

**THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CASE SUMMARIES
February 28, 2020**

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Case Name: *State of Ohio v. George Dewberry, Sr.*
Case No: Montgomery App. No. 27434; T.C. Case No. 2015-CR-2994
Panel: Donovan, Froelich, Tucker
Author: Jeffrey E. Froelich
Summary: Appellant was convicted of aggravated murder, attempted murder, and having weapons while under disability based on the shooting of two individuals. The trial court erred in denying appellant's request to call the surviving victim as a witness at the suppression hearing. Nevertheless, with the record before us, the trial court did not err in denying appellant's motion to suppress the surviving victim's photospread identification of appellant as the shooter; even if the police's photospread or its administration were unduly suggestive, the surviving victim's identification was sufficiently reliable. Appellant's convictions were based on sufficient evidence and were not against the manifest weight of the evidence; the jury did not lose its way when it concluded that appellant was the shooter. Any error in the trial court's failure to admit text messages sent to the surviving victim from her ex-boyfriend was harmless, given that the jury was made aware of the threatening nature of the messages and that the ex-boyfriend sent those messages to the victim shortly before the shooting. Appellant did not demonstrate that his counsel rendered ineffective assistance by failing to offer the text messages properly since the appellant was not prejudiced by the lack of the admission of the messages. The detective's brief testimony that an attorney told him that the surviving victim was in fear and wanted protection by the police was harmless error, given that the statement was cumulative of the victim's extensive prior testimony at trial on those matters. The trial court did not abuse its discretion in allowing an FBI special agent to testify on redirect examination about whether appellant's cell phone could have been located at his residence at the time of the shooting. No cumulative error shown. Judgment affirmed.

Case Name: *In re: S.F.*
Case No: Montgomery App. No. 28606; T.C. Case No. 2018-0268
Panel: Froelich, Hall, Welbaum
Author: Jeffrey E. Froelich
Summary: The juvenile court did not abuse its discretion in awarding permanent custody of a dependent child to Montgomery County Children Services instead of granting legal custody to the child's paternal grandmother. At the time of the final judgment, the child was 25 months old, had been in the agency's custody for 23 consecutive months, and had lived in the same foster home for nearly 19 months. Neither parent claimed to be able to provide a suitable home for the child in the foreseeable future, and the evidence showed that the child had bonded with the foster parents interested in adopting him; the child had had only sporadic visits with the paternal grandmother, who lacked a documented record of income sufficient to meet the needs of this child and others in her care. Clear and convincing evidence supported the trial court's determination that the child's best interest would be served by awarding permanent custody to the agency. Judgment affirmed.

Case Name: *MRC Innovations, Inc. v. Lion Apparel, Inc., et al.*
Case No: Montgomery App. No. 28229; T.C. Case No. 2015-CV-2880
Panel: Welbaum, Froelich, Tucker
Author: Jeffrey E. Froelich
Summary: Both parties to a commercial contract dispute appealed from the trial court's entry of judgment in favor of a protective equipment company and against the supplier that did not timely deliver goods ordered by the equipment company. The trial court did not err in granting summary judgment to the equipment company on claims related to glove shells that the supplier failed to deliver, as the evidence compelled a conclusion that the equipment company's prepayment toward those items was a refundable deposit, not "investment risk" subject to forfeiture, and the supplier did not have a right to cure after repeatedly failing to deliver conforming goods despite multiple delivery date extensions. Further, the trial court did not abuse its discretion by awarding pre-judgment interest to the equipment company from the date of the supplier's final missed delivery instead of from the date that the equipment company filed its counterclaim against the supplier. Finally, the trial court did not abuse its discretion by finding that the equipment company had not proven with reasonable certainty its claim for lost profits stemming from the supplier's failure to deliver outdoor items ordered under a separate contract between the parties. Judgment affirmed.

Case Name: *State of Ohio v. Kaleb Clem*
Case No: Clark App. No. 2019-CA-61; T.C. Case No. 2019-CR-0138B
Panel: Tucker, Hall, Welbaum
Author: Jeffrey M. Welbaum
Summary: Appellant was sentenced to eight months in prison after pleading guilty to trespass in a habitation. Appellant was a first-time, nonviolent felony offender. The trial court imposed prison instead of community control because appellant admitted to smoking marijuana on the day of his PSI interview, a clear violation of the bond condition requiring him to obey all Ohio criminal laws. We do not find that the sentence was clearly and convincingly not supported by the record or that the sentence was contrary to law. Judgment affirmed.

Case Name: *State of Ohio v. Kelli Rae Noble*
Case No: Montgomery App. No. 28435; T.C. Case No. 2018-CR-3596/1
Panel: Tucker, Donovan, Froelich
Author: Mary E. Donovan
Summary: The trial court did not err in overruling appellant's motion to suppress. The affidavit in support of the search warrant contained sufficient facts to justify the issuance of a nighttime search warrant. The search warrant issued by the magistrate permitted the officers to search the apartment for illegal narcotics, weapons, and money. Since any of these items could have reasonably been located in the locked safe found in the apartment, the police were not required to obtain a second search warrant to search the locked safe. Judgment affirmed. (Tucker, J., concurring.) (Froelich, J., concurring in judgment only.)

Case Name: *State of Ohio (City of Trotwood) v. Dominique A. Kirk*
Case No: Montgomery App. No. 28353; T.C. Case No. 2019-CRB-209W
Panel: Donovan, Hall, Welbaum
Author: Mary E. Donovan
Summary: Appellant served his jail sentence; consequently, this appeal challenging the sentence for his conviction for failure to comply with an order or signal of a police officer is moot. Appeal dismissed.

Case Name: *State of Ohio v. Alan L. Heys, Jr.*
Case No: Montgomery App. No. 28374; T.C. Case No. 2019-CR-78
Panel: Tucker, Donovan, Froelich
Author: Mary E. Donovan
Summary: State's appeal. The trial court erred in crediting appellee with jail time from his Logan County sentence toward his unrelated Montgomery County sentence. Appellee was entitled to three days of jail time credit following his Montgomery County arrest, plus the 14 days he was further held on the Montgomery County case in lieu of bond until sentencing, for a total of 17 days. Accordingly, the judgment of the trial court is modified to award appellee jail time credit of 17 days, rather than 183 days. (Tucker, P.J., concurring.)