed.

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

**KEY WORDS:** *Collision involving patrol vehicle; emergency call; political subdivision liability; R.C. 2744.02(B); individual liability; R.C. 2744.03(A)(6); wanton misconduct; willful misconduct; reckless conduct; R.C. 2315.21(B)(1); bifurcation; punitive damages; plain error; voir dire; prospective juror; exclusion of expert testimony; blood alcohol serum test results; impairment; Evid.R. 403(A); Evid.R. 702; evidence of prior convictions; witness impeachment; Evid. R. 609; juror misconduct; mistrial; providing tissues to crying witnesses; R.C. 2744.05(B)(1); setoff for insurance benefits; motion for new trial; Civ.R. 59(A)(6); manifest weight of the evidence.*

*Trial court did not err in failing to bifurcate punitive and compensatory damages issues where appellants did not file a motion requesting bifurcation of punitive and compensatory damages issues before trial. Trial court did not advocate for an eight-figure judgment when questioning potential jurors during voir dire and did not abuse its discretion in excusing a prospective juror for cause after the juror indicated that he did not think he could award plaintiffs an eight-figure judgment even if the evidence warranted it. Trial court did not abuse its discretion in precluding appellants' expert from testifying that, based on the results of a blood serum alcohol test, plaintiff driver was impaired and was unable to operate a vehicle safely at the time of the accident. Trial court did not abuse its discretion in refusing to admit hard copies of prior convictions for felonious assault and a drug-related charge where witness freely admitted that he had pled guilty to the charges. Trial court did not abuse its discretion in failing to grant a mistrial after a juror provided tissues to two crying witnesses. Appellants were not entitled to introduce evidence of any insurance offsets to which they might be entitled under R.C. 2744.05(B)(1) through the testimony of a witness during trial. Jury's verdict was not against the manifest weight of the evidence. There was substantial competent, credible evidence in the record upon which the jury could have reasonably found that police officer acted wantonly, willfully and recklessly in causing accident.*

**106377** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v KEVIN MCKINNEY

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Affirmed in part; reversed in part; and remanded.

Kathleen Ann Keough, J., Sean C. Gallagher, P.J., and Peter M. Handwork, J.,\* concur.

\*(Sitting by assignment: Judge Peter M. Handwork, Retired, of the Sixth District Court of Appeals.)

**KEY WORDS:** *Obstructing justice; R.C. 2921.32(A)(6); Crim.R. 31(A); jury unanimity; alternative means; multiple acts; maximum sentences; consecutive sentences; R.C. 2929.14(C)(4).*

*Defendant's conviction for obstructing justice affirmed. He was not deprived of jury unanimity under Crim.R. 31(A) because the case involved alternative means rather than multiple acts. The case was an alternative means case because the indictment charging the criminal offense of obstructing justice alleged one single conceptual grouping; thus jury, therefore, was not required to agree on the brute underlying facts because each set of facts would satisfy the elements of obstructing justice. The imposition of a maximum sentence for each offense was not contrary to law, but the trial court's imposition of consecutive sentences was contrary to law because the trial court did not consider the relevant statutory language.*

<b>106706</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v CHRISTOPHER WILLINGHAM			

<b>107033</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v CHRISTOPHER WILLINGHAM			

Affirmed.

Mary Eileen Kilbane, A.J., Mary J. Boyle, J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *Motion to dismiss for preindictment delay*

*In reviewing a trial court's decision on a motion to dismiss for preindictment delay, this court applies a de novo standard of review to the legal issues, but we afford great deference to the findings of fact made by the trial judge.*

*The statute of limitations for a criminal offense is the defendant's primary protection against overly stale criminal charges. However, the Due Process Clause of the Fifth Amendment provides additional protection in cases where the preindictment delay was unjustifiable and caused actual prejudice.*

*The Ohio Supreme Court established a burden-shifting framework for analyzing a due process claim based on preindictment delay. Under this framework, the defendant bears the initial burden of presenting evidence of actual prejudice. Once a defendant presents evidence of actual prejudice, the burden shifts to the state to produce evidence of a justifiable reason for the delay. Therefore, if the defendant fails to establish actual prejudice, the court is not required to consider the reasons for the delay.*

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A court must ‘consider the evidence as it exists when the indictment is filed and the prejudice the defendant will suffer at trial due to the delay. A claim of actual prejudice should be scrutinized “vis-à-vis the particular evidence that was lost or unavailable as a result of the delay” and “the relevance of the lost evidence and its purported effect on the defense.”

After independently considering the evidence as it existed when this indictment was filed, we find that Willingham has been prejudiced by the 17-year delay.

It is clear from the record that Willingham could have been identified as early as 2004, if the rape kit had been tested. Whether through negligence or error in judgment, the police ceased to actively investigate the case, which is not a justifiable reason for delay.

<b>106769</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ERIC L. WOCHLE			

Modified and remanded.

PER CURIAM.

**KEY WORDS:** *Ethnic intimidation; aggravated menacing; R.C. 2903.21; insufficient evidence.*

*Judgment modified and remanded. Insufficient evidence supported defendant’s ethnic intimidation conviction where the record did not demonstrate that the defendant intentionally and specifically threatened the victim with a gun because of his race. Rather, the threats were prompted by their dispute over where the car was parked. There is sufficient evidence in the record, however, that the defendant knowingly caused the victim to believe that he would cause serious physical harm to him. Therefore, the defendant’s conviction for ethnic intimidation is modified to aggravated menacing and remanded for sentencing.*

<b>107105</b>	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
TODD MANVILLE v KIRSTEN A. HAZEN			

Affirmed.

Larry A. Jones, Sr., P.J., Kathleen Ann Keough, J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *In forma pauperis motion; abuse of discretion; R.C. 2323.31 — court filing fees; Civ.R. 55 — motion for default judgment; Civ.R. 12(A)(1) — service of answer; Civ.R. 33(A)(2) — discovery requests; Civ.R. 56 — summary judgment; res judicata.*

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(Case 107105 continued)

**Appellant was shown to have filed numerous civil cases, motions, and notices in prior cases as well as in this current case. It was not an abuse of discretion where the trial court denied appellant's motion to proceed in forma pauperis.**

**Where the trial court granted leave to appellee to file her answer outside of the prescribed 28 days, denial of appellant's motion for default judgment was proper.**

**Appellant failed to show that he was prejudiced where he was not transported to attend a scheduled final pretrial. The trial court granted appellee summary judgment prior to the scheduled final pretrial therefore no final pretrial was held.**

**Appellant's motions for discovery filed prior to commencement of the action due to failure of service were properly denied; there was no prejudice to appellant on his subsequent motions for discovery where summary judgment was granted on res judicata.**

**Appellant was considered a creditor in appellee's bankruptcy case; appellant's claims should have been presented in appellee's bankruptcy proceedings. Appellant's claims are therefore barred by the doctrine of res judicata, and the trial court did not err in granting appellee's motion for summary judgment.**

<b>107165</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v LOUIS DRISCOLL			

Affirmed.

Eileen T. Gallagher, P.J., Patricia Ann Blackmon, J., and Michelle J. Sheehan, J., concur.

**KEY WORDS: Guilty; plea; constitutional; waive; Fourth Amendment; search; seizure; admission; Crim.R. 11.**

***A voluntary, knowing, and intelligent guilty plea waives any alleged constitutional violations unrelated to the entry of the guilty plea and nonjurisdictional defects in the proceedings.***

<b>107186</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ALBERT TOWNSEND			

Affirmed in part; reversed in part and remanded.

Larry A. Jones, Sr., J., Sean C. Gallagher, P.J., and Kathleen Ann Keough, J., concur.

**KEY WORDS: Crim.R. 44 — right to self-representation; bias; Evid.R. 611 — trial court's discretion to set procedure; compulsory process; reversible prejudice; manifest weight; jury instruction — complicity; R.C. 2971.01(h)(1) — sexually violent predator; merger**

(Case 107186 continued)

**of counts.**

The trial court engaged in extensive dialogue with appellant on trial procedures, questioned appellant on his understanding of those procedures, informed appellant that he would be held to the same standards as that of an attorney, referred appellant to a psychiatric evaluation and accepted appellant's timely written waiver. Appellant's request to represent himself was clearly and knowingly made. The trial court did not err in granting appellant's request to represent himself.

Representing himself, a portion of appellant's questions were either inappropriate or inadmissible and properly objected to; the trial court did not show bias against appellant.

The trial court established the procedure that standby counsel would assist appellant. It was not error, for security reasons, that appellant was not allowed at sidebar, rather standby counsel communicated appellant's wishes to the trial court at sidebar.

Appellant suffered no reversible prejudice where appellant failed to properly serve proposed witnesses with a subpoena.

Appellant failed to provide any authority showing that a victim is required to testify in a rape case; the trier of fact can determine guilt based on circumstantial and direct evidence and the credibility of other witnesses.

Sufficient evidence was shown that a second offender was involved with the sexual assault of the victim and that appellant worked in concert with the other offender. The trial court's jury instruction on complicity was proper.

Appellant's offenses occurred prior to the amendment of the statute and it was error to classify appellant a sexually violent predator based on the amended statute.

Appellant's offenses involved different types of sexual activity and the trial court properly ruled that the offenses were not allied offenses.

<b>107264</b>	<b>COMMON PLEAS COURT</b>	<b>E</b>	<b>CIVIL C.P.-NOT JUV,DOM OR PRO</b>
FITZ SIMON, INC. v JHG, INC., ET AL.			

Affirmed.

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

**KEY WORDS:** *Civ.R. 56, summary judgment, breach of contract, Business Opportunity Plan Act, R.C. 1334.11.*

*Appellee was entitled to summary judgment as a matter of law on its claims for breach of a promissory note and guaranty. Appellee*

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established a prima facie case of breach of contract shifting the burden to appellants to demonstrate the existence of genuine issues of material fact. Appellants defended solely on the basis of R.C. 1334.11 that allows a purchaser under an agreement covered by the Business Opportunity Plan Act, R.C. 1334, to assert enforcement defenses against a holder in due course. Appellants failed to support their opposition with an affidavit or other evidence.

<b>107277</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v MICHAEL D. JONES			

Affirmed and remanded.

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

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

*The defendant's assignment of error is moot to the extent that it challenges the consecutive nature of his sentence because he completed his sentence during the pendency of the appeal. The trial court inadvertently failed to incorporate its statutory findings supporting consecutive sentences in its journal entry. Case is remanded for trial court to issue a nunc pro tunc sentencing entry incorporating the statutory findings and correcting the clerical errors concerning the defendant's felony conviction.*

<b>107323</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ANGELO REYES			

Affirmed.

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

**KEY WORDS:** *Community-based correctional facility; probation violator; R.C. 2929.15; State v. Paige.*

*The trial court's sentence sending the defendant to prison for violating the terms of his community control sanctions is affirmed. Defendant's argument that the trial court's sentence was improper because the trial court sentenced him to consecutive terms of prison and time in a community-based correctional facility ("CBCF") had no merit. Rather, the trial court originally imposed community control sanctions, which included six months in a CBCF. When the defendant was released from the CBCF, he had six months of community control sanctions remaining from his sentence. The defendant violated the terms of his community control sanctions during this six-month period. The trial court found him to be a violator and sentenced him to prison for the*

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**violation. The trial court's sentence did not violate State v. Paige, 153 Ohio St.3d 214, 2018-Ohio-813, 103 N.E.3d 800.**

<b>107879</b>	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v JOE HILL, III			

Dismissed.

Anita Laster Mays, J., Patricia Ann Blackmon, P.J., and Raymond C. Headen, J., concur.

**KEY WORDS: Anders brief, Crim.R. 11, sentence contrary to law.**

***The potential assignments of error in the Anders brief relating to the appellant's guilty plea and sentencing have no merit because the trial court fully complied with Crim.R. 11, and the appellant's plea was made knowingly, intelligently, and voluntarily. In addition, the trial court did not err by sentencing the appellant to 36 months imprisonment because the sentence was not contrary to law.***