

**THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CASE SUMMARIES
JULY 2, 2010**

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- Case Name: *Fred A. Wagshul v. Shelley H. Wagshul*
Case No.: Montgomery App. No. 23564
Panel: Fain, Grady, Froelich
Author: Thomas J. Grady
Summary: Domestic relations court did not abuse its discretion when it imputed an additional income to a spousal support obligor from rent of a building he owns, including the net income he realizes as well as the depreciation deduction he takes on the rent the building produces; court did not fail to impute an income to the obligee; court's rejection of obligor's defense of impossibility, on a charge of contempt for failing to pay ordered support, is against the manifest weight of the evidence. Reversed, in part, and remanded.
- Case Name: *State of Ohio v. Undean Rhines*
Case No.: Montgomery App. No. 23486
Panel: Donovan, Fain, Kline
Author: Hon. Roger L. Kline
Summary: Defendant's convictions for aggravated menacing, criminal trespass, menacing, and disorderly conduct were supported by sufficient evidence and were not against the manifest weight of the evidence. Affirmed.
- Case Name: *State of Ohio v. Michael V. Gullette*
Case No.: Montgomery App. No. 23567
Panel: Fain, Grady, Froelich
Author: Per Curiam
Summary: Order dismissing indictment reversed pursuant to *State v. Williams*, Slip Opinion, 2010-Ohio-2453; case remanded for further proceedings.

Case Name: *Teresa Robinson v. C & L Associates, LLC*
Case No.: Montgomery App. No. 23672
Panel: Donovan, Brogan, Grady
Author: Thomas J. Grady
Summary: A landlord that breaches a duty imposed by the Landlords and Tenants Act to repair a defective condition in the leased premises is liable to the tenant on a claim for personal injuries that occur after the landlord's sale of the property, to the extent that the personal injuries proximately result from the landlord's prior breach. Summary judgment reversed and cause remanded. (Donovan, P.J., concurring in judgment only).

Case Name: *In Re: F.C.*
Case No.: Montgomery App. No. 23803
Panel: Brogan, Grady, Froelich
Author: Thomas J. Grady
Summary: When determining a motion by a children's services agency for permanent custody of a minor child, a finding that the child has been in the temporary custody of one or more of such agencies for twelve or more months out of a consecutive twenty-two month period avoids any need to also determine whether the child cannot or should not be placed with the parents within a reasonable time; evidence that an award of custody to the agency is in the child's best interest was clear and convincing. Affirmed.

Case Name: *State of Ohio v. Terry L. Clemmons*
Case No.: Montgomery App. No. 23237
Panel: Brogan, Grady, Froelich
Author: Thomas J. Grady
Summary: Claim of ineffective assistance of counsel arising from counsel's failure to argue that Defendant lacked the capacity to knowingly, intelligently, and voluntarily waive his *Miranda* rights is not demonstrated; hearsay evidence was admissible under the excited utterance exception; and, Defendant's conviction for felonious assault is not against the manifest weight of the evidence. Affirmed.

Case Name: *State of Ohio v. James R. Marriott*
Case No.: Clark App. No. 2008 CA 48
Panel: Brogan, Fain, Froelich
Author: Jeffrey E. Froelich
Summary: Trial court erred in failing to merge the two counts of aggravated burglary under R.C. 2911.11(A)(1). The defendant's infliction or threat of physical harm elevated defendant's conduct from burglary under R.C. 2911.12 to aggravated burglary under R.C. 2911.11(A)(1), but it did not convert the aggravated burglary into an assault statute with a separate animus for each person assaulted during the single entry in the structure. Defendant's two convictions for aggravated burglary should have been merged by the trial court at sentencing. Due to an error in the judgment entry regarding the length of post-release control, the matter must be remanded for resentencing in accordance with R.C. 2929.191. One count of aggravated burglary will be vacated and the matter will be remanded for resentencing under R.C. 2929.191; in all other respects, the judgment is affirmed. (Fain, J., dissenting).

Case Name: *State of Ohio v. Kevin Crew*
Case No.: Clark App. No. 2009 CA 45
Panel: Donovan, Fain, Kline
Author: Mary E. Donovan
Summary: Appellant's conviction for promoting prostitution is supported by sufficient evidence. The trial court did not abuse its discretion in admitting evidence of prior bad acts. Judgment affirmed.

Case Name: *State of Ohio v. Keith A. Ousley*
Case No.: Montgomery App. Nos. 23496, 23506
Panel: Donovan, Fain, Kline
Author: Mary E. Donovan
Summary: Appellant's conviction for trafficking in drugs is not against the manifest weight of the evidence and is supported by sufficient evidence. Judgment affirmed.

Case Name: *State of Ohio v. Edward L. Robinson*
Case No.: Montgomery App. No. 23796
Panel: Donovan, Fain, Grady
Author: Mary E. Donovan
Summary: Anders Brief. Affirmed. (Grady, J., concurring in judgment only).

Case Name: *State of Ohio v. Scott A. Lawson*
Case No: Montgomery App. No. 23456
Panel: Donovan, Fain, Kline
Author: Mike Fain
Summary: Trial court did not abuse its discretion in permitting State to elicit fact that defendant had been convicted of multiple felonies during its cross-examination of defendant, who testified in his own defense.

In Aggravated Burglary trial, trial court erred in overruling request that jury be instructed concerning lesser-included offense of Criminal Trespass. Defendant's testimony, if believed, would permit a reasonable jury to find that defendant committed Criminal Trespass (which he admitted), but that he neither inflicted, nor attempted nor threatened to inflict, physical harm on another, an essential element of Aggravated Burglary. Reversed and Remanded.

Case Name: *Lisa K. Devir v. William L. Devir*
Case No: Montgomery App. No. 23509
Panel: Donovan, Fain, and Kline
Author: Mike Fain
Summary: The trial court did not abuse its discretion in failing to impute income to an ex-wife, as the ex-wife is not voluntarily underemployed. The court also did not abuse its discretion in assigning the date the ex-wife's child support obligation would begin, in allocating the percentage of uninsured medical, dental, and optical expenses she would pay, or in allowing her to satisfy a child support arrearage at less than the statutory amount presumed in R.C. 3123.21. Evidence in the record supports these decisions. Furthermore, the trial court did not err in failing to require the ex-wife to pay interest on the child support arrearage, as she did not willfully fail to pay. The arrearage was caused by the retroactive support order, not by the ex-wife's actions. The trial court did not abuse its discretion in splitting the dependency tax exemptions for the year 2007, a year in which each parent had legal custody for about half of the year. Finally, the trial court did not abuse its discretion in modifying spousal support retroactive to the date the ex-husband filed a motion for termination of support. A court-ordered requirement of notifying another party of a change in circumstances might possibly satisfy due process concerns about imposing financial obligations prior to the time a motion for modification of support is filed. No such requirement applies here, and the court properly reduced spousal support as of the date that the ex-husband filed his motion. Affirmed.