

IN THE SUPREME COURT OF OHIO

ROBERT LEWIS : 09-0136
APPELLANT : On Appeal from the Summit
V Summit County Court of Appeals,
City of Akron/ Summit County Ninth Appellate District
Court of Appeals
Appeals Case NO CA-24236

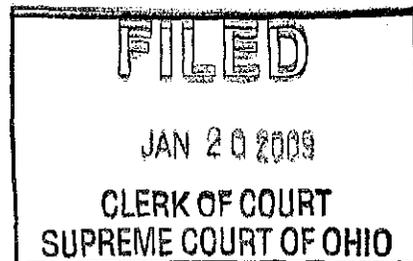
MERORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT LEWIS

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This cause presents several Constitutional issues for review. (1) The courts seized Appellant's personal property without due process of law violating Appellant's fourth and fourteenth Amendment Rights and violating Akron City Code section 92.25. (2) The court was biased when it ruled on Appellant's pre-trial motions and further more stated a total of six times that the Appellant was guilty prior to trial. (3) The court of Appeals erroneously rendered Appellant's fourth Error of Assignment of Double Jeopardy moot. Although the court of Appeals vacated the charge (4) the court of Appeals made an error in denying Error of Assignment number five by using an Ex post facto approach when it allowed testimony furnishing or promising to pay medical bills which is a violation of Ohio Evidence Rule 409. (5) The Appeals court failed to address issues Appellant presented in Issuing for Review in Appellant's brief dealing with boarding fees for Appellant's property being held illegally.

(1) In this case, the Ninth District Court of Appeals stated that the seizure of Appellant property is without merit because Appellant believes the ACC is unconstitutional. Appellant disagrees with this conclusion. Appellant argues that the city did not follow the law pertaining to the seizure and confinement of Appellant property. Appellant raised the issue of the illegal seizure and confinement of personal property several times to the Akron Municipal Court and filed for a Motion to Release Dog with memorandum in support which the court denied (shown on final appealable order). After Appellant's trial, Appellant filed a motion with the Summit County Court of Appeals to Vacate Illegal Confinement and fees of Appellant property only to be denied and later filed an Application for Reconsideration which was also denied.

The court of Appeals stated in its decision that the Appellant believes that ACC (Akron City Code)92.26 is unconstitutional because it permits the city to seize a dog without proof that the dog is "vicious dog a large" but this not true. The Akron City Code 92.26 reads *Seizure A. in*

the event that an Animal warden or law enforcement agent has probable cause to believe that a vicious dog is being harbored or cared for in violation of this chapter or that a pit bull is being harbored or cared for in a manner that violates 92.25(E) the warden or agent may petition a court of competent jurisdiction to order the seizure and impoundment of the vicious dog or pit bull pending trial. Or that State must prove that dog is either a pit bull or a vicious dog by a competent court. B in the event that a warden or agent has probable cause to believe that a vicious dog is running at large, the warden or agent may seize and impound the dog without seeking prior court order.

Judge Lynne S. Callahan of the Akron Municipal Court ordered appellant property seized without a petition from the dog warden. Judge Callahan does not have the authority to order an animal impounded due to the fact she has judicial power and the Summit County Dog Warden has executive power. Because of the constitutional separation of powers, meaning the equality that every branch of government has with the other branches, a judge cannot order animal control to do anything without being empowered by a specific statute. The judge operates under the judicial branch and animal control is under the executive branch. These are equal branches of government that cannot order each other to do anything. However, the judge has full power to order the arrest and incarceration of a person who violates a law or is in contempt of court. That is because the penal statutes grant that power to judges, authorizing them to issue arrest warrants and to direct the sheriff to keep a person in jail for specific length of time.

Appellant's property was not in violation of section 92.25(E) nor has the appellant been issued a complaint for this section. The section only applies to pit bulls and vicious dogs. Appellant's property is an Akita, not a pit-bull breed. In addition, the Appellant's property was not found roaming at large or loose. Appellant's property was taken without any due process of

law from inside Appellant's home, violating Appellant's fourth amendment right. There is no petition in the record that the dog warden filed with Judge Callaghan. There is only an order of seizure by Judge Callahan. The appeals court vacated appellant's conviction of restraint and of vicious dog charges. So it is logical to assume that the seizure and confinement of appellant property is illegal since the appellant's property had not been judicially declared vicious by a competent court at the time of illegal seizure and confinement. In *State v. Kollhuff* 2005-ohio-4599, the Montgomery Court of Appeals stated in a similar case of a dog being seized "although the trial court may have abused its discretion in originally issuing the "quarantine" order, this Court will not address this issue because that order became final when the trial court entered Kollhoff's conviction." The Appellant's conviction is not final yet.

(2) Appellant did not have an unbiased trier of fact during the duration of his criminal proceedings. The appeals court failed to address the issue. Appellant raised this error in appellants Issue Presented for Review in Appellants brief. During a criminal proceeding, Judge Bellfance stated on record four times "she knows the appellant's dog "Babi" killed another animal". She also stated on the record five times that she knows the appellant is guilty of all charges. Judge Bellfance later ruled on all four motions of appellant two days before appellant trial, with no written notice of her decision to appellant or appellant council.

Appellant was unclear and unaware of the status of motions pending trial and day of trial. Appellant was not able to make properly prepare and make wise decisions due to a lack of notice. Judge Bellfance did not sit as trial judge during the appellant's trial after this case sat on her docket for 8 months. So we can assume the reason Judge Bellfance did not sit as a trial judge is due to bias statements made on record. Although Judge Bellfance was not the trial judge, she ruled on the Appellant's Motion to Dismiss, Motion to release dog, and Motion limine three days

before trial. As a result of bias statements from the court, appellant has filed a grievance against Judge Bellfance for violating of Judge Bellfance judicial cannons. Appellant submitted transcripts of the appeal court of these bias statements along with appellant trial transcripts. Appellant also sent copies of the transcript to the Disciplinary Counsel for review. Appellant prays the highest court of Ohio can address appellant issue and not be ignored again.

(3) The Court of Appeals was mistaken when they rendered appellant fourth error of assignment of Double Jeopardy moot. All though the court of appeals vacated the charges of the Summit County code pertaining to a vicious dog unconstitutional relying on State v. Cowan, it does not eliminate double jeopardy at trial. Evidence of a prior alleged attack was presented by Akron City/Summit County prosecutor to prove that appellant was aware of his vicious dog. In this effort the Akron/Summit County prosecutor ran two court jurisdictions together at trial. The state argues if a dog is vicious or dangerous that this is an element of the charge to be proven by the municipality at trial but yet the Supreme Court has rejected this argument in Cowan. This alleged prior attack would not allow a jury to be fair and unbiased to appellant when pertaining to the Akron city code charges. Again, the appellant filed a Motion for Limine but Judge Bellfance with a bias opinion, denied appellant's arguments. This is one of many problems with having two jurisdictions ran concurrently at trial. Such evidence would be over whelming for any jury to separate the charges Akron city code 92.25b4 dog bite and control of dog 92.25 versus Summit county code 505.22 a1 Restaint of vicious dog and dangerous dog 505.22 a1. Even the language is the same dog bite versus vicious dog bite.

Never before has city trial and county criminal trial been ran together with concurrent jurisdiction imposed. Never before in Ohio has a dog trial been ran together with city and county jurisdiction. The Akron City/County prosecutor purposely used this form of double jeopardy

prosecution to bias the jury. The Akron City/Summit county prosecutor asked the court to sentence the appellant underneath the Akron city code and not summit county code. If the court did not fine or sentence appellant under summit county code, what was the purpose of even charging Appellant? (cited *State v Cowan* 103 Ohio st3d144 2004, *State v traylor* 29741 Ohio 2008, *highland hts v Manos* 2004 Ohio 6016, *Akron v Meyer* 2004 Ohio 4457, *Beavercreek v ride* 2007 Ohio 6869, *Akron v Marstellar* 155 Ohio appd 2003, *State v Kollhoff* 2005 Ohio 4599, Cite as *Beckett v. Warren*, 2008-Ohio-4689. Cite as *State v. Williams*, 2007-Ohio-4023. *Toledo v. Tellings*, 114 Ohio St.3d 278, 2007-Ohio-3724, *Toledo v. Tellings*, 114 Ohio St.3d 278, 2007-Ohio-3724, *State v. Preece*, 2008-Ohio-4040.) No case law in the state of Ohio has used this form of prosecution. This issue of two jurisdictions used as prosecution needs to be addressed to either permit or not permit this typed of prosecution. This violates the appellant's fifth amendment rights against Double Jeopardy and illegally using two jurisdictions from the city and county level.

(4) The Court of Appeal made an error in denying error of assignment number five by allowing the trial court to use an expo facto approach when it allowed testimony furnishing or promising to pay medical bills violation Ohio evidence rule 409. The appealed court denied this argument due to fact that a motion in lime was filed and was denied due to fact is was not preserved for appeal by counsel but this conclusion is incorrect. Appellant never challenged appellant motion in limine or questioned if it was preserved for appeal for assignment of error number five.

The appeal court failed to address the error and only selectively chose to address the issue which the appellant did not challenge. The error of assignment strictly dealt with using testimony of medical bills and appellant promising to pay or paid for a prior attack.

The trial court asked four separate witnesses at trial if the appellant furnished the medical bills which is against Ohio evidence 409. Payment of Medical and Similar Expenses Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury. Every single witness answered yes appellant paid or appellant promised to pay. Not one of the witnesses was present at the time of the alleged dog attacked. There was only one city/county prosecutor witness present at the alleged attack.

During criminal proceedings, the Appellant filed a Demand for a Discovery pursuant to Ohio criminal rule 16. Medical bills were never listed as part of Discovery or as evidence that was going to be used against appellant.

PROPOSTION OF LAW NO. 5- The appeals court failed to address findings presented in Issuing for Review in appellant brief which was to pay the boarding fees for appellant's property being held illegally. Appellant is not responsible for fees of boarding appellant's property at the Summit County dog pound. Appellant's property has been at the summit county dog pound since September 29, 2007.(cited *State v. Preece*, 2008-Ohio-4040 in a similar case and in *State v Kollhoff* 2005 Ohio 4599.)

STATEMENT OF THE CASE AND FACTS

The case arises from the attempt of appellant Robert Lewis to vacate conviction from the Akron Municipal Court charges from the Akron City Code 92.25b4 dog bite and Control of Dog 92.25 the Summit county code 505.22 a1 Restraint of vicious dog and dangerous dog 505.22 a1. and from the Summit county code 505.22 a1 Restraint of vicious dog and dangerous dog 505.22 a1. The appellant appealed to the Summit County Court of Appeal Ninth District. The Ninth District Court of Appeals vacated Appellant conviction from the 505.22 a1 Restraint of vicious dog and dangerous dog 505.22 a1 and affirmed appellant conviction from Akron City Code 92.25 b4 dog bite and 92.25 control of dog.

The court of appeals erred in ruling that the courts could seize the appellant's personal property without due process of law violating appellant's fourth and fourteenth rights. (1) The courts seized the appellant's personal property without due process of law violating appellant's fourteenth amendment rights. The court of appeals made an error in failing to address *Issues Presented* where the court ruled on appellant's pre-trial motions with all ready stating on the record before appellant trial. The court of appeals made an error when they rendered Appellant's fourth error of assignment of Double jeopardy moot. The Court of Appeal made an error in denying error of assignment number five by using an ex post facto approach when it allowed testimony furnishing or promising to pay medical bills violation Ohio Evidence Rule 409.

PROPOSITION OF LAW

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PROPOSTION OF LAW NO. 1- The courts seized appellants' personal property without due process of law violating appellant fourth and fourteenth amendment rights and violation Akron city code section 92.26

The Akron municipal court violated the Akron animal code section 92.26 which reads "Seizure A: in the event that an animal warden or law enforcement agent has probable cause to believe that a vicious dog is being harbored or cared for in violation of this chapter or that a pit bull is being harbored or cared for in a manner that violates 92.25(E) the warden or agent may petition a court of competent jurisdiction to order the seizure and impoundment of the vicious dog or pit bull pending trial. Or that State must prove that dog is either a pit bull or a vicious dog by a competent court. B in the event that a warden or agent has probable cause to believe that a vicious dog is running at large, the warden or agent may seize and impound the dog without seeking prior court order." The argument that a dog is vicious without due process has been shot down by the Ohio Supreme Court. Pending trial, appellant's property should have been returned. In a similar case, State v. Kollhuff 2005 Ohio 4599 Montgomery Appeals court said the court misused its discretion.

PROPOSTION OF LAW NO. 2 -The court was impartial on Appellant's pre-trial motions with stating on the record that Appellant is guilty before Appellant trial violating judicial Cannon 2 sixth and fourteenth amendment rights.

CODE OF JUDICIAL CONDUCT CANON 2: A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartially of the judiciary.

CODE OF JUDICIAL CONDUCT CANON 3:

a-5 A judge shall perform judicial duties without bias or prejudice. A judge shall not in the performance of judicial duties, by words or conduct manifest bias or prejudice.

PROPOSTION OF LAW NO. 3- The court of Appeals rendered appellant's fourth error of assignment of Double Jeopardy moot violating Appellant Fifth Amendment Right.

No previous case law pertaining to a dog has been subjected to city and county charges at trial. Akron v Meyer 2004 Ohio 4457, Beavercreek v ride 2007 Ohio 6869, Akron v Marstellar 155 Ohio appd 2003, State v Kollhoff 2005 Ohio 4599, Cite as *Beckett v. Warren*, 2008-Ohio-4689. Cite as *State v. Williams*, 2007-Ohio-4023. *Toledo v. Tellings*, 114 Ohio St.3d 278, 2007-Ohio-3724, *Toledo v. Tellings*, 114 Ohio St.3d 278, 2007-Ohio-3724, *State v. Preece*, 2008-Ohio-4040. No person shall be subjected to the same offense to be twice put in jeopardy of life or limb. Amendment v.

PROPOSTION OF LAW NO. 4—The Court of Appeal made an error in denied error of assignment no five allowing the lower court to use medical bills as evidence violating Ohio Evidence Rule 409. Ohio evidence rule 409 payments of medical and similar expenses. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability the injury.

PROPOSTION OF LAW NO. 5- The appeal court failed to address presenting in Issuing Review in appellant's brief the need to pay the boarding fees for appellant property being held illegally. Appellant is not responsible for fees of boarding appellant property at the summit county dog pound. Appellant property has been at the summit county dog pound since September 29, 2007. cited *State v. Preece*, 2008-Ohio-4040 in a similar case and in *State v. Kollhoff* 2005 Ohio 4599.

CONCLUSION

For the reasons discussed above, this case involves matters of substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

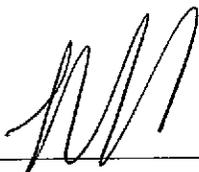


ROBERT LEWIS, Counsel of Record

ROBERT LEWIS COUNSEL FOR APPELLANT

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellees, GERALD K LARSON, Summit County / Akron City Attorney, and Max Rothol, City of Akron Dept. of Law, 217 HIGH Street, Akron, Ohio 44308 on January 20, 2009.



Robert Lewis
PRO SE

TABLE OF AUTHORITIES

CASES:

Toledo v Tellings, 114 OHIO St.3d 278, 2007-ohio-3724

State v Cowan 103 Ohio st3d144 2004

State v Traylor 29741 Ohio 2008

Highland Hts v Manos 2004 Ohio 6016

Akron v Meyer 2004 Ohio 4457

Beavercreek v ride 2007 Ohio 6869

Akron v Marstellar 155 Ohio appd 2003

State v Kollhuff 2005 Ohio 4599

Cite as *Beckett v. Warren*, 2008-Ohio-4689

Cite as *State v. Williams*, 2007-Ohio-4023

State v. Preece, 2008-Ohio-4040

CONSTITUTIONAL PROVISIONS: STATUTES

UNITED STATE CONSTITUTION Amendment IV

UNITED STATE CONSTITUTION Amendment V

UNITED STATE CONSTITUTION Amendment VI

UNITED STATE CONSTITUTION Amendment XIV

AKRON CITY CODE Akron City Code 92.25 b4

AKRON CITY CODE Akron City Code 92.25

AKRON CITY CODE Akron City Code 92.26

Ohio Evidence Rule 409

STATE OF OHIO)
)
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HOFFIGAN
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2008 DEC -3 AM 7:50

STATE OF OHIO/CITY OF AKRON) SUMMIT COUNTY) 24236
) CLERK OF COURTS)

Appellee

v.

ROBERT LEWIS

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
AKRON MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 07CRB12034

DECISION AND JOURNAL ENTRY

Dated: December 3, 2008

WHITMORE, Judge.

{¶1} Defendant-Appellant, Robert Lewis, appeals from his convictions and sentence in the Akron Municipal Court. This Court affirms in part and vacates in part.

I

{¶2} On March 13, 2007, Edward Hawkins took his dog, a Boston Terrier named Skippy, for a walk close to his home on Dorchester Road. During the walk, another dog attacked Skippy. Hawkins managed to kick the other dog until it released Skippy and ran towards Lewis's home. Hawkins recognized the dog that had attacked as Lewis's female Akita named Babi. As a result of the attack, Skippy received medical treatment, but eventually recovered.

{¶3} On September 25, 2007, Hawkins walked Skippy to the end of his driveway near a brick pillar. When Skippy reached the pillar, Babi rapidly emerged from the other side of the pillar, bit Skippy around the neck, and pulled Skippy out of his leash. Hawkins, who opted to carry a small crowbar with him after the initial attack on Skippy, began to hit Babi with the

crowbar. Babi released Skippy and ran, but Skippy died as a result of the injuries he sustained. Hawkins telephoned Animal Control and notified them of Babi's fatal attack on Skippy.

{¶4} On September 26, 2007, Akron Animal Control Warden Don Miller filed a complaint and summons in the Akron Municipal Court charging Lewis with the following Akron City Code ("A.C.C.") violations: (1) failure to register a dog, pursuant to A.C.C. 92.08; (2) failure to vaccinate a dog, pursuant to A.C.C. 92.11; (3) owning a dog found to be at large and not under his continuous control, pursuant to A.C.C. 92.25(B)(1); and (4) owning a dog that bites or causes physical harm to another domestic animal while off the premises of the owner, pursuant to A.C.C. 92.25(B)(4). The next day, the Akron Municipal Court ordered that Babi be immediately seized and impounded in the Summit County Animal Shelter for public safety reasons pending the determination of Lewis's case.

{¶5} On October 16, 2007, Warden Miller filed another complaint and summons in the Akron Municipal Court, this time charging Lewis with the following Summit County Ordinance ("S.C.O.") violations: (1) failure to restrain a dangerous or vicious dog, pursuant S.C.O. 505.22; and (2) negligently allowing a dog in his custody or care to cause serious physical harm to another dog while off his premises, pursuant to S.C.O. 505.24. On March 24, 2008, Lewis filed an unsuccessful motion to dismiss the S.C.O. charges.

{¶6} The matter proceeded to a jury trial on May 5, 2008. The jury found Lewis guilty of violating A.C.C. 92.25(B)(4), S.C.O. 505.22, and S.C.O. 505.24. The trial court then found Lewis guilty of failure to control,¹ pursuant to A.C.C. 92.25(B)(1), a minor misdemeanor, and dismissed the remaining charges of failing to register and vaccinate Babi. For his violation of

¹ The trial court acted as the trier of fact on Lewis's failure to control charge because there is no right to a jury trial on minor misdemeanor charges.

A.C.C. 92.25(B)(4), the court sentenced Lewis to restitution, a \$500 fine, and 180 days in jail suspended on the condition that Lewis complete thirty days of house arrest. The court also ordered that Babi be destroyed for Lewis's violation of A.C.C. 92.25(B)(4), but suspended the execution of its sentence pending the outcome of this appeal. The court sentenced Lewis to court costs on the remaining counts.

{¶7} Lewis now appeals from the trial court's judgment and raises ten assignments of error for our review. For ease of analysis, we rearrange several of the assignments of error.

II

Assignment of Error Number Two

"THE COURT FAILED TO ARRAIGNMENT THE APPELLANT, THEREFORE DEPRIVING APPELLANT OF DUE PROCESS OF LAW. THE COURT VIOLATED CRIM R PROCEDE 5,10,11,43 (a)[.]" (Sic.)

{¶8} In his second assignment of error, Lewis seems to argue that the trial court failed to arraign him in accordance with the Ohio Rules of Criminal Procedure. Specifically, he argues that the trial court did not follow the procedures set forth in Crim.R. 5 and Crim.R. 10. We disagree.

{¶9} Crim.R. 5 governs the procedure for initial appearances in criminal cases while Crim.R. 10 governs arraignment procedures. Under both rules "the court is required to advise the defendant of his constitutional rights, including the right to counsel, at the initial appearance or arraignment." *State v. Eschrich*, 6th Dist. No. OT-06-045, 2008-Ohio-2984, at ¶21. The court also must "inform the accused of the charges made against him and to allow him to offer an answer to those charges." *State v. Bickel*, 9th Dist. No. 07CA0053, 2008-Ohio-5747, at ¶9, quoting *State v. Hawkins* (Mar. 24, 1998), 10th Dist. No. 97APA06-740, at *2. Any alleged defects in this procedure must be raised by objection prior to trial. Crim.R. 12(C)(1) (providing

that “objections based on defects in the institution of [a] prosecution” must be raised before trial). If a defendant fails to raise an issue regarding the arraignment prior to trial, he forfeits the objection. *Bickel* at ¶9, citing Crim.R. 12(H).

{¶10} It is unclear whether the court below brought Lewis before it for both an initial appearance and an arraignment. Nevertheless, the court’s journal entry, located on the back of Lewis’s criminal file folder, indicates that Lewis entered a plea of not guilty after “having been informed of his *** rights pursuant to Criminal Rule 5 and 11.” The journal entry also indicates that after the City brought new charges against Lewis on October 16, 2007, for S.C.O. violations, he waived arraignment on the new charges. Thus, it would appear from the trial court’s journal entry that Lewis was informed of his rights at the time of his initial charges and voluntarily waived another presentation of those rights when additional charges were brought against him. Moreover, Lewis has not filed a transcript of the proceedings that he claims were deficient. Without a transcript, this Court has no way of determining whether Lewis objected to any alleged defects “in the institution of [his] prosecution” so as to preserve his argument for appeal. See Crim.R. 12(C)(1); *State v. Noble*, 9th Dist. No. 07CA009083, 2007-Ohio-7051, at ¶12. We must presume regularity of the trial court’s proceedings and conclude that Lewis has not met his burden of demonstrating error on appeal. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Consequently, Lewis’s second assignment of error is overruled.

Assignment of Error Number Three

“THE COURT FAILED TO RULE ON THE APPELLANT PRETRIAL MOTIONS THEREFORE DEPRIVING APPELLANT OF DUE PROCESS OF LAW AS GARANTEED BY THE OHIO AND UNITED STATES CONSITUION, THE COURT VIOLATED CRIM R. 19 (5) (D) (1). VIOLATED SIXTH AMENDMENT.” (Sic.)

{¶11} In his third assignment of error, Lewis argues that the trial court offended his due process rights by failing to rule on his pre-trial motions “for over seven months.” He seems to argue that the trial court had no authority to orally rule on his motions because magistrate’s orders must be in writing, filed with the clerk, and served upon the parties or their attorneys pursuant to Crim.R. 19.

{¶12} Initially, we note that Crim.R. 19 only applies to magistrates and has no application here. The trial court personally handled every aspect of Lewis’s case. Nothing in the record indicates that a magistrate was ever involved. Accordingly, Lewis’s argument that the trial court somehow violated Crim.R. 19 lacks merit.

{¶13} The record also does not support Lewis’s proposition that the trial court failed to rule on his pre-trial motions “for over seven months.” For instance, Lewis filed his motion to dismiss on March 24, 2008, and the trial court journalized its order denying the motion on May 2, 2008. Although Lewis filed a motion to release Babi on October 13, 2007 and the trial court did not journalize its denial of that motion until May 2, 2008, the transcript of a March 28, 2008 proceeding² contains numerous references to the trial court’s oral denial of Lewis’s motion at an earlier hearing. Thus, the record contains evidence that Lewis was aware of the trial court’s ruling well before it was journalized. Because Lewis has not shown that the trial court failed to rule on his motions in a timely manner, Lewis’s third assignment of error is overruled.

Assignment of Error Number Seven

“THE COURT ERRORED IN MOTION TO DISMISS THE APPELANT STATING THAT SCCO 505.22 AND 505.24 ARE UNCONSTITUTIONAL LABELLING CERTAIN DOGS ‘DANGERROUS’ OR VICIOUS WITH OUT PROVIDING THEIR OWNERS DUE PROCESS OF LAW.” (Sic.)

² The transcript provided to this Court does not indicate the purpose for this proceeding, but a notation on Lewis’s criminal file folder indicates that the court held a status hearing on this date.

{¶14} In his seventh assignment of error, Lewis argues that the trial court erred in denying his motion to dismiss based on the argument that Summit County's vicious dog ordinances are unconstitutional. Specifically, he argues that he was not provided with a meaningful opportunity to challenge Babi's classification as a dangerous or vicious dog in violation of *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777. We agree.

{¶15} This Court reviews de novo a trial court's denial of a motion to dismiss. *State v. Osburn*, 9th Dist. No. 07CA0054, 2008-Ohio-3051, at ¶12. In doing so, we recognize that "[s]tatutes enjoy a strong presumption of constitutionality." *State v. Shipley*, 9th Dist. 03CA008275, 2004-Ohio-434, at ¶78. One who seeks to challenge the constitutionality of a statute bears the burden of proving the unconstitutionality beyond a reasonable doubt. *Id.*, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 38-39.

{¶16} In *Cowan*, the Supreme Court struck down R.C. 955.22, Ohio's vicious dog statute. *Cowan* at syllabus. The statutory provisions at issue in *Cowan* provided, in relevant part, as follows:

"(D) Except when a dangerous or vicious dog is lawfully engaged in hunting or training for the purpose of hunting and is accompanied by the owner, *** no owner *** of a dangerous or vicious dog shall fail to do either of the following:

"(1) While that dog is on the premises of the owner, *** securely confine it at all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top, except that a dangerous dog may, in the alternative, be tied with a leash or tether so that the dog is adequately restrained[.]

"(E) No owner *** of a vicious dog shall fail to obtain liability insurance with an insurer authorized to write liability insurance in this state providing coverage in each occurrence, subject to a limit, exclusive of interest and costs, of not less than one hundred thousand dollars because of damage or bodily injury to or death of a person caused by the vicious dog."

R.C. 955.22 utilized R.C. 955.11's definition of the terms "dangerous dog" and "vicious dog."

Those statutory provisions provided, in relevant part, as follows:

"(1)(a) 'Dangerous dog' means a dog that, without provocation, *** has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner *** and not under the reasonable control of its owner, *** or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top.

"(4)(a) 'Vicious dog' means a dog that, without provocation and subject to division (A)(4)(b) of this section, meets any of the following:

"(i) Has killed or caused serious injury to any person;

"(ii) Has caused injury, other than killing or serious injury, to any person, or has killed another dog."

The Supreme Court reviewed R.C. 955.22's scheme and determined that it was facially unconstitutional due to its "fail[ure] to provide dog owners a meaningful opportunity to be heard on the issue of whether a dog is 'vicious' or dangerous[.]" *Cowan* at syllabus.

{¶17} The Supreme Court reasoned that R.C. 955.22 permitted a dog warden to unilaterally classify a person's dog as vicious or dangerous and subject that person to regulatory burdens and criminal sanctions without any prior opportunity for that person to challenge the warden's determination. *Id.* at ¶11-13. The Court specifically noted that the statute did not provide a dog owner with "safeguards, such as a right to appeal or an administrative hearing." *Id.* at ¶13. Once the warden determined that a dog was either dangerous or vicious that determination triggered R.C. 955.22's provisions. *Id.*

{¶18} Lewis argues that the trial court erred in denying his motion to dismiss because S.C.O.'s dangerous/vicious dog provisions are indistinguishable from the statutory scheme that

the Supreme Court struck down in *Cowan*. S.C.O. 505.21(a) defines a "dangerous dog" as a dog that:

"[W]ithout provocation, has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger, any person, or bites or causes physical harm to another dog, cat or other animal. ***"

S.C.O. 505.21(d) defines a "vicious dog" as a dog that, "without provocation, has either: (1) killed or caused injury to any person; or (2) killed another dog." After determining that Babi was dangerous or vicious, Warden Miller filed charges against Lewis for violations of S.C.O. 505.22 and 505.24. S.C.O. 505.22 provides, in relevant part, as follows:

"(a) No owner of a dangerous or vicious dog shall fail to do either of the following, except when the dog is lawfully engaged in hunting or training for the purpose of hunting and accompanied by the owner:

"(1) While on the premises of the owner, securely confine such dog at all times in a locked pen which has a top, locked fenced yard or other locked enclosure which has a top, except that a dangerous dog may, in the alternative, be tied with a leash or tether so that the dog is adequately restrained and unable to reach any sidewalk or area where any invitee or licensee would normally be expected to travel[.]

"(b) Whoever violates this section is guilty of a misdemeanor of the first degree."

S.C.O. 505.24 provides, in relevant part, that:

"(a) No person, being the owner *** of any dangerous or vicious dog within the County, whether hunting, training or otherwise, shall negligently, or by reason of a violation of any provision of this chapter, allow such dog, when off the premises of the owner, to cause physical harm to any person or serious physical harm to another dog, cat or other animal.

"(b) Lack of intent on the part of such person to allow such dog to injure a person, other dog, cat or other animal, or the lack of knowledge of the violent propensities of such dog, is not a defense to a violation of this section.

"(c) Whoever violates this section is guilty of a misdemeanor of the third degree."

Although Warden Miller did not cite Lewis for additional violations, S.C.O. 505 also contains provisions requiring dangerous/vicious dog owners to obtain liability insurance on their dogs. R.C. 505.26.

{¶19} Our review of S.C.O. 505's scheme leads us to conclude that it is indistinguishable from the scheme struck down in *Cowan*. Once Warden Miller determined that Babi was dangerous or vicious, S.C.O. 505's provisions went into effect and Lewis was subjected to them without any meaningful opportunity to challenge Babi's classification as a dangerous or vicious dog. See *Cowan* at syllabus. The State argues that S.C.O. 505.22 and 505.24 are not unconstitutional because the issue of whether a dog is dangerous or vicious is an element of the charge to be proven by the municipality at trial. Therefore, someone in Lewis's position has the opportunity to challenge his dog's classification at trial. Yet, the Supreme Court specifically rejected this argument in *Cowan*. See *Cowan* at ¶11-12. The Court noted that:

"We find it inherently unfair that a dog owner must defy the statutory regulations and become a criminal defendant, thereby risking going to jail and losing [his] property, in order to challenge a dog warden's unilateral decision to classify [his] property. The statute does not provide [a dog owner] a right to be heard in a meaningful time and in a meaningful manner on the issue of whether [his] dogs were vicious or dangerous." *Id.* at ¶13.

Accordingly, a trial does not constitute a "meaningful opportunity" for a dog owner to contest their dog's classification. *Id.*

{¶20} Because S.C.O. 505.22 and 505.24 are indistinguishable from the statute struck down in *Cowan*, we must conclude that the trial court erred in denying Lewis's motion to dismiss those charges. See *Highland Heights v. Manos*, 8th Dist. No. 84238, 2004-Ohio-6016, at ¶5-10 (striking down dangerous/vicious dog ordinance as unconstitutional because it denied owner a meaningful opportunity to challenge a vicious dog classification prior to trial).

Accordingly, Lewis's seventh assignment of error is sustained and his convictions for violating S.C.O. 505.22 and 505.24 are hereby vacated.

Assignment of Error Number One

"THE COURT VIOLATED THE APPELLANT FIFTH AMENDANT RIGHTS WHERE THE COURT SEIZED APPELLANT DOG WITH OUT PROPER NOTICE OR HEARING, WITHOUT DUE PROCESS OF LAW." (Sic.)

{¶21} In his first assignment of error, Lewis argues that the trial court violated his Fifth Amendment rights by seizing Babi without a prior court determination. Specifically, he argues that A.C.C. 92.26 unconstitutionally permits the City to seize a dog without proof that the dog is a "vicious dog at large."

{¶22} The record reflects that Lewis failed to raise this argument in the trial court. Although he challenged the constitutionality of S.C.O. 502.24 and 505.22, he never made a similar challenge on the basis of A.C.C. 92.26. The "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a [forfeiture] of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Dent*, 9th Dist. No. 23855, 2008-Ohio-660, at ¶7, quoting *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus, limited by, *In re M.D.* (1988), 38 Ohio St.3d 149. While a defendant who forfeits such an argument still may argue plain error on appeal, this Court will not sua sponte undertake a plain error analysis if a defendant fails to do so. See *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶11. Because Lewis forfeited this issue on appeal and has not raised a claim of plain error, we must conclude that his first assignment of error lacks merit.

Assignment of Error Number Four

“THE COURT ERRORED IN TRYING THE APPELLANT TWICE WITH SAME CRIME. VIOLATING HIS FIFTH AMENDANT RIGHTS AGAINST DOUBLE JEOPARDY. WITH MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.” (Sic.)

{¶23} In his fourth assignment of error, Lewis argues that the trial court violated his Fifth Amendment Double Jeopardy rights by “trying [him] twice” for the same crime. Specifically, he argues that the City should not have been permitted to convict him of both A.C.C. and S.C.O. violations because the same conduct supported both sets of violations. As we have already determined that the trial court erred in not dismissing the S.C.O. violations and have vacated those convictions, Lewis’s fourth assignment of error is moot and we decline to address it. See App.R. 12(A)(1)(c).

Assignment of Error Number Five

“THE COURT ERRORED BY PREJUDICE THE JURY. BY USING A EX POST FACTO APPROACH.” (Sic.)

{¶24} In his fifth assignment of error, Lewis argues that the trial court erred by allowing the City to inform the jury that Babi had engaged in a previous attack, thereby suggesting that Lewis was aware of her vicious behavior. Specifically, he avers that the City should not have been allowed to introduce evidence with regard to Babi’s March 13, 2007 attack on Skippy.

{¶25} The record reflects that Lewis filed a motion in limine, seeking to exclude the evidence of Babi’s March attack, but failed to object to the evidence at trial. “[A] motion in limine does not preserve the record on appeal [;] *** [a]n appellate court need not review the propriety of such an order unless the claimed error is preserved by an objection *** when the issue is actually reached *** at trial.” (Emphasis omitted.) *State v. Grubb* (1986), 28 Ohio St.3d 199, 203, quoting Palmer, Ohio Rules of Evidence Manual (1984), at 446. The “failure to timely

advise a trial court of possible error, by objection or otherwise, results in a [forfeiture] of the issue for purposes of appeal.” *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121. Since Lewis forfeited this issue in the court below by failing to contemporaneously object to the evidence of Babi’s March attack at trial and has not argued plain error on appeal, we must conclude that his fifth assignment of error lacks merit. See *Hairston* at ¶11 (placing the burden upon an appellant to argue plain error on appeal).

Assignment of Error Number Six

“APPELLANT WAS DEPRIVED OF DUE POCCESS (sic) OF LAW WHERE HIS CONVICTION IS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE.”

{¶26} In his sixth assignment of error, Lewis argues that his convictions are based on insufficient evidence and are against the manifest weight of the evidence. Specifically, he argues that there was no evidence that Babi was the dog responsible for attacking Skippy. We disagree.

{¶27} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. “While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *Id.*, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

proven beyond a reasonable doubt.” *Id.* at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In *State v. Roberts*, this Court explained:

“[S]ufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency.” (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Accordingly, we address Lewis’s challenge to the weight of the evidence first, as it is dispositive of his claim of sufficiency.

{¶28} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

“[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.* Therefore, this Court’s “discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶29} As we have vacated Lewis’s S.C.O. convictions, we limit our analysis to his two remaining convictions. A.C.C. 92.25 provides that:

“(B) Any person owning *** a dog shall be strictly liable if such dog is found to:

“(1) Be at large within the city unless securely attached upon a leash held in the hand of a person in a manner which continuously controls the dog.

“***

“(4) Bite or otherwise cause physical harm to any *** domestic animal *** while the dog is off the premises of the owner, or while on premises which are not exclusively controlled by the owner.”

A dog is “at large” if it is off the premises of the owner. A.C.C. 92.25(A).

{¶30} Hawkins testified that Lewis’s female Akita, Babi, attacked Skippy, his Boston Terrier, when he walked Skippy to the end of his driveway on September 25, 2007. Hawkins indicated that he recognized Babi based on her size, weight, color, and the fact that she had attacked Skippy in March 2007. Hawkins observed that Lewis had pens for his Akitas in his back yard, but routinely tied the dogs to some type of leash or chain just outside the pens. He further observed that, although Lewis’s yard was fenced in, the chain link fence only stood about four feet high. Hawkins confirmed that Skippy died as a result of the September attack.

{¶31} Mary Jo Rozke, another one of Hawkins’s neighbors, testified that she heard what sounded like a “vicious” dog attack occur on September 25, 2007. Rozke admitted that she never saw the attack, but testified that Lewis’s dogs frequently barked and growled loudly at her whenever she walked by their yard. She further testified that on at least one occasion, she had seen one of the dogs jump Lewis’s chain link fence.

{¶32} Warden Miller testified that Hawkins reported the attack on Skippy to him after Hawkins returned home from the veterinarian’s office. He testified that Hawkins showed him where the attack had occurred, but that he did not see any blood in the area because “[t]hey’d already washed off the driveway” by the time he arrived. Warden Miller walked over to Lewis’s residence and observed Lewis’s two Akitas in the back yard. He testified that the larger, male Akita was chained inside the fenced yard, but that the smaller, female Akita was loose inside the

yard. Warden Miller admitted that he did not see any blood on the female Akita, but explained that dogs frequently clean themselves after an attack. He also opined that it would be common for an Akita to act aggressively and that an Akita like Babi could effortlessly jump a four foot fence such as the one Lewis had surrounding his yard.

{¶33} Kathy Wheeler, Lewis's mother, testified that when she left for work at 8:00 a.m. on September 25, 2007, both of Lewis's Akitas were locked in their respective pens in the back yard. She claimed that when she arrived home approximately an hour to an hour and a half later, Lewis had the female Akita, Babi, in the kitchen. According to Wheeler, Warden Miller arrived at the house about ten to fifteen minutes after she arrived at home. Wheeler claimed that Warden Miller told her and Lewis that he knew Babi had killed Skippy. Wheeler also claimed that Warden Miller told her that she would not want to see the evidence of the attack on Hawkins's property because "[i]t's like a blood bath[.]" Accordingly, Wheeler's testimony directly contradicted Warden Miller's testimony, in which he stated that he did not arrive at Hawkins's home immediately after the attack, that Hawkins or one of his family members had already cleaned the area where the attack occurred before his arrival, and that Babi was still loose inside Lewis's back yard when he arrived at Lewis's house.

{¶34} Christina Hawkins, Hawkins's daughter, and her boyfriend, Charles Hutson, testified that they went and spoke to Lewis at his home after the fatal attack on Skippy. Both testified that Lewis had Babi in the basement at that point because "he didn't want anyone to take [her]." Both also testified that Lewis essentially acknowledged that Babi had attacked Skippy by indicating that he might be willing to compensate Hawkins in some manner for Skippy's death.

{¶35} Based on our review of the record, we cannot conclude that the jury lost its way in convicting Lewis of violating A.C.C. 92.25(B)(4) because Babi caused physical harm to Skippy while off Lewis's premises. Furthermore, we cannot conclude that the trial judge lost his way in convicting Lewis of violating A.C.C. 92.25(B)(1) because Babi was "at large" by being off of Lewis's premises when the attack occurred. As such, Lewis's two convictions are not against the manifest weight of the evidence.

{¶36} Having disposed of Lewis's challenge to the weight of the evidence, we similarly dispose of his sufficiency challenge. See *Roberts*, supra, at *2. Lewis's sixth assignment of error lacks merit.

Assignment of Error Number Eight

"THE TRIAL COURT ERROR BY FINDING THE APPELLANT GUILTY OF CONTROL OF DOG[.]" (Sic.)

{¶37} In his eighth assignment of error, Lewis argues that the trial court erred by not submitting his failure to control charge, pursuant to A.C.C. 92.25(B)(1), to the jury with his other charges. We disagree.

{¶38} A violation of A.C.C. 92.25(B)(1) is a minor misdemeanor. A.C.C. 92.99(D). "There is no right to a jury trial for a minor misdemeanor offense." *State v. Kearns*, 9th Dist. No. 06CA0020-M, 2006-Ohio-5811, at ¶16, citing R.C. 2945.17(B)(1). Accordingly, Lewis's eighth assignment of error is overruled.

Assignment of Error Number Nine

"APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF INEFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDANT (sic)."

{¶39} In his ninth assignment of error, Lewis argues that he was deprived of the effective assistance of counsel because his counsel "refused to state objections to the court which

he new (sic) would [] highly influence the jury and [Lewis] wouldn't be able to appeal." We disagree.

{¶40} To prove an ineffective assistance claim, Lewis must show that: (1) counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment [,]" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. To demonstrate prejudice, Lewis must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Furthermore, the Court need not address both *Strickland* prongs if an appellant fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶41} Lewis does not identify any of the material or evidence that he believes was objectionable at trial. An appellant bears the burden of demonstrating error on appeal through citations to the record. See App.R. 16(A)(7). Without any indication of what evidence Lewis believes was objectionable, this Court cannot determine whether his counsel's performance was deficient. See *Strickland*, 466 U.S. at 687. Consequently, Lewis's ninth assignment of error is overruled.

Assignment of Error Number Ten

"APPELLANT SENTENCING IS CRUEL AND UNUSUAL PUNISHMENT FOR THE CRIME." (Sic.)

{¶42} In his tenth assignment of error, Lewis argues that his sentence is cruel and unusual punishment. He seems to argue that the trial court should have issued him a more

lenient sentence because defendants in other dog bite cases more egregious than his own have received more lenient sentences. We disagree.

{¶43} A trial court has full discretion to sentence a defendant to a prison term so long as the term falls within the statutory range designated for the offense. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. To determine whether a trial court exceeded its sentencing authority in issuing a sentence, this Court employs a two-step approach. *State v. Kalish*, 102 Ohio St.3d 23, 2008-Ohio-4912, at ¶4.

“First, [we] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.” *Id.*

An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶44} The trial court sentenced Lewis to restitution, a \$500 fine, 180 days in jail suspended on the condition that Lewis complete thirty days of house arrest, and court costs based on his violation of A.C.C. 92.25(B)(4). A violation of A.C.C. 92.25(B)(4) constitutes a first-degree misdemeanor. A.C.C. 92.99(B). For a first-degree misdemeanor offense, a court may sentence a defendant to a maximum of 180 days in jail and may fine a defendant up to \$1,000. R.C. 2929.24(A)(1); R.C. 2929.28(A)(2)(a)(i). Accordingly, Lewis’s sentence and fine do not offend the maximum penalty provisions set forth in R.C. 2929.24 and 2929.28, and his sentence is not clearly and convincingly contrary to law. *Kalish* at ¶18.

{¶45} In sentencing Lewis, the trial court noted his lack of remorse for Babi's behavior. The court further noted that despite Lewis's awareness that Babi tended to be aggressive and had previously attacked Skippy, Lewis failed to take measures that easily could have prevented the fatal attack. Our review of the trial court's reasoning convinces us that the court did not abuse its discretion in sentencing Lewis. Consequently, Lewis's tenth assignment of error is overruled.

III

{¶46} Lewis's seventh assignment of error is sustained, and his S.C.O. convictions are vacated pursuant to that determination. Lewis's fourth assignment of error is moot, and his remaining assignments of error are overruled. The judgment of the Akron Municipal Court is affirmed in part and vacated in part.

Judgment affirmed in part,
and vacated in part.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.