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May 21, 2020

107027 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JESUS GARCIA

Reversed and remanded.

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

KEY WORDS: *App.R. 9, failure to file a complete record, substantial responsibility, App.R. 9(B)(4), appellate record, sufficiency and weight of evidence.*

Appellant appeals his convictions for several criminal charges. The trial transcript notation provides that all trial exhibits that were not contained in the record are in the custody of the state. After multiple informal requests and a sua sponte order, the state provided a portion of the missing trial exhibits accompanied by a notice of submission. The state concedes in the notice that it has exhausted all efforts to secure the missing exhibits and states that the exhibits are required to address the assignments of error, yet maintains that it is appellant's duty to provide the complete record. Pursuant to State v. Jones, 71 Ohio St.3d 293, 643 N.E.2d 547 (1994), a case may be remanded to the trial court for a hearing to determine whether the defendant is substantially responsible for the missing evidence and, if not, to grant a new trial if the record cannot be settled pursuant to App.R. 9. See also App.R. 9(B)(4) that requires that the appellant include a transcript and all relevant evidence when challenging the sufficiency or weight of the evidence.

This case is remanded for a hearing pursuant to Jones.

107758 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
STATE OF OHIO v CHARLES MAXWELL

Affirmed.

Kathleen Ann Keough, J., Eileen T. Gallagher, A.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Death penalty; postconviction; discovery; findings of fact; conclusions of law; verbatim; sufficient operative facts; res judicata.*

The trial court did not abuse its discretion by denying defendant's request for discovery during postconviction because defendant did not set forth sufficient operative facts justifying the need for additional discovery. The trial court did not violate defendant's right to due process by adopting verbatim the state's second proposed findings of fact and conclusion of law. Defendant had the chance to submit his own proposal; he failed to take the

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opportunity to do so. The trial court did not abuse its discretion by denying defendant's petition for postconviction relief without an evidentiary hearing because the grounds for relief were either barred by res judicata or defendant failed to present sufficient operative facts to establish substantive grounds for relief.

108166	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v DA'MONTAIS BANKS, JR.			

Affirmed.

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

KEY WORDS: *Sufficiency of the evidence; manifest weight of the evidence; expert testimony; harmless error.*

There was sufficient evidence for aggravated murder conviction where the state presented substantial evidence tying defendant to drive-by shooting, including his DNA found on the stolen car used in drive-by and firearm found inside of car, cell site location information that was consistent with defendant being involved in drive-by and defendant being found with fresh and untreated wound that he attempted to hide from police. Aggravated murder conviction is not against the manifest weight of the evidence where there is no conflict in the evidence and no evidence weighing heavily against conviction. Where the defendant could not show prejudice resulted from admission of challenged portion of expert testimony, even assuming that the trial court thereby erred, such error would be harmless.

108212	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
SHANNON THOMAS v HYUNDAI OF BEDFORD, ET AL.			

Affirmed.

Kathleen Ann Keough, J., and Eileen A. Gallagher, J., concur; Mary Eileen Kilbane, P.J., dissents with separate opinion.

KEY WORDS: *Arbitration agreement; race discrimination; retaliation; motion to stay litigation pending arbitration; procedurally unconscionable.*

Trial court did not abuse its discretion in granting employer's motion to stay litigation pending arbitration of plaintiff's race discrimination and retaliation claims where plaintiff failed to demonstrate that his claims were not subject to arbitration and that the agreement was procedurally unconscionable.

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108527	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v ALEX MENDEZ			

Affirmed.

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

KEY WORDS: *Ineffective assistance of counsel; manifest weight of the evidence; insufficient evidence; burglary; intimidation; criminal damaging; telecommunications harassment.*

Convictions for burglary, intimidation, telecommunications harassment, and criminal damaging were affirmed. The burglary and intimidation convictions were not against the manifest weight of the evidence and sufficient evidence supported the intimidation and criminal damaging convictions.

Defendant-appellant did not receive ineffective assistance of counsel where counsel's remark in opening statement that he did not like defendant was part of a broader tactical trial strategy and did not invite the jury to speculate that defendant had admitted guilt off the record. Defendant-appellant did not receive ineffective assistance of counsel where counsel's cross-examination of the victim was within the scope of the direct-examination and did not needlessly introduce damaging testimony.

108537	JUVENILE COURT DIVISION	F	CIVIL C.P.-JUV, DOM, PROBATE
IN RE R.G.			

Reversed and remanded.

Patricia Ann Blackmon, P.J., and Raymond C. Headen, J., concur; Kathleen Ann Keough, J., dissents with separate opinion.

KEY WORDS: *R.C. 2151.414; parental rights; dependent child; permanent custody; reunification efforts.*

The trial court erred in terminating mother's parental rights where son was deemed a dependent child due to medical issues, was placed in foster care outside of the county, mother had visitation difficulties, and mother showed improvement in ability to care for him while son showed some improvement in health.

108687	COMMON PLEAS COURT	A	CRIMINAL C.P.
STATE OF OHIO v SHARON COLLIER			

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Affirmed in part, reversed in part, and remanded.

Eileen T. Gallagher, A.J., Patricia Ann Blackmon, J., and Raymond C. Headen, J., concur.

KEY WORDS: *Consecutive sentence; findings; hearing; plea; guilty; breach; contract; express; plain error; prejudice; ineffective; deficient; allied offense; merger; recommendation.*

Defendant's convictions are affirmed. The state did not breach a term of the negotiated plea agreement by recommending a prison term during the sentencing hearing. The trial court did not commit plain error by failing to merge the money laundering and theft offenses for the purposes of sentencing. However, the trial court failed to make the necessary findings for imposing consecutive sentences.

108762	PARMA MUNI.	C	CRIMINAL MUNI. & CITY
CITY OF PARMA v IHOR LYBA			

Affirmed.

Sean C. Gallagher, P.J., Michelle J. Sheehan, J., and Raymond C. Headen, J., concur.

KEY WORDS: *App.R. 16; probable cause; Miranda; harmless error.*

The appellant's reliance on case authority regarding what constitutes reasonable suspicion to conduct an investigatory stop and whether statements of a defendant are admissible at trial are inapplicable to the facts as presented in this appeal, and the minor discrepancy in the trial court's discussion of the facts was irrelevant because there was no dispute the defendant drove a vehicle while intoxicated through a crowded public parking lot.

108879	COMMON PLEAS COURT	E	CIVIL C.P.-NOT JUV,DOM OR PRO
CITY OF BROOK PARK v FRATERNAL ORDER OF POLICE LODGE #15			

Affirmed.

Sean C. Gallagher, P.J., Michelle J. Sheehan, J., and Raymond C. Headen, J., concur.

KEY WORDS: *R.C. 2711.09; R.C. 2711.10(D); arbitration award; authority; exceeded; powers; rationally derived; collective bargaining agreement; union; retirees; health insurance; benefits; grievance; arbitrability.*

Affirmed the trial court's decision to vacate an arbitration award pursuant to R.C. 2711.10(D). The arbitrator exceeded his power by issuing an award that was not rationally derived from the terms of the collective bargaining agreement when the union was not designated as a representative of retirees under the collective

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bargaining agreement, there were no provisions in the agreement that concerned retirees' health-insurance reimbursement benefits, and the agreement limited grievances to disputes concerning the interpretation or application of any provision of the collective bargaining agreement.

108901 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
SEARCH MANAGEMENT LLC v JUDY FILLINGER

Affirmed.

Larry A. Jones, Sr., J., Eileen T. Gallagher, A.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Promissory note; default judgment; writ of possession; absolute ownership; ejectment.*

Appellant filed an action in ejectment, not a foreclosure action. The trial court did not err where it issued a writ of possession rather than granting appellant absolute ownership.

108954 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v SHANIKA JACKSON

Reversed and remanded.

Larry A. Jones, Sr., P.J., Kathleen Ann Keough, J., and Raymond C. Headen, J., concur.

KEY WORDS: *Felonious assault; law-of-the-case doctrine; sufficiency.*

Law-of-the-case doctrine applies in this case where the parties involved are the same; the trial court proceeding is the same; the evidence submitted is the same; and the reviewing court for appellant and codefendant is the same. Thus, there is insufficient evidence to sustain a conviction of felonious assault.

109162 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v TYSON DIXON

Affirmed.

Larry A. Jones, Sr., J., Anita Laster Mays, P.J., and Eileen A. Gallagher, J., concur.

KEY WORDS: *Void sentence; R.C. 2929.03(A)/parole eligibility; evidentiary hearing.*

Under the guide of R.C. 2929.03(A), appellant's sentence is not contrary to law where the judgment entry included parole eligibility.

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There was no error where the trial court did not hold an evidentiary hearing on appellant's motion to vacate void sentence. Appellant failed to establish any sufficient operative facts to show substantive grounds for relief.

109356	JUVENILE COURT DIVISION	F	CIVIL C.P.-JUV, DOM, PROBATE
IN RE S.S., ET AL.			

Affirmed.

Mary Eileen Kilbane, J., Anita Laster Mays, P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Permanent custody; best interests; abuse of discretion; competent and credible evidence; R.C. 2151.414(E); R.C. 2151.414(D)(1); R.C. 2151.414(B)(1)(a).

Affirming the decision of the trial court that permanent custody to Cuyahoga County Department of Children and Family Services ("CCDCFS") was in the best interests of the children. There was no abuse of discretion because the court found 1) that the children should not be placed with their mother because the mother did not remedy the conditions causing the children to be removed initially and 2) because the mother did not show sufficient improvement or a clear desire to improve over a two-year period, it was in the best interests of the children for permanent custody to go to CCDCFS.