

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
)
Plaintiff-Appellant,)
)
v.)
)
JUANITA M. TROISI)
)
Defendant-Appellee.)

CASE NO. **08-2490**
On Appeal from the
Lake County Court of Appeals
Eleventh Appellate District

Court of Appeals Case No. 2008-L-060

**APPELLEE JUANITA M. TROISI'S RESPONSE TO STATE OF OHIO'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST, NOR DOES IT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

In asserting that it is a case of public or great general interest or one that involves a substantial constitutional question, the State is misconstruing and misrepresenting the nature of the decision of the court of appeals. The State claims that the reversal in the court of appeals was because of a “procedural deficiency,” and asserts that the court of appeals:

. . . misapplied longstanding principles of constitutional law and effectively eliminated the State’s ability to seek justice in cases reversed on a procedural deficiency. In a 2 to 1 decision, the court of appeals reversed and vacated the decision of a jury on the grounds that the testimony of the State’s expert was admitted without the proper foundation . . . [b]ecause of this decision, the State is no longer able to retry a defendant after a reversal for a procedural deficiency; the court of appeals has essentially equated a reversal for improperly admitted evidence with a reversal based on evidentiary insufficiency.

However, the decision of the court of appeals was NOT based upon a “procedural deficiency”. This is simply a misinterpretation of the opinion by the State. Instead, the primary foundation of the decision to vacate the conviction was a finding of insufficient evidence. This conclusion is inescapable if one simply carefully reads the pertinent language of the opinion of the court of appeals:

We first point out that appellant’s second and fourth assignments of error assert the same legal theory . . . namely, whether the state presented adequate evidence at trial to meet its burden of proof on each element of the crime charged. It is from this point [that] we shall begin our analysis.

* * * * *

With the statutory definition in mind, the state was required to prove appellant: (1) Knowingly; (2) sold, offered for sale, or otherwise disposed of goods in her possession; (3) knowing that a spurious trademark was affixed to or otherwise used in connection with the goods; and (4) the spurious trademark: (a) is identical with or substantially indistinguishable from a mark that is registered on the principal register in the United States patent and trademark office for the particular purse, jewelry or item, *and* (b) is likely to cause confusion or mistake or to deceive other persons.

. . . appellant's challenge is directed at the manner in which the state attempted to prove

element (4)(a). Appellant alleges that the testimony of Tim Richissin, the state's intellectual property counterfeiting expert, by itself, was inadequate to prove the subject goods bore a "spurious" or "counterfeit" mark as defined by statute. We agree with appellant's argument.

* * * * *

Over defense objection, Mr. Richissin defined "trademark counterfeiting" as "[c]opying the registered trademark of a property owner." He further testified, again over objection, he is "one of the more knowledgeable people in Northeast Ohio about trademark counterfeiting." According to Mr. Richissin, he is able to personally distinguish counterfeit goods from authentic goods due to his training and experience in this area.

During direct examination, Mr. Richissin was provided certain examples of goods seized from appellant and asked to identify whether the items were, in his estimation, counterfeit . . . Mr. Richissin concluded each, over strenuous objections by defense counsel, were knock-offs and therefore counterfeit. At the conclusion of direct examination, Mr. Richissin testified, again over objection, that the trademarks on the merchandise he inspected were "identical or substantially indistinguishable from the genuine trademark."

During the defense's case-in-chief, defense counsel called Mr. Richissin as a witness. During defense counsel's direct examination of Mr. Richissin, the witness testified he had never obtained a record from the United States patent and trademark office. He further testified he had never personally viewed the trademarks from the principal register of any items he testified were counterfeit. After the conclusion of Mr. Richissin's testimony, defense counsel rested.

The state neither submitted certified copies of the authentic trademarks of the companies whose marks were at issue nor any other evidence of the actual trademarks registered in the principal register of the United States patent and trademark office. In essence, aside from Mr. Richissin's assurances that the goods were counterfeit (as defined by Richissin himself) the record is devoid of *any evidence* from which the jury could conclude that the items seized bore a trademark "identical with or substantially indistinguishable from a mark that is registered on the principal register in the United States patent and trademark office . . ." as required by R.C. 2913.34(F)(1)(a)(i). R.C. 2913.34 specifically requires the state to prove, beyond a reasonable doubt, that a "counterfeit mark" was attached or affixed to the goods in question. The definition of "counterfeit mark" is precisely defined in the statute and requires proof that the mark be "identical with or substantially indistinguishable from" the marks registered with the United States patent and trademark office. Without evidence that the goods bore a counterfeit mark as defined in the law, there can be no violation of the trademark counterfeiting statute.

Although Mr. Richissin testified the items he inspected, each of which were affixed with a recognizable trademark emblem of some kind, were inauthentic based upon multiple

factors, it is merely from these observations that he was able to conclude the items represented instances of "trademark counterfeiting." Given the statute, the supportive testimony for his conclusions is basically insufficient to meet the statutory definition of the crime of trademark counterfeiting set forth under R.C. 2913.34.

* * * * *

. . . We acknowledge that Mr. Richissin did, on direct examination, draw the blank conclusion that the items he inspected were "either identical or substantially indistinguishable from the genuine trademark." However, Mr. Richissin later testified he had never seen the genuine trademarks as they appear on the principal register in the United States patent and trademark office. Because he had never viewed the genuine trademarks and the state failed to submit some evidence of the same, Mr. Richissin's initial conclusion completely lacks evidentiary support.

Because there was no evidence presented that would allow the jury to conclude the goods bore a counterfeit mark that was identical with or substantially indistinguishable from a registered trademark, the jury was allowed to render a verdict based only upon Mr. Richissin's non-legal conception of this ultimate issue. Irrespective of the propriety of the jury instructions, the jury heard no evidence regarding the first prong of the definition of a "counterfeit mark." Hence, under these circumstances, Mr. Richissin's testimony was both misleading and legally insufficient to prove the ultimate issue which his testimony embraced.

* * * * *

. . . In our view, the statutory elements of the crime of "trademark counterfeiting" are unambiguously set forth under R.C. 2913.34. The statute *requires* the state to prove the trademark affixed to the purported knock-off merchandise is identical with or substantially indistinguishable from that which is properly registered with the United States trademark and patent office. This is a specific, express element of the crime for which appellant was prosecuted. However, as outlined above, the state failed to offer any substantive evidence to prove this element of the crime. We therefore hold this "gap" in the evidentiary chain necessitates a reversal of appellant's conviction for "trademark counterfeiting."

Therefore, based upon this very clear language of the court of appeals, this case was not decided on a "procedural deficiency." Instead, it is a case wherein the conviction was vacated because the prosecution presented evidence that was insufficient to support all of the essential elements of the crime charged -- It is simply an example of a case that was inadequately presented from an evidentiary standpoint, by the government. Therefore, this is not a case that involves a substantial constitutional question, nor is it one of public or great general interest.

**ARGUMENTS IN SUPPORT OF APPELLEE'S POSITION REGARDING EACH
PROPOSITION OF LAW ARGUED BY APPELLANT**

ARGUMENT IN SUPPORT NO.1

THE COURT OF APPEALS REVERSED THE JURY VERDICT ON THE BASIS OF
INSUFFICIENT EVIDENCE; THEREFORE, VACATUR WAS THE PROPER REMEDY AND
APPELLEE CANNOT BE RETRIED

(i)

The State is arguing that the within case falls within the ambit of Lockhart v. Nelson (1988), 488 U.S. 33 and that, according to the Nelson doctrine, the case must be remanded for a retrial, rather than the conviction being vacated.

Nelson stands for the proposition that when an appellate court assesses the sufficiency of the evidence in a jury case it must consider all of the evidence that was before the jury, even if the evidence was improperly admitted. If, in so doing, it is concluded that the evidence as a whole was insufficient, then the double jeopardy clause precludes retrial. However, if it is concluded that the evidence as a whole supported the jury's verdict, but that the trial court erred by admitting some of the evidence, then the double jeopardy clause does not preclude retrial. Nelson, 488 U.S., at 40-42. In such a case, the proper remedy is a retrial, not an outright reversal and vacatur.

With this in mind, it is still clear that vacatur by the court of appeals was proper herein, because the court held that the evidence as a whole, including the testimony by the expert witness (whether it was properly admitted or not), *was insufficient* to establish the essential element that the alleged spurious trademark was "identical with or substantially indistinguishable from" a federally registered mark. Therefore, this case does not satisfy the retrial criteria of the Nelson doctrine. To see that this is true, again consider this very clear explanation by the court of appeals:

During direct examination, Mr. Richissin was provided certain examples of goods seized from appellant and asked to identify whether the items were, in his estimation, counterfeit. . . Mr. Richissin concluded [that] each, over strenuous objections by defense counsel, were knock-offs and therefore counterfeit. At the conclusion of direct examination, Mr. Richissin testified, again over objection, that the trademarks on the merchandise he inspected were "identical or substantially indistinguishable from the

genuine trademark."

During the defense's case-in-chief, defense counsel called Mr. Richissin as a witness. During defense counsel's direct examination of Mr. Richissin, the witness testified he had never obtained a record from the United States patent and trademark office. He further testified he had never personally viewed the trademarks from the principal register of any items he testified were counterfeit. After the conclusion of Mr. Richissin's testimony, defense counsel rested.

Based upon this state of the evidence, the undeniable fact of the matter is that, taking into account *all* of the evidence that was admitted before the jury, it was *impossible* for the jury to conclude (from the standpoint of legal sufficiency; that is, based upon the statutory definition of "counterfeit mark") that the alleged spurious trademarks were "identical with or substantially indistinguishable from" a federally registered mark. This is because the jury was given *no evidence* of what such a registered mark looked like -- by his own admission the expert witness had never personally viewed such a registered mark, and the record does not contain any other evidence whatsoever to establish what such a registered mark looks like. Because of this very obvious reality, the jury did not have before it a depiction of a registered trademark from which it (or any other fact-finder) could conclude that the alleged spurious trademarks were "counterfeit marks" according to the definition set forth in the statute. Therefore, the reversal was indeed based upon the insufficiency of the evidence as a whole, and the Nelson retrial doctrine is not triggered.

(ii)

This aspect of the argument should not be closed without explicitly taking note of the fact that in the primary part of its opinion, wherein the court of appeals concludes that the conviction was not supported by sufficient evidence, the court never opined that the testimony of the expert witness was inadmissible. This realization is critical because the only way that the State's Nelson argument could be successful is if the court of appeals ruled that the trial court erred by admitting the expert testimony, but that the evidence as a whole (including the improperly admitted expert

testimony) was sufficient to support the jury's verdict. It is necessary to explicitly point this out because the State, in its argument in Proposition of Law No.1, creates some confusion in this area.

For example, the State argues that:

... the court of appeals held that the State's expert witness ... improperly testified that the goods in question were counterfeit ... [and] wholly discounted [his] testimony, stating that it 'completely lacks evidentiary support' because 'it was introduced without a proper foundation and/or qualification.' Based on the United States Supreme Court's holding in Burk that improper receipt of evidence gives way to reversal for trial error, the State should be permitted to retry the defendant, and the Eleventh District's order of vacatur was improper.

This argument makes it appear as if the court of appeals reversed the conviction because of "improper" testimony by the witness, or because of the "improper receipt of evidence." However, this is simply not the case. Appellee submits that in advancing this argument the State is conflating two very separate aspects of the opinion of the court of appeals.¹

To see that this is true, it must first be observed that, in paragraphs 8 through 37 of its opinion, the court of appeals is dealing exclusively with the second and fourth assignments of error; to wit: sufficiency of the evidence. It must be similarly observed that, in paragraphs 38 through 41, it is exclusively dealing with the first assignment of error; to wit: that the admission of the expert testimony invaded the province of the jury. These are two separate and independent aspects of the opinion, and they deal with two very different areas of the law. As indicated in the pertinent language from the court of appeals, excerpted above, the holdings of insufficient evidence *is based on an analysis that includes all of the evidence that was adduced at trial, including a consideration of the expert testimony as substantive evidence.* It is as a result of this analysis that the court of appeals vacates the conviction. It is only *later*, in the next separate part of

¹An example of this conflation is found in the State's argument, at the second full paragraph of page 6 of its Memorandum, wherein it cites, in a single sentence in its argument, references to paragraphs 36 and 40 of the opinion of the court of appeals. As set forth herein, it is clear that each of these two paragraphs are contained in completely separate and independent parts of the opinion.

the opinion, in paragraphs 38 through 41, that the court of appeals considers the question raised in the first assignment of error, regarding whether the admission of the expert testimony was improper in that it invaded the province of the jury. The court of appeals even leads into this second aspect of its opinion by stating, at the beginning of paragraph 38 that: “[w]hile the forgoing analysis *is dispositive of the instant case*, we shall still address appellant’s first assignment of error because it contemplates an issue that is capable of repetition yet evading review.”

It makes perfect sense for the court of appeals to break up its opinion into these distinct parts as it did. In the first part, the court held that, in considering *all* of the evidence, there was insufficient evidence to establish the essential element of a “counterfeit mark.” In this particular case this conclusion then begs the question: “well, then how/why did the jury conclude that this element was met?” The answer is found in the second part of the court’s opinion (paragraphs 38 through 41), primarily at paragraph 39:

. . . Mr. Richissin was allowed to testify that "trademark counterfeiting" means "[c]opying the registered trademark of a property owner." Although this definition may be sufficient in Mr. Richissin's business of intellectual property crime investigation, the statutory definition differs significantly from this open-ended conception. However, in light of this definition, Mr. Richissin was permitted to testify, over defense counsel's objection, that the items at issue were counterfeit without any substantive evidence that the marks on the items were counterfeit pursuant to R.C. 2913.34(F)(1)(a)(1). Because the state introduced no evidence of the marks as they appear on the principal registry, the jury was unable to measure Mr. Richissin's testimony against the proper statutory definition set forth under R.C. 2913.34(F)(1)(a)(i). By allowing him to draw his conclusion without introducing evidence of the marks as they exist on the principal registry, the issue of whether the marks were counterfeit was taken from the jury. Therefore, Mr. Richissin's testimony, which carried with it an air of authority beyond that of general lay testimony, acted to usurp the jury's role.

This explains why the jury found Appellee guilty even though there was insufficient evidence (as a matter of law, considering the statutory definition of “counterfeit mark”) to establish the essential element of a “counterfeit mark.” The jury simply accepted the expert’s

opinion that the goods were “counterfeit,” without having the benefit of understanding/knowing that the relevant statutory definition was “significantly different” from the expert’s definition (as pointed out by the court of appeals). With its attendant air of authority, it was easy for the jury (and natural, from its standpoint) to accept the expert’s definition as sufficient support for the proposition that the goods were “counterfeit.” The jury was simply not given the necessary information that would allow it make a finding based upon the statutory definition.

ARGUMENT IN SUPPORT NO.2

THE OPINION OF THE COURT OF APPEALS DID NOT ANNOUNCE A BLACK-LETTER RULE GOVERNING THE METHOD OF PROVING THE EXISTENCE OF A COUNTERFEIT MARK; U.S. V. GUERRA DOES NOT AID THE STATE’S CASE; AND WHETHER THE MERCHANDISE IS “AUTHENTIC” OR “GENUINE” IS IRRELEVANT UNDER THE STATUTE

(i)

It seems to be the State’s argument here that the court of appeals erred to the extent that it announced a “court-ordered requirement” that requires that the State, in order to prove that a mark is counterfeit, must introduce “evidence of the marks as they appear on the principal registry.”

Firstly, it is not at all clear from a reading of the opinion that the court of appeals imposed such a requirement. As stated previously, the opinion deals with the issues on appeal in two separate and distinct parts. The first part holds that the evidence was insufficient to establish the essential element of a “counterfeit mark,” according to the statutory definition of “counterfeit mark.” The second part holds that, “given the course of these proceedings,” the expert testimony was improper. Beyond that, the opinion does not announce a black-letter legal principle that requires that the “counterfeit mark” element be proven in any specific manner.

Secondly, the State points out that the dissenting judge stated that “there are a variety of ways for the state to meet its burden of demonstrating that the marks used on products were

identical or substantially indistinguishable from the registered marks.” Indeed, the dissenting judge suggested three such ways: (1) introduce certified copies of the trademarks in question, (2) introduce authentic products and have a representative from the company identify the items as authentic, or (3) adduce an expert opinion regarding the identity of the actual trademarks combined with the defendant’s confession.

As stated by the dissenting judge, the method identified in (1) represents “the paramount” way to prove that the alleged offending mark is a “counterfeit mark.” Considering the necessary elements of proof and the language of the statute, Appellee agrees with this proposition.

As for the method identified in (2), Appellee submits that more may be required. If the State proceeds to “introduce authentic products and have a representative from the company identify the items as authentic,” then Appellee submits that more is required. In such a case, in order to set up a valid comparison (i.e., to make the comparison that is called for by the language of the statute) it would be necessary to also introduce evidence that the mark on the “authentic product” is a mark that is “registered on the principal register in the United States patent and trademark office.”

Appellee submits that the method identified in (3) completely fails in achieving the intended purpose. In order to qualify as a “counterfeit mark” under the statute, there must be evidence sufficient to establish that the mark in question is “identical with or substantially indistinguishable from” a federally registered mark. This statutory language necessitates a comparison between the alleged offending mark and the federally registered mark. Furthermore, this required statutory inquiry is (a) one of fact, and (b) lies exclusively within the province of the fact-finder. Upon this foundation we can proceed to analyze method (3).

Firstly, it is not at all clear how the introduction of “an expert opinion regarding the identity

of the actual trademarks” would aid in setting up the necessary comparison. By the phrase “actual trademarks,” the dissenting judge is apparently referring to “a mark that is registered on the principal register in the United States patent and trademark office,” as called for under the statute. It is true that a mark is either registered on this “principal register” or it is not. This is purely a question of fact. Therefore, for obvious reasons, an “expert opinion” is completely useless in establishing that a mark is so registered, and in producing a depiction of such a mark.

Secondly, “the defendant’s confession” (or a defendant’s opinion) is completely irrelevant to the comparison inquiry concerning whether an allegedly offending mark is “identical with or substantially indistinguishable from” a federally registered mark. As previously observed, the essential element that is being discussed herein calls for a comparison between the allegedly offending mark and a registered mark. With these two marks side-by-side, the comparison inquiry asks whether the two marks are “identical with or substantially indistinguishable from” one another. Any opinion, statement, position, feeling or “confession” expressed by the defendant (or by anyone else) is completely irrelevant to this inquiry.

(ii)

The State cited United States v. Guerra (2002), 293 F.3d 1279, purportedly in support of the propositions (1) that the court of appeals herein “too narrowly defined the proof required to meet” the counterfeit mark element, and (2) that the State should be able to “prove its case through nearly any available means.” However, it is interesting to note that in Guerra the court pointed out that in order to establish the “identical or substantially indistinguishable” requirement under the federal statute, “[t]he jury had been shown *registered designs* of the trademarks for each cigar, as well as various cigar labels or brands produced by authorized licensees. The jury therefore had *a valid basis for comparison* in determining whether the designs were ‘identical or substantially

identical.” [Emphasis Supplied].

As observed hereinabove, in the instant case it was impossible to set up a valid comparison for the jury to consider, because one of the marks necessary to the comparison inquiry was not furnished by the State. On the other hand, the two necessary depictions were furnished to the jurors in Guerra. Therefore, Guerra supports the position of Appellee.

(iii)

In connection with the issue of the expert testimony, the State argues that:

“Mr. Richissin could testify to his opinion of the *authenticity* of the merchandise . . . in testifying about the counterfeit Louis Vuitton bag that he purchased, Mr. Richissin stated that the LV bag trademarks were in the wrong position on the bag and that the bag had plastic over the handles, two red flags that the bag was not *authentic*. Additionally, he testified that the odor of the bag indicated that the material was not the same as that of an *authentic* bag. Ultimately, Mr. Richissin concluded that *the bag was counterfeit* based on his analysis . . . without further information [from the expert], the jury would be unable to make a determination as to the authenticity of a product.” [Emphasis Supplied].

From this argument it is clear that the State is simply (and still) confusing the issues of the colloquial concept of “authentic” and “genuine” goods, on the one hand, with goods wherein “a counterfeit mark is attached to, affixed to, or otherwise used in connection with the goods.” This is critical to recognize because the latter type goods are defined to be unlawful under the statute, while the former are not. To see that this is true it must be recognized that the statute focuses on the “mark” that is used in connection with the goods, not upon the goods *per se*. Indeed, the statute contains no prohibition regarding goods that are not “authentic,” “genuine,” “real,” etc. As far as this particular statute is concerned, such goods may be manufactured and sold as long as a “counterfeit mark,” as that term is defined by the statute, is not used. This is why the “authentic/genuine” focus of the State is so misplaced. This misplaced focus is compounded (and indeed illustrated) by State arguments that include references to “authenticity” and “genuineness” (the Brief that was filed by the State in the court of appeals is replete with such misleading

references). The State confused this issue in the trial court (which explains why it presented the case in the manner in which it did), it carried this confusion into the court of appeals, and it is apparently still under the influence of this misunderstanding.

The State presented the case in the trial court in the manner in which it did because it was confused regarding this very issue (i.e., “authenticity/genuineness versus the counterfeit nature of the “mark” that is used). It is certainly not a difficult task to obtain certified copies of documents from the United States patent and trademark office that depict a mark that is appears on the “principal register” that is referenced in the statute. Once this depiction is in evidence, the jury is faced with the straight-forward *factual inquiry* of determining whether the allegedly offending mark is “identical with or substantially indistinguishable from” the federally registered mark. Expert testimony is neither required for this exercise nor is it helpful.

In its Memorandum the State complains that:

In this case, over 1900 pieces of merchandise were seized from the defendant; it would be nearly impossible for the State to allow a direct jury comparison of each piece of counterfeit merchandise with its authentic counterpart. Additionally, a non-authentic item may not have a genuine counterpart to allow a direct comparison.

However, what the State fails to mention is the fact that there were on the order of only 20 (or less) designer marks at issue in the prosecution herein. In a criminal prosecution where a person’s liberty is at stake it is certainly not unreasonable to suggest that the prosecution might be required to introduce a number of documents that are consistent with the nature of the charges that it decided to level. Furthermore, there were multiple copies of many of the goods/items. With a depiction of the registered marks along with the allegedly offending goods/items (or batches of them) the jury could have proceeded with the comparison exercise in an orderly and straight-forward manner. Finally, the fact that “a non-authentic item may not have a genuine counterpart to allow a direct comparison” is of absolutely no consequence. This fact merely

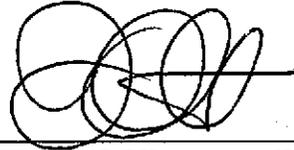
indicates that there is not a “counterfeit mark” problem and therefore no violation of the criminal statute. This complaint by the State again illustrates the problem that is manifested by confusing the irrelevant issue of whether an article is “authentic/genuine” with the statutorily germane issue of whether the article uses a “counterfeit mark.”

At the end of the day the reasonable litigant/advocate must admit that the easiest, most effective and most sensible way to set the stage for the comparison that is called for by the statute is to simply introduce into evidence a certified copy of a document from the United States patent and trademark office that depicts the registered mark in question so that it can be laid side-by-side with the allegedly offending mark and the comparison thereby made by the fact-finder. That being said, it is a fact that the court of appeals in this case did not mandate this method, nor should it have to. Once the statute is read and understood, the approach is obvious.

CONCLUSION

Based upon all of the foregoing, it is clear that the Court of Appeals reversed the conviction on the basis of insufficient evidence. Therefore, vacature was the proper remedy. This case is nothing more than an “insufficiency of the evidence” case. For these reasons, this is not a case that involves a substantial constitutional question, nor is it a case that is of public or great general interest, and jurisdiction should be declined.

Respectfully submitted



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CERTIFICATE OF SERVICE

A copy of the foregoing *Appellee Juanita M. Troisi's Response to State of Ohio's Memorandum in Support of Jurisdiction* was mailed this 27th Day of January, 2009, via regular U.S. Mail, postage prepaid to:

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Respectfully submitted



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