

ORIGINAL

NO. 2009-2131

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO

Plaintiff-Appellant

-vs-

WELTON CHAPPELL

Defendant-Appellee

MERIT BRIEF

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## **INTRODUCTION AND SUMMARY OF ARGUMENT**

As the smell of freshly popped corn wafts through the air and the family sits down to watch the newest DVD release, everyone is reminded:

### **FBI WARNING**

The motion pictured contained in this DVD is protected under the copyright laws of the United States and other countries. This DVD is sold for home use only and all other rights are expressly reserved by the copyright owner of such motion picture. Any copying or public performance of such motion picture is strictly prohibited and may subject the offender to civil liability and severe criminal liability. (Title 17, U.S.C. §501 and 506).

Despite this warning, Chappell obtained a computer, software, and other items to download and copy movies playing in the theater so he could sell the movies for a profit.

For his conduct, Chappell faced a charge for possessing criminal tools. The State intended to prove that Chappell possessed certain items with the intent to use them *criminally*—to violate 17 U.S.C. § 506. Chappell’s criminal purpose in possessing certain items was to make copies of movies and CDs and sell these items for a profit. The trial court and Eighth District held that the State could only use an *offense* found within the Ohio Revised Code to prove that a person acts criminally.

That decision ignores the plain language of the statute, which only uses the words 1) criminally, 2) criminal purpose, and 3) criminal use and improperly restricts the obligation of prosecutors to prosecute individuals that violate the law within its borders and protect Ohio citizens. This Court should reverse and remand for trial.

### **STATEMENT OF THE CASE**

Chappell initially faced multiple charges. The jury was unable to reach a decision on any charge. After declaring a mistrial, Chappell successfully moved to have all of the remaining charges dismissed with the exception of possessing criminal tools. The trial

court found that the indictment for possessing criminal tools was valid on its face. Chappell then asked for a supplemental bill of particulars so he would have notice of the means by which he acted criminally. The State responded and indicated that Chappell's criminal purpose in possessing the items was to violate 17 U.S.C. § 506, a federal statute.

Chappell filed another motion to dismiss arguing that the State failed to present an element to the grand jury, the State is preempted from using this federal offense, and the State cannot use a federal law to prove criminal purpose.

The trial court agreed in part with Chappell's argument. The trial court found that the State is not required to specify in the indictment the crime that makes possession of certain items illegal.<sup>1</sup> The trial court also disagreed with the preemption argument because the "State is pursuing possession of criminal tools, not a copyright infringement case."<sup>2</sup> The trial court did find that the State must use an offense found within the Ohio Revised Code to prosecute a violation of criminal tools.<sup>3</sup>

The Eighth District held that the State must use an offense found within the Ohio Revised Code to prosecute a person for possessing criminal tools.<sup>4</sup>

### **STATEMENT OF THE FACTS**

While conducting a controlled purchase of narcotics from a residence, a confidential informant was also able to purchase bootlegged DVDs.<sup>5</sup> The bootlegged

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<sup>1</sup> Tr. 11-12.

<sup>2</sup> Tr. 12-13.

<sup>3</sup> Tr. 13.

<sup>4</sup> *State v. Chappell*, Cuyahoga App. No. 92455, 2009-Ohio-5371, at ¶s 8-9.

<sup>5</sup> Tr. 12.

DVDs were of movies that were playing in the theater.<sup>6</sup> Based on the purchase of narcotics, the police obtained a search warrant for the premises and its curtilage.<sup>7</sup> When the officers executed the search warrant, Welton Chappell and his vehicle were present.<sup>8</sup> The officer secured Chappell and during a pat down discovered \$6,793.<sup>9</sup>

The officer advised Chappell of his Miranda rights and began to conduct an interview.<sup>10</sup> Chappell was at this residence to drop off CD sleeves to the target of the search warrant.<sup>11</sup> Chappell indicated that he had illegal pirating software on his computer in his vehicle and that he dubbed movies for his clients.<sup>12</sup>

### **LAW AND ARGUMENT**

#### ***PROPOSITION OF LAW I: THE STATE MAY USE VIOLATIONS OF FEDERAL CRIMINAL LAW OR VIOLATIONS OF MUNICIPAL CRIMINAL LAW TO PROVE THAT A PERSON POSSESSES ITEMS TO USE THE ITEMS CRIMINALLY IN VIOLATION OF R.C. 2923.24.***

##### **I. Question presented**

A person may not possess any item with the intent to use the item *criminally*. This statute is an attempt to “expand upon a former measure prohibiting the possession

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<sup>6</sup> Tr. 59.

<sup>7</sup> State’s Exhibit 1.

<sup>8</sup> Tr. 20-21.

<sup>9</sup> Tr. 22.

<sup>10</sup> Tr. 66.

<sup>11</sup> Tr. 67.

<sup>12</sup> Tr. 74-75.

of burglar's tools, to include possession of all things intended for *criminal use*.”<sup>13</sup> Chappell possessed items with the intent to violate the federal copyright law. Because Chappell’s intent is to violate federal law, this is a criminal act. Can the State prosecute an individual for possessing items with the intent to violate a criminal federal law or criminal municipal law?

## **II. Law and Analysis**

### **A. Law.**

“In reviewing statutory provisions, courts are constrained to look to the statutory language and the purpose to be accomplished. Words used in a statute must be taken in their usual, normal or customary meaning \* \* \* [and it] is the duty of the court to give effect to the words used and not to insert words not used.”<sup>14</sup>

R.C. 2923.24 states a positive prohibition against possession or control of “any substance, device, instrument, or article, with purpose to use it *criminally*.” While addressing an allied offense argument this Court held that, “possessing criminal tools is not limited to possession with the purpose to commit theft; rather, it is broad enough to include *any criminal purpose as the requisite intent*.”<sup>15</sup>

### **b. Analysis**

#### **i. Normal and customary meaning of the word criminally.**

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<sup>13</sup> Legislative Service Commission to 1972 H 511 (emphasis added).

<sup>14</sup> *State v. Cargile*, 123 Ohio St.3d 343, 346, 2009-Ohio-4939, at ¶ 18 (quotations and citations omitted).

<sup>15</sup> *State v. Talley* (1985), 18 Ohio St.3d 152, 156 (emphasis added).

The proposition turns on the definition of “criminally.” What is the normal or customary meaning of the word criminally? Crime is defined as “a social harm that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding.”<sup>16</sup>

Welton Chappell possessed money, a vehicle, hard drives, computers, and packaging material in the State of Ohio. Chappell had a criminal purpose in possessing these items. The criminal purpose was to download and copy movies that were playing in theaters and sell those movies. Downloading and selling movies is a violation of federal criminal law—a crime. The State did not prosecute Chappell for a violation of federal copyright law. The state prosecuted Chappell with the possession of certain items to accomplish his intent to violate federal copyright law. In fact, as this case currently stands the State has not proven that Chappell *actually* violated the federal copyright law. But the statute only requires the State prove that Chappell’s intent is to violate the federal copyright law.

The State could prove, by Chappell’s own admission, that his intent was to download movies, make copies, and sell those copies. Chappell had software on his computer to accomplish that goal and prove his criminal intent. Thus, the items listed in the indictment were possessed with the purpose to act *criminally* and are criminal tools under Ohio law.

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<sup>16</sup> Blacks Law Dictionary 8<sup>th</sup> Ed.

## ii. Purpose of the statute

When determining what a word in a statute means, courts also look “to the purpose to be accomplished.”<sup>17</sup> The Legislative Service Commission indicates the purpose of this statute:

“This section expands upon a former measure prohibiting the possession of burglar’s tools, to include possession of all things intended for *criminal use*.”<sup>18</sup>

The purpose of the statute was to broaden criminally liability. The only words in the this statute, of importance here, are the words “criminally” and “criminal.” The whole concept behind criminal law is to protect citizens from criminal acts. By limiting the word criminally to only include crimes within the Ohio Revised Code, the purpose of the statute—to expand the law to all things intended for criminal use and protection of Ohio citizens from crimes occurring within its borders— cannot be accomplished. This rewriting of the word criminally to mean offense defeats the purpose of the statute.

Crime means *any* crime. The State may use any criminal act committed within its territorial jurisdiction to support a possession of criminal tools charge.<sup>19</sup> The criminal act may be a federal law or a municipal ordinance.

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<sup>17</sup> *Cargile*, 2009-Ohio-4939, at ¶ 18.

<sup>18</sup> Legislative Service Commission to 1972 H 511 (emphasis added).

<sup>19</sup> In determining whether the State can prosecute cases within its jurisdiction the State is entitled to the broadest possible jurisdiction under R.C. 2901.11(G) “This section shall be liberally construed, consistent with constitutional limitations, to allow this state the broadest possible jurisdiction over offenses and persons committing offenses in, or affecting, this state.”

**c. Chappell's argument**

Chappell's arguments below and in his memorandum-opposing jurisdiction have been threefold. First, he argued that the State has violated his right to a grand jury indictment. Second, he argued that the word criminally means an *offense* as defined in R.C. 2901.03. Third, he argued that the State is preempted from using this particular statute.

**i. What elements must be presented to the Grand Jury?**

Chappell argued that his right to a grand jury has been violated. Specifically, he argued that the State is required to present the underlying criminal act to the grand jury. Chappell is incorrect. The State must prove that a person possessed items to use them criminally. Criminally is an element. But the particular crime is a means by which the element is completed and is in actuality a sentencing enhancement determination.

There is a difference between an element and a means by which an element is committed.<sup>20</sup> All essential elements must be presented to the grand jury. The question then becomes whether the criminal act is an element. It is not.

By Chappell's own admission, any offense in the Ohio Revised Code can be used to support the criminal purpose. Therefore, the *particular* crime is not an element but a means by which the element may be proven. It is necessary for due process concerns and sentencing that Chappell has notice of the criminal act the State intends to prove. Additionally, the criminal act also determines whether possessing criminal tools is a felony or misdemeanor. If the criminal act is a felony, then possessing criminal tools is

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<sup>20</sup> *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, at ¶ 37. (J. O'Connor's opinion joined by J. Lundberg Stratton and J. Cupp.)

a felony. If the criminal act is a misdemeanor, then possessing criminal tools is a misdemeanor.

The State provided Chappell notice in the bill of particulars of the criminal act that was his purpose in possessing the criminal tools. The initial crime presented to the Grand Jury is a felony and the crime that Chappell actually intended to violate—17 U.S.C. § 506—is also a felony.

Because the particular crime that Chappell intends to violate is not an element but a means to commit an element, the State is not required to present a *particular* crime to the grand jury.

For purposes of sentencing, the State must present a crime in order to establish probable cause for a felony. The State did that in this case. The State protected Chappell's right to have all essential elements presented to the grand jury.

**ii. Chappell argued that criminally actually means offense.**

Chappell argued that the word *criminally* should have the same definition as “offense.” This argument ignores the statute's plain language and how the legislature deals with other criminal acts.

The only Ohio criminal statute that uses the lone word *criminally* is R.C. 2923.24—the possessing criminal tools statute. Looking at other criminal statutes, the legislature is always clear when the State is limited to using an offense in the Ohio Revised Code.

In the aggravated robbery and robbery statutes, the legislature uses the term “theft.” Theft is a crime in municipal, state, and federal jurisdictions. But the legislature modifies the word theft with the word *offense* and further limits theft “as defined in

section 2913.01.” Thus, the Legislature has clearly prevented the State from using a federal or municipal theft statute to support a conviction for robbery.

In the aggravated burglary and burglary statutes, the legislature uses two words that implicate criminal laws that exist in multiple jurisdictions. But each of these terms is then modified to limit the criminal act to some crime in the Ohio Revised Code.

The first element in these statutes is “trespass.” Jurisdictions may consider different acts to be a trespass. But the word “trespass” in the burglary statutes is defined as a violation of 2911.21. This limits what types of trespass form an element in this burglary statute. Thus, the legislature clearly defines what acts constitute a trespass to limit what the State may use to establish a burglary.

These statutes also require a purpose to commit a crime. But the word crime in the burglary statutes is then modified by the word *offense*. Because the word *offense* modifies the word criminal the State must prove an offense within the Ohio Revised Code.

There is no similar limitation in the possessing criminal tools statute. Because there are limitations restricting what crimes the state can use in other statutes but no similar limitation in the criminal tools statute, it can be inferred that the Legislature did not intend to limit the word criminally to state law offenses. In fact, the word offense does not appear anywhere in the possessing criminal tools statute. The only similar word is “criminal,” which is modified by either “purpose” or “use.” In R.C. 2923.24, the word criminal is *never* modified by the word offense. And if the word offense did modify the word *criminally* in the possession of criminal tools statute, the State’s proposition is wrong.

Additionally, the Ohio Revised Code contemplates using federal, other state, and municipal laws as part of determining guilt and punishment in Ohio. Most enhancements for prior crimes usually encompass municipal, other state, and federal criminal acts.<sup>21</sup> The Legislature contemplates using laws of multiple jurisdictions in an effort create the broadest jurisdiction and to afford Ohio citizens the greatest protection from individuals that commit criminal acts.

**iii. Chappell argued the state is preempted from proving intent to violate 17 U.S.C. § 506.**

Chappell maintained that *Perry* controls the outcome in this case because “*Perry* sustained dismissal of the unlawful use and theft charges as well as the PCT count.”<sup>22</sup> This is a disingenuous portrayal of this Court’s decision in *Perry*. *Perry* only addressed the “unauthorized use” statute *because Perry was found not guilty of possessing criminal tools*.<sup>23</sup>

To evaluate a preemption claim courts examine “whether a work fixed in a tangible medium of expression is within the subject matter of copyright and whether the rights addressed are equivalent to the exclusive copyright rights set out in Section 106, Title 17, U.S.Code.”<sup>24</sup> “When a state law violation is predicated upon an act

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<sup>21</sup> There are numerous examples of using other criminal laws to define terms such as the definition of an offense of violence includes any municipal, state, or federal law. R.C. 2901.01(A)(9)(b)-(c). In the definitions sections to R.C. 2923.31 one definition of corrupt activity is any conduct that meets the definition of racketing found in the Federal Code. R.C. 2923.31(1)(1).

<sup>22</sup> Chappell’s Memorandum in response pg. 6.

<sup>23</sup> *State v. Perry*, 83 Ohio St.3d 41, 1998-Ohio-422. (emphasis added).

<sup>24</sup> *Id.* at 42.

incorporating elements *beyond mere reproduction or the like*, the rights involved are not equivalent and preemption will not occur.”<sup>25</sup> The state’s purpose in prosecution must be qualitatively different from a copyright infringement claim.<sup>26</sup> “Put somewhat differently, courts question whether the state law ‘regulate[s] conduct that is qualitatively distinguishable from that governed by federal copyright law-i.e., *conduct other than reproduction, adaptation, publication, performance, and display.*”<sup>27</sup>

Because the State’s purpose in prosecuting Chappell is to protect Ohio consumers from Chappell’s actions by prohibiting his *possession* of items so that he cannot fraud consumers into purchasing his products, the possession of criminal tools statute prohibits “conduct other than reproduction, adaptation, publication, performance, and displaying.”

For example, a person that decides to copy and sell movies and music is not guilty of federal criminal copyright until he takes a substantial step in furtherance of that criminal act—that person must attempt to sell the recordings to have a financial gain in violation of the federal copyright law. Under Ohio law, the person is guilty of possessing criminal tools if that person goes into an electronics store and purchases items to fulfill the criminal intent to violate the federal copyright law. That person may not have recorded any copyrighted material or even attempted to make a financial gain from the copyrighted material. But that person now possesses criminal tools because he possesses the items from the electronics store and with the purpose to violate the federal

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<sup>25</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.* (2d Cir.1983), 723 F.2d 195, 200, rev’d on other grounds, (1985), 471 U.S. 539.

<sup>26</sup> *State v. Perry*, 83 Ohio St.3d at 43.

<sup>27</sup> *People v. Williams* (2007), 876 N.E. 2d 235, 247 (quoting *Toney v. L’Oreal USA, Inc.* (7th Cir.2005), 406 F.3d 905, 910.)

criminal copyright law. Therefore, Chappell's prosecution prohibits conduct above and beyond simple reproduction, adaptation, publication, performance, and display. The equivalency test is not present and Chappell's prosecution is not preempted.

The State's purpose in prosecuting Chappell's possession of criminal tools is not to vindicate the rights of a copyright holder. The State's purpose is to protect consumers from Chappell's actions. The possessing criminal tools statute is not preempted.

**d. Assuming Chappell's argument on preemption is correct, the State proposition is still correct and should be adopted.**

This particular case presents the use of a federal statute that this Court may find is preempted. But the question still remains as to what the Legislature means by *criminally*. If this Court disagrees with Chappell's previous arguments concerning his indictment and his definition of criminally but agrees with the preemption issue, the State would still be permitted to proceed under a different legal theory. Thus, the dismissal of the indictment is inappropriate.

If this Court finds that *criminally* means *any federal or municipal crime* and that the particular criminal act to support a violation of possessing criminal tools is a means to act *criminally*, this Court should reverse the Eighth District's decision to dismiss this case and remand with instructions to provide Chappell with notice, through a bill of particulars, of the means by which Chappell acted criminally.

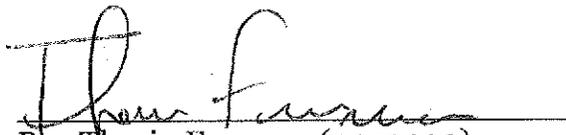
**CONCLUSION**

The Eighth District improperly limited what the State may prosecute without a clear directive from the legislature. Criminally does not mean offense. Criminally means *any crime*. R.C. 2923.24 is clear, unequivocal, and prohibits possession of any

item with the intent to use the item for any criminal purpose. The State's proposition of law is based on R.C. 2923.24's plain language and should be adopted.

Respectfully submitted,

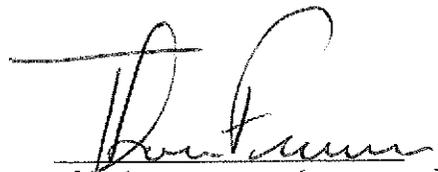
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Merit brief was sent by regular U.S. mail this 26<sup>th</sup> day of April 2010 to Joseph T. McGinness 6100 Rockside Woods N. Suite 210 Cleveland Ohio 44131.



Thorin Freeman (0079999)

IN THE SUPREME COURT OF OHIO

09-2131

STATE OF OHIO )

Plaintiff-Appellant )

v. )

WELTON CHAPPELL )

Defendant-Appellee )

CASE NO: \_\_\_\_\_

On Appeal from the Cuyahoga  
County Court of Appeals  
Eighth Appellate District

Court of Appeals  
Case No. CA-92455

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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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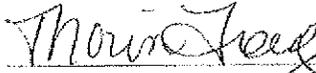
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**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Chappell* Appeals Case No. 92455, Cuyahoga Common Pleas Case number CR-495988, on October 22, 2009.

This appeal raises a substantial constitutional question, involves a felony, or a question of public or great general interest and invokes this Court's discretionary authority under Art. IV, § 2(B)(2)(e) and S.Ct. R. II Section 1 (A)(2) and (3).

Respectfully submitted,  
WILLIAM D. MASON (0037540)



By: Thorin Freeman (0079999)  
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**CERTIFICATE OF SERVICE**

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail, postage prepaid, to counsel for Appellee Joseph McGinness 6100 Rockside Woods, North Suite 210 Cleveland Ohio 44131 and the Ohio Public Defender 250 East Broadstreet Street Suite 1400 Columbus Ohio 43215 on this 20<sup>th</sup> day of November, 2009.



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# 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 21 2009



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FILED AND JOURNALIZED  
PER APP.R. 22(C)  
OCT 22 2009  
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BY [Signature] DEP.

ANNOUNCEMENT OF DECISION  
PER APP.R. 22(B) AND 26(A)  
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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).

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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.

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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.

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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.

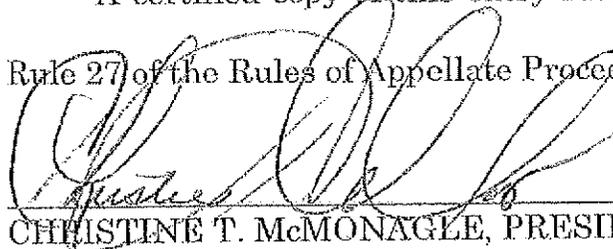
The court finds there were reasonable grounds for this appeal.

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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.



Christine T. McMonagle

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CHRISTINE T. McMONAGLE, PRESIDING JUDGE

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

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