

**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

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## Summary of Reply

The State asks this Court to hold that the plain meaning of the word “criminally” in the criminal tools statute refers to not only crimes within Ohio’s Revised Code, but any crime that occurs in the State of Ohio. This proposition is based on the statute’s plain language and legislative intent in enacting R.C. 2901.04(D). R.C. 2901.04(D) makes clear that statutory references within the Revised Code “*shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance.*” This statute expands the definition of criminal offense in R.C. 2901.03(A), which Chappell uses as support for his position. Chappell wants this Court to hold that under R.C. 2901.03(A) the word “criminally” in the criminal tools statute only refers to crimes within the Ohio Revised Code and not municipal or federal criminal acts. The legislative intent in passing R.C. 2901.04(D), however, is to broaden the definition of what constitutes a criminal offense under R.C. 2901.03(A). The more expansion definition of criminal offense within R.C. 2901.04(D) specifically refers to violations of Federal and municipal law— as such, the definition of “criminally” necessarily includes all criminal acts in Ohio whether prosecuted under the Revised Code or not.

Additionally, the specific indictment in this case is valid and all essential elements were presented to the Grand Jury. The State provided to Chappell the means by which the State will prove he acted criminally—his intent to violate 17 U.S.C. § 506 in the bill of particulars. Chappell’s second argument that the State’s prosecution is preempted misconstrues what the State intends to prove at trial. In this case, in determining whether the State’s prosecution is preempted, the second prong of the two-part test for preemption cannot be established by Chappell because the State *is not* prosecuting Chappell for any violation of an exclusive right embodied in 17 U.S.C. § 106. The United States Supreme Court has indicated that no rights within 17 U.S.C. § 106 have been violated unless there is an actual infringement. And under the preemption test, if there is no infringement, then the second part of the preemption test cannot be established.

A plain reading of the criminal tools statute and the definition provided in R.C. 2901.04(D) supports the State’s proposed rule of law. This Court should adopt the State’s proposition that reads, “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.”

## 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.**

Chappell's answer to the State's proposition of law addresses one reason as to why the State's proposition is wrong and two reasons why he cannot be prosecuted under this specific indictment.

- A. The plain language of the criminal tools statute allows the State to use any criminal offense to prove a person acts criminally. Reliance on R.C. 2901.03(A) to define criminally as used in the criminal tools statute is misplaced because R.C. 2901.04(D) defines criminal offenses as a violation of federal law, municipal law, and the laws of other states.**

The criminal tools statute prohibits any "person [from possessing] or [having] under the person's control any substance, device, instrument, or article, with purpose to use it criminally." R.C. 2923.24's plain language is that possession of an item with the intent to use the item *criminally* is sufficient to prove a violation of the criminal tools statute. The General Assembly enacted R.C. 2901.04(D) to "provide a rule for interpreting

statutory references that define or specify a criminal offense.”<sup>1</sup> R.C. 2901.04(D) modifies and expands R.C. 2901.03(A) to include any “federal offense” within the definition of “criminal offense.” The definition of the word *criminally* in R.C. 2923.24 is not limited to criminal conduct as only defined by a criminal statute exclusively within the Ohio Revised Code, as argued by Chappell, but also includes conduct that is defined as criminal under former Ohio Revised Code sections, municipal ordinances, criminal codes of other states, and the federal code. Chappell's argument that the definition of criminal offense under R.C. 2901.03 is the *only* applicable statute is therefore, a limited and incorrect reading of the Revised Code's expansive definition of what constitutes a criminal offense.

Chappell's reliance on R.C. 2901.03 and the rules of construction stated in R.C. 2901.04(A) and (B) is similarly misplaced. The definition of a criminal offense in Ohio encompasses more than those offenses strictly defined and set forth in the current version of the Ohio Revised Code. For the purposes of defining R.C. 2923.24's element that the items possessed are to be used *criminally*, such element encompasses all conduct defined as being criminal by applicable municipal ordinances, applicable state ordinances, and applicable sections of the U.S. Code.

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<sup>1</sup> Baldwin's Ohio Legislative Service Annotated (Vol. 5, 2004) L-1372 (“S.B. 146”) (emphasis added).

## 1. R.C. 2901.04(D) and its application.

Construing R.C. 2901.04(D) with R.C. 2901.03 in this case supports the proposition that use of the word “*criminally*” in R.C. 2923.24 means *any* crime. First, the State recognizes that R.C. 2901.03(A) abrogates common law criminal offenses by indicting that “no conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.” R.C. 2901.04(D) then limits that canon of construction in R.C. 2901.04(A) and expands upon the definition of criminal offense provided in R.C. 2901.03(A) by providing that, “any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense *shall be construed to also refer to an existing or former law* of this state, another state, or the *United States, to an existing or former municipal ordinance* \* \* \*.”<sup>2</sup>

By passing R.C. 2901.04(D), the legislature’s intent was twofold:

- 1) eliminate the application of R.C. 2901.04(A) in defining a criminal offense and;<sup>3</sup>
- 2) “to provide a rule for interpreting statutory references that define or specify a criminal offense.”<sup>4</sup>

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<sup>2</sup> R.C. 2901.04(D) (emphasis added).

<sup>3</sup> R.C. 2901.04(A)’s rule construing statutes in a defendant’s favor and against the State has no application because in determining what is a criminal action R.C. 2901.04(D) applies, which specifically limits application of R.C. 2901.04(A).

Because the intent in drafting R.C. 2901.04(D) is to address definitions regarding criminal offenses, it is applicable to the analysis in this case.

R.C. 2901.03 defines what a criminal offense is by explaining that criminal offenses are only those offenses defined in the Ohio Revised Code. The possession of criminal tools statute is a criminal offense because it is defined within the Ohio Revised Code. It prohibits possession of items with the intent to use those items to commit any crime. The question then turns on whether there is a statute that helps to define the word *criminally* as used in the criminal tools statute. R.C. 2901.04(D) is that statute and helps to resolve the question in this appeal by expanding upon R.C. 2901.03's definition and construes the *statutory reference* within the criminal tools statute as referring "to an existing or former law of this state, another state, or the United States, [or] an existing or former municipal ordinance \* \* \*."<sup>5</sup>

The plain language in R.C. 2901.04(D) provides that the statutory reference to "criminally" in the criminal tools statute shall be construed to mean a violation of any federal criminal offense. The State intends to prosecute Chappell's *intent* to violate a federal criminal law—17 U.S.C. § 506—through his possession of the items listed in the indictment. Chappell

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<sup>4</sup> Baldwin's Ohio Legislative Service Annotated (Vol. 5, 2004) L-1372 ("S.B. 146") (emphasis added).

<sup>5</sup> R.C. 2901.04(D).

wants this Court to ignore the words used in the criminal tools statute, and further, to ignore the words and intent in drafting R.C. 2901.04(D). He argues that because 17 U.S.C. § 506 is not a criminal offense contained within the Ohio Revised Code, the State has not charged a criminal offense. This Court should reject Chappell's interpretation because the criminal tools statute has a statutory reference that must be construed to refer to a law of another state, a federal law, or a municipal ordinance. The State's proposition provides a sound rule of law that this Court should adopt.

**2. Chappell further argues that because there is no penalty for violating 17 U.S.C. § 506 in the Ohio Revised Code, under R.C. 2901.03(B) the State cannot use the federal statute to prove a violation of the criminal tools statute because there is no penalty in Ohio for violating 17 U.S.C. § 506.**

Under R.C. 2901.03(B) "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." Chappell's argument that because 17 U.S.C. § 506 does not have a penalty, it cannot be used to prove that he acted criminally as that word is used in the criminal tools statute misconstrues how R.C. 2901.03(A) modifies the application of R.C. 2901.03(B). R.C. 2901.03(A)

states that “no *conduct* constitutes an offense \* \* \*.” The use of the word *conduct* in (A) limits the definition in part (B) of R.C. 2901.03 in this case.

Chappell’s *conduct* in this case is the possession of certain items. His *intent* is to act criminally. Chappell’s *conduct* is prohibited and has a penalty because his intent is to act criminally. R.C. 2901.03(B) does not require that the specific intent to act criminally also have a penalty located in the Ohio Revised Code. The criminal tools statute states a positive prohibition against possession of items with criminal intent and has a penalty of either a misdemeanor or felony, depending on the violator’s intent. R.C. 2901.03(B) does not refer to the element of *criminally* within the criminal tools statute. *Criminally* within the criminal tools statute is defined by its plain meaning and the General Assembly’s definition provided in R.C. 2901.04(D).

The State’s proposition that the word “criminally” within the criminal tools statute means *any* criminal act is supported by the plain language of the criminal tools statute, the intent in passing the criminal tools statute, the definition of criminal offense in R.C. 2901.04(D), and the stated intent in passing R.C. 2901.04(D). The State’s proposition provides a sound rule of law that is supported by legislative intent and provides clear guidance to

prosecutors throughout this State to determine whether a person's intent is to act criminally.

**B. The Cuyahoga County Grand Jury found that Chappell possessed certain items with the intent to act criminally. The indictment tracked the language of the criminal tools statute. Thus, Chappell was provided his right to a Grand Jury finding the *essential elements* of the criminal tools statute.**

The Grand Jury found that Chappell possessed money, a vehicle, hard drives, a computer, and packaging material with the intent to act criminally and that Chappell's intent was to commit a felony.<sup>6</sup> This indictment tracked the language of the criminal tools statute and stated all essential elements. The State is not required to identify the particular felony that will ultimately be used at trial to have a valid indictment under R.C. 2923.24. The felony can be elucidated in a bill of particulars so that a defendant is provided an opportunity to defend the charges at trial. Additionally, the trial court rejected Chappell's argument and the Eighth District did not rely on Chappell's argument in issuing its decision. Furthermore, at least two separate Ohio appellate courts, discussed *infra*, found that a criminal tools indictment that tracks the criminal tools statute does not have to further list the underlying criminal felony.

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<sup>6</sup> Count 6 of the indictment returned on May 16, 2007.

In this case, the Cuyahoga County Grand Jury returned an indictment indicating that Chappell possessed certain items with the intent to use the items criminally and that Chappell's intended use of these items would be a felony.<sup>7</sup> Chappell argues that because the State did not present 17 U.S.C. § 506 to the Grand Jury and the State now wants to present this felony as the criminal intent his right to a grand jury indictment has been violated. This argument is incorrect for two reasons.

First, the particular criminal offense presented to the Grand Jury is only the *means* by which a person acts criminally in violating the criminal tools statute. The essential element is "criminally." The Grand Jury needs to find, by probable cause, that Chappell's intent was to commit a crime. Thus, the State can present any offense supported by probable cause as long as the offense is a felony to support a criminal tools indictment. The only issue, in this context, is to provide a defendant notice of the *means* by which he acted criminally in possession of certain items. Because the specific criminal offense is a means by which a person acts "criminally" in the criminal tools statute, the specific criminal offense ultimately relied on at trial does not have to be the same criminal offense that was presented to the Grand Jury.

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<sup>7</sup> Count 6 of the indictment.

Second, a criminal tools indictment need only track the language of the statute and do not have to include the specific felony to be valid. Two intermediate appellate courts take this approach. In *State v. Jackson*, the appellant argued that his indictment for possessing criminal tools was void because it “it fails to specifically allege the criminal purpose with which he possessed the shotgun.” The Fifth District disagreed and held that the indictment was valid because it tracked the language of the criminal tools statute. The indictment provided that the appellant possessed a shotgun with the intent to use the shotgun criminally. The indictment did not need to specifically allege a specific crime that was intended to be committed. This indictment included all the essential elements and was held to be valid.<sup>8</sup>

In a similar case, the Second District held that a criminal tools indictment does not need to allege the particular criminal offense to be valid. In *State v. Maddox*, the grand jury indicted appellant for possession of criminal tools. The indictment for criminal tools did not provide notice as to the criminal purpose. The trial court instructed the jury that the criminal purpose was to engage in drug trafficking—to which the appellant objected. The Second District held that the indictment tracked the

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<sup>8</sup> *State v. Jackson* (Nov. 15, 1995), Knox App. No. 95-CA-6.

language of the statute and gave notice of all elements of possession of criminal tools. The Court went further and held that the State would be permitted to include within the bill of particulars the relevant felony it would pursue as the appellant's criminal purpose.<sup>9</sup>

These cases stand for the underlying proposition that the *specific* criminal purpose is not an element of the criminal tools statute. The particular crime that the State will pursue under the criminal tools case is a means by which a defendant commits possession of criminal tools. The specific felony that is used during the trial need not be presented to the grand jury. If the conduct as presented to the grand jury could support a felony by probable cause the indictment is valid. The only concern—not applicable here—is notice to the defendant so he may appropriately defend the charge. In this case, Chappell has adequate notice of the State's intent to prove that his criminal intent was to violate 17 U.S.C. § 506 because that information is included in the bill of particulars.

The indictment in this case is valid. The Cuyahoga County Grand Jury found that each essential element of the criminal tools statute was presented by probable cause. There has been no violation of Chappell's right to a Grand Jury and Chappell's argument as to this particular indictment fails.

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<sup>9</sup> *State v. Maddox* (June 29, 2001), Montgomery App. No. 18389 at \*7-8.

- C. **The State’s case is not premised on any legal or equitable rights of any copyright holder. Nor is the State prosecuting Chappell for reproduction, distribution, displaying, uploading, posting, or downloading copyrighted material. Chappell’s prosecution is based on his conduct of possession coupled with the intent to commit a crime. This prosecution is not preempted under *State v. Perry* or the copyright law.**

Chappell continues to claim that this Court opinion in *State v. Perry* “sustained the dismissal . . . of the [possession of criminal tools] count”<sup>10</sup> in relation to the issue of preemption. This statement is patently false. In *Perry*, this Court never addressed the possession of criminal tools count. *The defendant in Perry was acquitted of possession of criminal tools* and this Court never addressed preemption in relation to that count. *Perry* is relevant because it provides the test for whether preemption is applicable to this specific indictment. As discussed in the State’s merit brief, the State is prosecuting Chappell for *conduct* other than reproduction, adaptation, publication, performance, and display—the activity within the scope of 17 U.S.C. § 106. The State is not attempting to govern the “legal or equitable rights” owned by the copyright holder and contained within the federal copyright statute. Thus, federal law does not preempt the State’s case.

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<sup>10</sup> Chappell’s reply brief at pg. 11 and Chappell’s Memorandum in Opposition to Jurisdiction at pg. 6.

Chappell further misrepresents what the State is required to prove in this case. The State is not attempting to prove that Chappell *actually violated* the federal criminal copyright law. In fact, the many CDs and DVDs that contained downloaded movies and music are not even listed as criminal tools. The State's will attempt to prove Chappell possessed the items listed in the indictment with the *intent* to commit a criminal act—a violation of 17 U.S.C. § 506. All of the hundreds of DVD's and CDs that Chappell copied and was attempting to sell from his vehicle represent a potential violation of the copyright law. It is the items listed in the criminal tools indictment, along with Chappell's own statement that he possessed those items with the intent to download movies and CD's and sell these items for profit that makes Chappell guilty of possessing criminal tools. The fact that Chappell actually committed the copyright violation on potentially hundreds of occasions is only relevant to his *intent* in *possessing* the items listed in the indictment.

1. **The second element of the preemption test is not present because this case does not concern a copyright owner's exclusive right to reproduce, perform, prepare, distribute, and display. Because Chappell's prosecution does not concern a copyright holder's exclusive rights there is no equivalency.**

Chappell's prosecution is not based on *violating* copyright law or protecting copyrighted works. Because Chappell's violation of the criminal tools statute "is predicated upon an act incorporating elements *beyond mere reproduction or the like* \* \* \* preemption [does] not occur."<sup>11</sup> The State is not prosecuting for any *actual infringement* of the exclusive rights found within 17 U.S.C. § 106, as claimed by Chappell. If there is no infringement, this prosecution is not subject to preemption.

To find preemption this Court must determine whether the prosecution involves a copyrighted work and whether the prosecution is based on vindicating any of the exclusive rights contained within 17 U.S.C. § 106—reproduce, prepare derivatives, perform, distribute, and display their work. Under the two-part preemption test, the second prong is not established in this prosecution.<sup>12</sup> The second prong requires that the test for equivalency be established. To establish equivalency the prosecution

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<sup>11</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>12</sup> The State concedes that the first prong of the preemption test is met.

must concern the “owners of a copyrighted work exclusive rights to reproduce, prepare derivatives, perform, distribute, and display their work. Thus, ‘a right is equivalent to one of the rights comprised by a copyright if it “is infringed *by the mere act of reproduction, performance, distribution or display.*””<sup>13</sup> Because Chappell’s action in possessing the items listed in the criminal tools indictment does not encompass any action of reproduction, performance, distribution, or display, the equivalency test cannot be established; thus, there is no preemption.

The State’s prosecution is based upon Chappell’s possession of items coupled with his criminal intent. In fact, based on the State’s theory of prosecution, a copyright holder would not have any rights within 17 U.S.C. § 106 infringed from this prosecution. The United States Supreme Court has noted that a copyright holder has no right of action against a person that possess an item that can be used to commit a copyright violation.<sup>14</sup> In *Sony v. Universal*, certain copyright holders sued Sony for producing a device capable of recording television shows and replaying those shows at anytime. This product is known as a “Betamax” and Sony was sued under a theory of contributory infringement. The United States Supreme Court

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<sup>13</sup> *State v. Perry*, 83 Ohio St.3d 42, 42, 1998-Ohio-422 (citations omitted).

<sup>14</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.* (Jan. 17, 1984), 464 U.S. 417.

found that a copyright holder has an exclusive right within 17 U.S.C. § 106 infringed when, “anyone trespasses into [the] exclusive domain by *using or authorizing the use* of the copyrighted work in one of the five ways set forth in [17 U.S.C. § 106].”<sup>15</sup> The Supreme Court further stated that a copyright holder only has a cause of action “against an infringer” of the copyrighted work.<sup>16</sup> Thus, Sony was not liable. Based on the United States Supreme Court’s decision, for an exclusive right found within 17 U.S.C. § 106 to be actionable there must be an actual infringement. If there is no infringement, no rights within 17 U.S.C. § 106 are implicated.

The State’s example in its merit brief can be used to demonstrate the principle the State is not prosecuting Chappell for any *act of infringement* and the equivalency test cannot be established. If an individual decides that he wants to download and sell movies that are currently playing in a theater, a copyright holder has no redress nor can the State prosecute this individual based on this intent standing alone. Now, if this person goes to an electronics store and buys a computer, software, blank DVD’s, and packaging material to accomplish this objective the State may prosecute for the possession of these items as criminal tools. At the point of possession with criminal intent, that person violated the criminal tools statute. But no

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<sup>15</sup> *Id.* at 433. (emphasis added).

<sup>16</sup> *Id.* at 434.

“trespasses into [the] exclusive domain by *using or authorizing the use* of the copyrighted work in one of the five ways set forth in [17 U.S.C. § 106]” has occurred.<sup>17</sup> In this hypothetical, no copyright holder is permitted to take legal action against this person because there has not been an infringement of any exclusive right embodied in 17 U.S.C. § 106. Therefore, there is no infringement. Without infringement, the test for preemption cannot be established because there is no equivalency.

Because the State is not prosecuting for an act of infringement, but is prosecuting for possession of certain items with the intent to commit a crime, the test for preemption cannot be established in this case and Chappell’s argument fails.

### **CONCLUSION**

The Eighth District’s opinion prevents the State of Ohio from fulfilling its statutory obligation to prosecute individuals that violate the law. The plain language of the criminal tools statute and R.C. 2901.04(D) allow for this prosecution. The State requests adoption of the proposition of law so that the State may present this case to a jury. The Ohio Revised

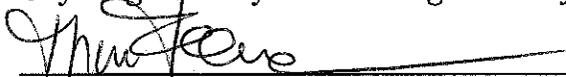
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<sup>17</sup> *Id.* at 433. (emphasis added).

Code supports the State's proposition and this Court should issue a rule of law consistent with that proposition.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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