

## CASE DECISION LIST

Court of Appeals, Eighth Appellate District

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November 21, 2019

**107350** BOARD OF TAX APPEALS H ADMIN APPEAL  
ROONEY PROPERTIES, LLC, ET AL. v CUYAHOGA COUNTY BOARD OF REVISION, ET AL.

Affirmed.

Patricia Ann Blackmon, J., Mary J. Boyle, P.J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *App.R. 9(B); presumption of regularity; Board of Revision; Board of Tax Appeals.*

*Where the property owner challenging fiscal officer's valuation of parcels did not present a complete record to the Board of Tax Appeals and did not present the transcripts of the Board of Revisions audios to the court of appeals, the court would apply presumption of regularity. The record as constituted does not show that the Board of Tax Appeals' decision affirming the Board Of Revisions values is unlawful or unreasonable.*

**107707** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: S.A., III

Affirmed.

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

**KEY WORDS:** *Juv.R.22; motion to suppress; hearing; cold-stand identification; Neil v. Biggers; reliable; totality of the circumstances; ineffective assistance; sufficiency and manifest weight of the evidence.*

*The alleged delinquent was not denied a meaningful opportunity to contest the cold-stand identification when the trial court heard the evidence for the suppression issues and the adjudication simultaneously. Where the matter was presented to the bench, the same testimony was necessary for the suppression issues as well as the adjudication, the trial court permitted the parties to separately address the suppression issues after presentation of the evidence, and the court made explicit findings concerning the cold-stand identification prior to the adjudication, the alleged delinquent was not prejudiced by the trial court's failure to hold a separate suppression hearing. Under the totality of the circumstances, and considering the Biggers reliability factors, the victim's cold-stand identification was reliable, thus overcoming any suggestive nature of the identification procedure. Because the alleged delinquent was not prejudiced by the trial court's failure to hold separate hearings, defense counsel's consent to the court holding one hearing on the suppression and the adjudication does not constitute ineffective assistance of counsel. The evidence supports the adjudication of delinquency.*

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**108008** PROBATE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
ARTHUR P. DUECK, ET AL. v JOSEPH KERRIGAN, TRUSTEE, CLIFTON PARK TRUST, ET AL.

Affirmed.

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

**KEY WORDS:** *Res judicata, declaratory judgment, trust property, direct beneficiary, permissive rights.*

*This court determined in Dueck v. Clifton Club Co., 2017-Ohio-7161, 95 N.E.3d 1032 (8th Dist.), that: (1) the Clifton Park lot owners are direct beneficiaries of the Clifton Park Trust; (2) that the Clifton Club, a social club, by reason of the club's status as a lot owner, is a direct beneficiary of the Clifton Park Trust; (3) the members of the Clifton Club have a permissive right of access to the trust property beach that is derived from the Clifton Club's direct beneficiary status; and (4) access to the trust property beach is regulated by the Trustees pursuant to the Trust terms.*

*The trial court correctly determined that res judicata applies to appellants' claim that the Clifton Club members do not have a permissive right to access the trust property; that the trustees lack authority to regulate access to the beach; and that the use by the club members is a public use requiring unanimous consent of the Clifton Park lot owners.*

**108067** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v RONNELL L. GATES

Dismissed.

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

**KEY WORDS:** *Mootness; completed sentence.*

*Appeal dismissed as moot because the sentence appellant challenges had already been served.*

**108130** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV, DOM OR PRO  
BST OHIO CORPORATION, ET AL. v EVAN GARY WOLGANG, ET AL.

Reversed and remanded.

Mary J. Boyle, P.J., Kathleen Ann Keough, J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *R.C. 2711.09; R.C. 2711.13; arbitration award; confirmation of arbitration award; motion to vacate, modify, or*

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(Case 108130 continued)

**correct arbitration award.**

**Under R.C. 2711.13, a party has three months to move to vacate, modify, or correct an arbitration award. Thus, a trial court errs when it confirms an arbitration award prior to the three-month time limit when the party opposing confirmation appears and objects to confirmation and informs the trial court that it intends to file a timely motion to vacate, modify, or correct the arbitration award within the three-month time period. Thus, the trial court erred in this case when it confirmed the arbitration award just over a month after the arbitrator issued the final award and appellant appeared at a hearing and informed the trial court that it opposed confirmation and planned to move to vacate before the three-month time limit expired.**

**108147** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JAMES ABERCROMBIE, III

Affirmed.

Michelle J. Sheehan, J., Anita Laster Mays, P.J., and Larry A. Jones, Sr., J., concur.

**KEY WORDS: Motion to withdraw; guilty plea; abuse of discretion; Peterseim factors; scope of hearing.**

***The trial court did not abuse its discretion in denying the defendant-appellant's presentence motion to withdraw his guilty plea. The record demonstrates the court engaged in a full Crim.R. 11 colloquy, the defendant-appellant understood the rights he was waiving as well as the nature of the charges and possible penalties, he was represented by competent counsel during the plea, and the court gave the request the consideration it merited.***

**108151** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
THEODORE DUMAS, ET AL. v NORTH EAST AUTO CREDIT, LLC

**108388** COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO  
THEODORE DUMAS, ET AL. v NORTHEAST AUTO CREDIT LLC

Affirmed and remanded.

Sean C. Gallagher, J., Mary J. Boyle, P.J., and Larry A. Jones, Sr., J., concur.

**KEY WORDS: Arbitration defense; class action; motion to dismiss; motion to stay; R.C. 2711.02.**

***Until the class-certification stage, a defendant cannot waive its right to assert an arbitration defense against the putative class members or as a basis to demonstrate that, and because the putative class members are not parties to the action, the defendant cannot seek to***

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**stay the action pending arbitration of what is currently considered a nonjusticiable controversy between it and the putative class members.**

**108156** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v CARDELL D. HOUSTON

Affirmed.

Raymond C. Headen, J., and Kathleen Ann Keough, J., concur; Mary J. Boyle, P.J., concurs in judgment only.

**KEY WORDS:** *Postconviction relief; DNA evidence; R.C. 2953.21; ineffective assistance of counsel; sufficient operative facts.*

**The trial court's denial of Houston's petition for postconviction relief on the ground of ineffective assistance of counsel was proper where Houston failed to present sufficient operative facts demonstrating counsel's performance was deficient and there was a reasonable probability of a different outcome, but for that performance.**

**108179** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v JUVIS MONTGOMERY

Affirmed.

Sean C. Gallagher, P.J., Frank D. Celebrezze, Jr., J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *Guilty plea; felonious assault; appointed counsel; dissatisfaction; informed plea; motion to withdraw; hearing; manifest injustice; due process; recorded; Crim.R. 22; objection; R.C. 2947.23(A)(1); costs; discretion; waive; judicial factfinding; sentence.*

**Affirmed appellant's conviction and sentence. The record did not reflect that appellant's due process rights were violated and established that appellant made an informed plea with full understanding of the sentence that would be imposed. Trial court did not abuse its discretion in denying postsentence motion to withdraw guilty plea without a hearing, retained discretion to deny waiver of costs, and complied with sentencing requirements.**

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**108236** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: A.C.

Affirmed.

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

**KEY WORDS:** *Legal custody; continuance; due process; extension of temporary custody; manifest weight of the evidence; preponderance of the evidence; best interest of the child.*

*No abuse of discretion in denying Father's motion for continuance where claimed medical emergency was contrived and dilatory.*

*No abuse of discretion in denying Father's motion to extend temporary custody where Father made no effort to complete his case plan, there was no reason to believe that the child could be placed with Father within the next six months, and legal custody was in the child's best interest.*

*No abuse of discretion in denying Father's request to remove assigned case worker where there was no evidence of a genuine conflict.*

**108384** BEDFORD MUNI. G CIVIL MUNI. & CITY  
JEFFERSON CAPITAL SYSTEMS, LLC v CHARLOTTE GIBSON

Dismissed.

Frank D. Celebrezze, Jr., J., Sean C. Gallagher, P.J., and Eileen A. Gallagher, J., concur.

**KEY WORDS:** *Final appealable order; R.C. 2505.02; Voluntary dismissal; dismissal without prejudice; Civ.R. 41(A); sanctions; R.C. 2323.51.*

*The trial court's judgment dismissing the civil action without prejudice is not a final appealable order capable of invoking this court's jurisdiction. The trial court did not rule on the motion for sanctions that was timely filed by appellant. The trial court's judgment dismissing the case without prejudice did not divest the trial court of jurisdiction to rule on the motion for sanctions. Accordingly, appellant's motion for sanctions remains pending.*

**108464** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE J.D., ET AL.

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Affirmed.

Frank D. Celebrezze, Jr., P.J., Eileen A. Gallagher, J., and Michelle J. Sheehan, J., concur.

**KEY WORDS:** *Permanent custody; manifest weight; best interest; R.C. 2151.414.*

**The trial court's determination that permanent custody is in the children's best interest is supported by clear and convincing evidence in the record. Accordingly, the trial court's judgment granting permanent custody of the children to appellee and denying appellant's oral motion for legal custody to the children's paternal grandmother is affirmed.**

**108628** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE: L. K.

Affirmed.

Mary J. Boyle, P.J., Frank D. Celebrezze, Jr., J., and Kathleen Ann Keough, J., concur.

**KEY WORDS:** *Permanent custody; clear and convincing evidence; R.C. 2151.414.*

**The trial court's order awarding the agency permanent custody of the minor child was supported by clear and convincing evidence. There was clear and convincing evidence that the minor child could not be returned to the mother's custody within a reasonable time or should not be placed with mother and that it was in the minor child's best interests to be placed in the agency's permanent custody.**

**108645** DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE  
S.E.E. v S.V.E.

Affirmed.

Eileen T. Gallagher, P.J., Sean C. Gallagher, J., and Raymond C. Headen, J., concur.

**KEY WORDS:** *Civil protection order; manifest weight of the evidence; domestic violence; risk factors.*

**Domestic violence civil protection order affirmed where credible evidence demonstrated that wife had been a victim of domestic violence, that there was a likelihood of future domestic violence, and that wife needed the CPO for protection.**

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**108761** JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE  
IN RE L.M., ET AL.

Affirmed.

Sean C. Gallagher, J., Eileen T. Gallagher, P.J., and Larry A. Jones, Sr., J., concur.

**KEY WORDS:** *Permanent custody; R.C. 2151.414; abandoned; best interest; competent, credible evidence; continuance; failed to appear; extension; temporary custody; abuse of discretion; case plan; paternity.*

*Affirmed trial court's judgment that terminated parental rights and granted permanent custody of three children to the children services agency. At the time the children were placed in custody, they were living under horrific circumstances, neither parent had visited with the children or substantially complied with their case plans, and father had not established paternity. In the case of each child, the trial court found the "child is abandoned" and that it was in the best interest of the child to grant permanent custody of the child to the agency. Trial court's decision was supported by competent, credible evidence in the record. Trial court did not abuse its discretion in denying the requested continuance of father's trial counsel or in denying his motion for extension of temporary custody.*

**108947** COMMON PLEAS COURT A CRIMINAL C.P.  
STATE OF OHIO v KERRI REYES

Reversed and remanded.

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

**KEY WORDS:** *Allied offenses; merger; double jeopardy; void sentence; res judicata.*

*Trial court erred in denying defendant's motion to vacate sentence where defendant was improperly sentenced on multiple allied offenses of similar import. Defendant's allied offenses argument was not barred by res judicata even though she did not raise it on direct appeal because her sentence was void.*