

NO. 09- 09 - 2131

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 92455

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STATE OF OHIO

Plaintiff-Movant

-vs-

WELTON CHAPPELL

Defendant-Respondent

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**MEMORANDUM IN SUPPORT OF JURISDICTION**

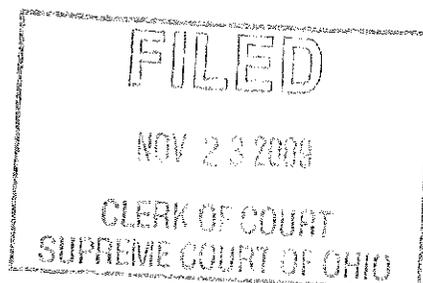
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**TABLE OF CONTENTS**

Why This Felony Case is a Case of Great Public or General Interest and  
Involves a Substantial Constitutional Question..... 1

Statement of the case and facts..... 2

Law and Argument..... 3

Proposed proposition of law I: ..... 3  
The State may use violations of federal criminal law or violations of  
municipal criminal law to prove that a person possess items to use the  
items *criminally* in violation of R.C. 2923.24

Conclusion ..... 4

Certificate of Service .....5

**Appendix**

*State v. Cahppell*, Cuyahoga County Court of Appeals Case No. 92455

## **Why This Felony Case is a Case of Great Public or General Interest and Involves a Substantial Constitutional Question**

The Eighth District now limits what the State is permitted to prosecute without any indication from the General Assembly that the State is not permitted to use a Federal or municipal law to support an element of an Ohio offense. In Ohio, it is illegal to possess an item with the intent to use that item “*criminally*.” In this case, the State intended to prove that Welton Chappell possessed items recovered from his car such as computers, packaging material, and hard drives and that he possessed these items to copy and sell CDs and DVDs. Copy and selling CDs and DVDs violates federal copyright law. Thus, Chappell possessed these items with the intent to use them *criminally*.

The Eighth District held that the State cannot use a Federal law to prove that Chappell acted “*criminally*” because the Federal Copyright Law is not found within the Ohio Revised Code. But this rationale means the State cannot prosecute a possession of a scale—criminal tool—used to weigh marijuana if the possession of marijuana is based on a violation of a municipality’s criminal ordinance.

There is no indication by the legislature that the State is not permitted to prosecute an individual for possession of items used to facilitate copying and selling CDs and DVDs if this act violates federal or

municipal law. Without a clear directive from the legislature, the Eighth District should not restrict prosecution of criminal offenses.

This Court should exercise jurisdiction in this case to answer the question of whether the State may use a violation of federal or municipal criminal law to prove an element of offense defined in Ohio Revised Code.

### **Statement of the case and facts**

During a search, officers found a computer, packaging material, and hard drives, hundreds of DVDs and blank DVDs, and \$6,793 on his person. Chappell admitted that he would download movies that were currently being played at theaters and copy the movies to sell. Chappell also demitted that his computer equipment was used to facilitate these offenses. Before trial, the trial court dismissed the State's possession of criminal tools charge. The State intended to prove that Chappell possessed the items in his vehicle with the intent to use them *criminally*. R.C. 2923.24. The reason Chappell was going to use these items criminally was because he would be violating federal copyright law. And the violation of federal copyright law would take place in Ohio. The trial court found and the Eighth District agreed that the State cannot use a federal criminal offense to support an essential element in Ohio. The trial court dismissed the possession of criminal tools charge.

## Law and argument

### **Proposed proposition of law I:**

**The State may use violations of federal criminal law or violations of municipal criminal law to prove that a person possess items to use the items *criminally* in violation of R.C. 2923.24**

To prove that a person violates R.C. 2923.24, the State must prove that items are possessed with the intent to use them *criminally*. The statute is clear on its face and criminalizes possession of an item if the possessor's intent is to use the item *criminally*. The statute does not require that the crime that the possessor intends to violate be defined in the Ohio Revised Code. But the Eighth District has now restricted the definition of *criminally* to only apply to conduct prohibited in the Ohio Revised Code.

The Eighth District uses definition of "offense" in the Ohio Revised Code to determine that the legislature intended to prohibit the State's ability to prosecute individuals that possess an item with the intent to violate either a Federal or municipal criminal law. If the legislature intended to limit the State's ability to prosecute in that manner, the word *criminally* would be modified by the word *offense*. It is not and the Legislature did not intend the result affirmed by the Eighth District. The State intended to

prosecute Chappell with a crime that is specifically defined in Ohio and one element of that crime is a violation of federal criminal law.

The State is permitted to prove that an individual possess a criminal tool because the person intends to violate a federal, municipal, or state criminal law. That is the plain reading of the statute.

The opinion in this case, creates precedent that restricts the State's ability to prosecute people for violating a statute that is clear on its face. The Prosecutors of this State are legally required to uphold the criminal laws. The Eighth District's decision prevents prosecutors from carrying out a statutory obligation. Without a clear directive from the legislature that the State cannot prosecute a State defined criminal offense because an element of that offense is not in the Revised Code, the Eight District should not prohibit prosecutors from enforcing violations of State law.

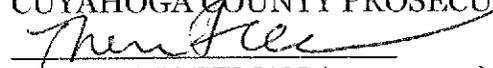
### **Conclusion**

Resolution of this issue is not complex but it is important. The Eight District, without a directive from the General Assembly, restricts the obligation of Prosecutors to prosecute individuals that possess items with an intent to violate either federal or municipal criminal law. When a court restricts the rights of the State to prosecute, resolution of that issue is

important and should be decided by this Court. The State asks that this Court accept this case for review.

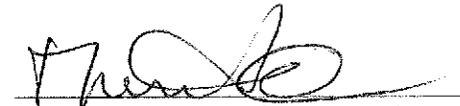
Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant was mailed by regular U.S. Mail on the 20<sup>th</sup> day of November 2009 to Joseph McGinness 6100 Rockside Woods, North Suite 210 Cleveland Ohio 44131.

  
Thorin Freeman (0079999)  
Assistant Prosecuting Attorney

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 92455

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**STATE OF OHIO**

PLAINTIFF-APPELLANT/  
CROSS-APPELLEE

vs.

**WELTON CHAPPELL**

DEFENDANT-APPELLEE/  
CROSS-APPELLANT

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**JUDGMENT:  
AFFIRMED; CROSS APPEAL DISMISSED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-495988

**BEFORE:** McMonagle, P.J., Blackmon, J., and Boyle, J.

**RELEASED:** October 8, 2009

**JOURNALIZED:** OCT 22 2009

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FILED AND JOURNALIZED  
PER APP.R. 22(C)  
OCT 22 2009  
GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION  
PER APP.R. 22(B) AND 26(A)  
RECEIVED  
OCT 08 2009

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GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

Plaintiff-appellant/cross-appellee the state of Ohio (the "State") appeals from the judgment of the trial court dismissing a charge of possession of criminal tools against defendant-appellee/cross-appellant Welton Chappell. Chappell cross appeals from the trial court's denial of his motion to suppress. We affirm the dismissal of the possession of criminal tools charge and dismiss Chappell's cross appeal as untimely filed.

I.

Chappell was indicted in a four-count indictment on two counts of criminal simulation of music and movies in violation of R.C. 2913.32, one count of receiving stolen property (a laptop computer) in violation of R.C. 2913.51, and one count of possessing criminal tools (i.e., money, an automobile, hard drives, a laptop computer, and packaging material) in violation of R.C. 2923.24. The charges stemmed from allegedly bootlegged DVDs and CDs found in Chappell's car during the execution of a search warrant.

The trial court subsequently denied Chappell's motion to suppress. At trial, the trial court granted Chappell's Crim.R. 29 motion in part and dismissed the receiving stolen property count. The jury could not reach a verdict on the other counts and the trial court declared a mistrial.

The court subsequently granted Chappell's motion to dismiss the criminal simulation counts, leaving only the possession of criminal tools charge for retrial. Under R.C. 2923.24, regarding possessing criminal tools, "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

Chappell then moved for dismissal of that charge as well. After a hearing, the trial court denied Chappell's motion and ruled that the indictment adequately set forth the offense of possession of criminal tools under R.C. 2923.24.

Chappell then moved to compel a response to his second motion for a bill of particulars, in which he had asked the State to identify, among other things, his alleged criminal purpose in using the alleged criminal tools. In its supplemental bill of particulars, the State asserted that it intended to introduce evidence at trial that Chappell possessed the criminal tools with the intent to violate federal copyright infringement law.

Chappell then again moved to dismiss the possession of criminal tools charge. After a hearing, the trial court granted his motion and dismissed the indictment. The trial judge found that the intent to use an item criminally must arise from an intended violation of Ohio law and that "the State is not free to use

the law of any jurisdiction or federal law in order to support its claim.” The State appeals the dismissal; we find no error.

II.

Ohio is a code state; it has no common law offenses. *Charles Gruenspan Co. v. Thompson*, 8<sup>th</sup> Dist. No. 80748, 2003-Ohio-3641, ¶35. As such, “no conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.” R.C. 2901.03(A). “An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.” R.C. 2901.03(B). Sections of the Revised Code defining offenses are to be strictly construed against the State and liberally construed in favor of the accused. R.C. 2901.04.

Under these sections, it is apparent that prosecution under Ohio law must emanate from violations of offenses defined in the Revised Code, i.e., a violation of state law. Violating federal copyright law is not defined as an offense in the Revised Code nor does the Code provide any penalty for it. Thus, even assuming Chappell possessed tools and intended through their use to violate federal copyright law, such intent is not a crime that can be prosecuted by the State under the Ohio Revised Code, as there would have been no intended violation of state law.

The State argues, however, that a motion to dismiss cannot properly be granted where the indictment is valid on its face. It contends that R.C. 2923.24 does not indicate that the underlying intent to use the items criminally must be an intended violation of state law and because the indictment properly set forth the elements of possessing criminal tools, the trial court erred in dismissing it. The State contends that the trial court went beyond the face of the indictment by considering its supplemental bill of particulars in ruling on the motion to dismiss and improperly considered whether the State would be able to satisfy its burden of proof at trial.

Crim.R. 12(C) permits pretrial motions regarding “any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue.” In deciding a Crim.R. 12(C) motion, the court may decide such a motion “based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.” Crim.R. 12(F).

A motion to dismiss tests the sufficiency of the indictment, without regard for the quantity or quality of evidence that may be produced by either the State or the defendant. *State v. Patterson* (1989), 63 Ohio App.3d 91, 95; *State v. Varner* (1991), 81 Ohio App.3d 85. “The proper determination is whether the allegations contained in the indictment ma[k]e out offenses under Ohio law.” *Patterson* at 95. If they do, it is premature for the trial court to determine, in

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advance of trial, whether the State can satisfy its burden with respect to the charges. *Id.*

We disagree that the trial court impermissibly decided the issue for trial in ruling on Chappell's motion to dismiss. Chappell's motion did not embrace what would be the general issue for trial (whether he possessed tools with criminal intent); rather, it alleged that the indictment failed to make out any offense under Ohio law because a violation of federal copyright law is not an offense under the Ohio Revised Code. Because Chappell's motion did not require a determination of the general issue for trial, the trial court could consider the motion under Crim.R. 12(C). Further, as Crim.R. 12(F) allows the court to consider briefs, affidavits, testimony, and other exhibits, the trial court could properly consider the supplemental bill of particulars in deciding the motion. See, e.g., *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶18.

As the trial court did not err in granting Chappell's motion to dismiss, appellant's assignment of error is overruled.

### III.

Chappell cross appeals from the trial court's denial of his motion to suppress. We dismiss his cross appeal as untimely filed.

Under App.R. 4(A), a party shall file its notice of appeal within 30 days of the judgment or order appealed. App.R. 4(B)(1) states that if a notice of appeal

is timely filed by a party, “another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.”

The trial court rendered its judgment granting Chappell’s motion to dismiss on November 7, 2008. The State filed its notice of appeal on November 21, 2008. At that point, Chappell had the choice of filing his cross appeal within ten days of the State’s filing its notice of appeal, or within the traditional 30-day window created by App.R. 4. Under the rules, the latest that Chappell could have filed his cross appeal was December 8, 2008 (December 7, 2008 was a Sunday, so Chappell could have filed on Monday, December 8). The record reflects that Chappell filed his appeal on December 9, 2008, one day beyond the required time limit of App.R. 4. The time requirements for filing a cross appeal pursuant to App.R. 4 are mandatory and jurisdictional. *Kaplysh v. Takieddine* (1988), 35 Ohio St.3d 170. Thus, this court cannot address the merits of Chappell’s untimely cross appeal as we lack jurisdiction and the cross appeal is dismissed.

Judgment affirmed.

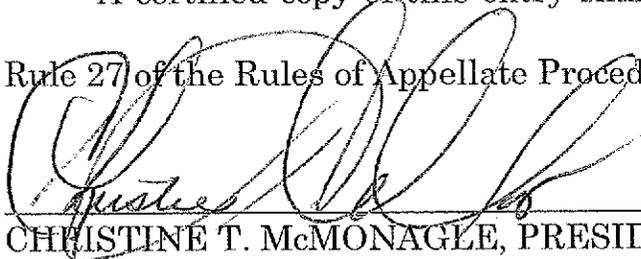
It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

A large, stylized handwritten signature in black ink, appearing to read 'Christine T. McMonagle', is written over a horizontal line.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and  
MARY J. BOYLE, J., CONCUR

VOL 0692 P00340