

**THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CASE SUMMARIES
May 11, 2018**

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- Case Name: *Tackle Construction Group, LLC v. Pedtke Enterprises, Inc., dba Servepro of Northwest Dayton*
Case No: Montgomery App. No. 27813; T.C. No. 16-CVF-01782
Panel: Welbaum, Froelich, Hall
Author: Michael T. Hall
Summary: The trial court did not err by granting Appellee a set-off from the amount that it owes Appellant. The manifest weight of the evidence shows that Appellant wrongfully failed to complete construction work on a project, that this caused Appellee to lose the project, and that the loss of the project led to Appellee suffering monetary damages. The trial court also did not err by not awarding Appellant prejudgment interest. Appellant did not ask for prejudgment interest timely. Judgment affirmed.
- Case Name: *In The Matter Of: C.P., Jr.*
Case No: Clark App. No. 2017-CA-48; T.C. No. 2015-147
Panel: Froelich, Hall, Tucker
Author: Michael T. Hall
Summary: *Anders* appeal. No non-frivolous issues for appellate review. The record supports the trial court's award of permanent custody to Clark County Department of Job and Family Services. Judgment affirmed.
- Case Name: *State of Ohio v. Deontae Howard*
Case No: Montgomery App. No. 27198; T.C. No. 14-CR-2123
Panel: Welbaum, Donovan, Hall
Author: Jeffrey M. Welbaum
Summary: The juvenile court did not abuse its discretion in transferring Appellant's case to adult criminal court, as the juvenile court weighed the required statutory factors under R.C. 2152.12(D) and (E), and provided specific reasons for finding Appellant unamenable to care and rehabilitation in the juvenile justice system, all of which were

rationaly supported by the record. Affirmed. (Donovan, J., concurring.)

Case Name: *State of Ohio v. John F. Aicher*
Case No: Montgomery App. No. 27570; T.C. Nos. 16-TRC-6617 & 16-CRB-1842
Panel: Welbaum, Hall, Tucker
Author: Jeffrey M. Welbaum
Summary: The trial court did not err in overruling Appellant's motion to suppress evidence flowing from field sobriety tests and a breath sample. Contrary to Appellant's claim otherwise, the officer on duty had a reasonable, articulable suspicion that Appellant was driving under the influence of alcohol to justify performing the field sobriety tests. In addition, the State provided sufficient evidence that Aicher's breath sample was tested in substantial compliance with the Ohio Department of Health's regulations. Affirmed.

Case Name: *State of Ohio v. Tanner D. Hopkins*
Case No: Montgomery App. No. 27131; T.C. No. 15-CR-121
Panel: Welbaum, Froelich, Tucker
Author: Michael L. Tucker
Summary: Defendant-appellant, following a jury trial and merger determinations, was convicted and sentenced for murder (purposeful) and an attached repeat violent offender specification, felonious assault (serious harm) and an attached repeat violent offender specification, and having weapons under disability. The trial court did not abuse its discretion by admitting into evidence, under Evid.R. 404(B), Defendant-appellant's prior assault upon the felonious assault victim which occurred approximately six weeks prior to the events leading to Defendant-appellant's indictment. The trial court did not abuse its discretion by admitting statements made by the felonious assault victim as excited utterances. The trial court did not err by its failure to merge the murder and felonious assault counts because the murder involved the felonious assault victim's viable fetus. Thus, each count involved a separate victim. The record does not demonstrate ineffective assistance of counsel or prosecutorial misconduct. The weapons under disability conviction is supported by sufficient evidence. The trial court did not err by overruling Defendant-appellant's motion to suppress statements. The issue of the trial court's failure to conduct a community control sanctions revocation hearing in a separate case is not before the court. The trial court did not abuse its discretion by the admission of autopsy photographs. Defendant-appellant did not timely assert any challenge to the array of potential jurors. Finally, Defendant-appellant has not demonstrated cumulative error. Judgment affirmed.

Case Name: *State of Ohio v. Brian Swiadek*
Case No: Montgomery App. No. 27733; T.C. No. 17-CRB-3673
Panel: Welbaum, Donovan, Froelich
Author: Jeffrey E. Froelich
Summary: *Anders* appeal. After a bench trial, defendant was convicted of public indecency and sentenced to a suspended jail term, probation, and a \$50 fine. Upon our independent review of the record, no non-frivolous issues found. Judgment affirmed.

Case Name: *State of Ohio v. Korey Baker*
Case No: Greene App. No. 2017-CA-55; T.C. No. 03-CR-715
Panel: Donovan, Froelich, Tucker
Author: Jeffrey E. Froelich
Summary: Defendant was convicted in 2004 of attempted felony murder (Count I) and two counts of felonious assault (Counts II and IV); Counts I and II involved victim 1, and Count IV involved victim 2. After merging Count IV for sentencing, defendant was originally sentenced on Counts I and II, the attempted felony murder and felonious assault on victim 1. In 2017, upon motion by the defendant based on an Ohio Supreme Court case, the trial court vacated the conviction for Count I; the court then resentenced defendant on Counts II and IV, stating that its original sentence on Count II was a “scrivener’s error” and should have been on Count IV and that Count II had been merged with Count I.

The trial court did not violate double jeopardy when it sentenced defendant on Count IV. The trial court’s statement in the original judgment entry that defendant was acquitted of Count IV was a typographical error; the jury had found defendant guilty of Count IV and the trial court stated at the original sentencing that it was merging that count for sentencing as an allied offense of similar import.

The trial court’s imposition of sentence on Count II at the original sentencing was not a “scrivener’s error.” Although the trial court may have intended to sentence the defendant on Count IV (felonious assault on victim 2) and merge Count II (felonious assault on victim 1), the court orally imposed sentence on Count II and expressly stated that Count IV would be merged. Even if erroneous, that sentence was not challenged on direct appeal, was now final, and could not be changed upon resentencing. And, because the trial court apparently merged Count IV into Count II at the original sentencing hearing, the trial court lacked authority in 2017 to impose a sentence on Count IV upon vacating Count I.

Judgment reversed, and case remanded for an amended judgment entry consistent with this Opinion.