

IN THE SUPREME COURT OF OHIO

11-0230

Jason T. Carrick :
 :
 Appellant :
 :
 v. : **On Appeal from the Wayne**
 : **County Court of Appeals**
 State of Ohio : **Ninth Appellate District**
 :
 Appellee : **Court of Appeals Case No.**
 : **09-CA-0077**

NOTICE OF CERTIFIED CONFLICT

Clarke W. Owens, #0070822
132 S. Market Street, Suite 204
Wooster, Ohio 44691
tel. (330) 262-2667
fax (330) 262-3778
cwowstr@aol.com

COUNSEL FOR APPELLANT, JASON T. CARRICK

Latecia Wiles, #0077353
Wayne County Prosecutor's Office
115 W. Liberty Street
Wooster, Ohio 44691
tel. (330) 262-3030
fax (330) 287-5412
lwiles@countyprosecutor.com

COUNSEL FOR APPELLEE, STATE OF OHIO

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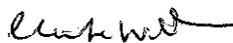
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IN THE SUPREME COURT OF OHIO

Jason T. Carrick :
Appellant :
v. :
State of Ohio : NOTICE OF CERTIFIED
Appellee : CONFLICT, S.Ct.R. IV

Appellant Jason T. Carrick hereby gives notice of S.Ct.R. IV appeal by virtue of a conflict in the Courts of Appeal, as certified by the Ninth District Court of Appeals in Case No. 09-CA-0077. A copy of the decision certifying the conflict is attached, as are the conflicting opinions on the legal question identified by the Ninth District.

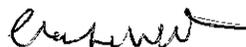
Respectfully,



Clarke W. Owens #0070822
Attorney for Appellant, Jason T. Carrick
132 S. Market Street, Suite 204
Wooster, Ohio 44691
(330) 262-2667
fax (330) 262-3778
cwowstr@aol.com

CERTIFICATE OF SERVICE

A copy of this Notice of Certified Conflict was served by the undersigned counsel by means of courthouse mail to the Wayne County Prosecutor, in the Wayne County Common Pleas courthouse, Wooster, Ohio, on this 9th day of February, 2011.



Clarke W. Owens
Attorney for Appellant, Jason T. Carrick

STATE OF OHIO
COUNTY OF WAYNE
9TH DISTRICT
COURT OF APPEALS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO 2011 FEB 8 AM 7 35

C.A. No. 09CA0077

Appellee

TIM NEAL
CLERK OF COURTS

v.

JASON T. CARRICK

Appellant

JOURNAL ENTRY

Appellant, Jason T. Carrick, has moved this Court to certify a conflict between its December 29, 2010, judgment and the judgment of the Fourth District Court of Appeals in *State v. Compher* (Dec. 9, 1985), 4th Dist. Nos. 1174 and 1175. Specifically, Mr. Carrick has proposed that a conflict exists on the following issue:

“Whether the ‘making unreasonable noise’ provision of Ohio Revised Code 2917.11(A)(2) is unconstitutionally void for vagueness.”

The State of Ohio has not responded in opposition.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the “judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]” When certifying a conflict, an appellate court must: 1) determine that its judgment is in conflict with a judgment of another court of appeals on the same question; 2) determine that the conflict is on a rule of law, not on the facts of the cases; and 3) clearly set forth in its opinion or its journal entry the rule of law believed to be in conflict with that of another district. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

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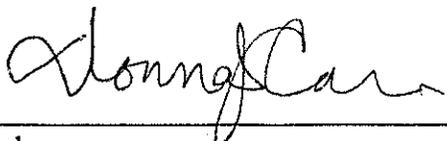
Upon review, we conclude that this Court's decision conflicts with the judgment of the Fourth District Court of Appeals in Case No. 1174, and that the conflict is on a rule of law, not on the facts of the cases. In both cases, the appellant challenged the constitutionality of the "unreasonable noise" provision of R.C. 2917.11(A)(2) in the context of convictions based solely upon the volume – rather than the content – of the noise at issue. The Fourth District held:

"[W]e agree with the trial court that the language 'making unreasonable noise' in R.C. 2917.11(A)(2) fails to give a person of ordinary intelligence fair notice that his contemplated conduct would violate the statute and encourages ad hoc and discriminatory enforcement."

In contrast, in *State v. Carrick*, this Court held that "[b]ecause R.C. 2917.11(A)(2) incorporates the objective standard of a reasonable person, we conclude that it is not unconstitutionally vague." *Id.* at ¶11. This Court determines that Fourth District Case No. 1175, which was addressed in the same opinion but decided on other grounds, is not in conflict.

Because Mr. Carrick has demonstrated that a conflict exists between this District and the Fourth District, the motion to certify a conflict is granted. Accordingly, this Court certifies a conflict between the districts on the following legal issue:

"Whether the 'making unreasonable noise' provision of Ohio Revised Code 2917.11(A)(2) is unconstitutionally void for vagueness."



Judge

Concur:
Moore, J.
Dickinson, J.

State v. Carrick, 2010-Ohio-6451, C. A. 09CA0077 (OHCA9)

2010-Ohio-6451

STATE OF OHIO, Appellee

v.

JASON T. CARRICK, Appellant

C. A. No. 09CA0077

Court of Appeals of Ohio, Ninth District, Wayne

December 29, 2010

APPEAL FROM JUDGMENT ENTERED IN THE WAYNE COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO CASE Nos. CRB 09-11-01613 CRB 09-11-01612.

CLARKE W. OWENS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

DECISION AND JOURNAL ENTRY

DONNA J. CARR, Judge.

{11} Appellant, Jason Carrick, appeals the judgment of the Wayne County Municipal Court. This Court affirms.

I.

{12} On October 31, 2009, Carrick hosted a Halloween party in a building that he owned near West Smithville-Western Road in Wayne County. Shortly after midnight, Deputies of the Wayne County Sherriff s Office issued Carrick a minor misdemeanor citation for disorderly conduct in violation of R.C. 2917.11(A)(2). The trial court found him guilty and fined him \$150.

{13} On appeal, Carrick raises four assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED BY OVERRULING JASON CARRICK'S MOTION TO STRIKE UNCONSTITUTIONAL STATUTORY LANGUAGE BECAUSE THE PERTINENT SECTION OF OHIO REVISED CODE 2917.11(A)(2) IS UNCONSTITUTIONALLY VAGUE ON ITS FACE."

{¶4} In his first assignment of error, Carrick argues that R.C. 2917.11(A)(2) is unconstitutionally vague in its entirety. Although not set forth in his statement of this assignment of error, Carrick also argues that R.C. 2917.11(A)(2) is unconstitutionally overbroad. This Court disagrees in both respects.

{¶5} R.C. 2917.11(A)(2) provides: "No person shall recklessly cause inconvenience, annoyance, or alarm to another by [m]aking unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person[.]" At issue in this appeal is the statute's prohibition of recklessly causing "inconvenience, annoyance, or alarm" by "making unreasonable noise." "To withstand a claim of vagueness, a criminal statute must define a criminal offense with sufficient clarity for ordinary people to understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶238. This Court must presume that legislative enactments are constitutional and will "apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional." *State v. Dorso* (1983), 4 Ohio St.3d 60, 61. With respect to a challenge to the constitutionality of a criminal statute based on vagueness, a statute will not be held to be unconstitutional if the statute can be subject to a reasonable construction that makes the class of offenses criminalized "constitutionally definite." *Id.*

{¶6} In *Dorso*, the Ohio Supreme Court considered the constitutionality of a municipal ordinance that prohibited "the playing or rendition of music of any kind, singing, loud talking, amplification of sound, or other noises on the premises, in such manner as to disturb the peace and quiet of the neighborhood[.]" *Id.* at 60. Responding to the argument that the ordinance was unconstitutionally vague with respect to the phrase "to disturb the peace and quiet," the Court construed the statute to include a reasonable person standard:

"[W]e construe the Cincinnati ordinance at issue to prohibit the playing of music, amplification of sound, etc., in a manner which could be anticipated to offend the reasonable person, i.e., the individual of common sensibilities. Specifically, we find the ordinance to proscribe the transmission of sounds which disrupt the reasonable conduct of basic human activities, e.g., conversation or sleep." *Id.* at 63-4.

The Court observed that this holding "does not permit the imposition of criminal liability upon a party whose conduct disturbs only the hypersensitive [and] vitiates the claimed vagueness of the ordinance." *Id.* at 64.

{¶7} In *State v. Reeder* (1985), 18 Ohio St.3d 25, the Ohio Supreme Court considered a different portion of the disorderly conduct statute and concluded that the prohibition of "engaging in violent or turbulent behavior" in R.C. 2917.11(A)(1) is not unconstitutionally vague. The Court held that "the enactment fairly informs a person of ordinary intelligence and understanding what conduct is prohibited by law." *Reeder*, 18 Ohio St.3d at syllabus. Specifically, the Court noted that the word "turbulent," when considered in its context, fairly informed a reasonable person of the conduct prohibited. *Id.* at 27.

{¶8} In *State v. Livingston* (Oct. 2, 1986), 2d Dist. No. CA9641, the Second District Court of Appeals

considered whether the "unreasonable noise" portion of R.C. 2917.11(A)(2) was unconstitutionally vague. In that case, a minister was charged with violating R.C. 2917.11(A)(2) by making unreasonable noise after refusing to lower the level of an amplification system during an outdoor event. The Second District Court of Appeals concluded that the statute was not unconstitutionally vague because "[i]n the usual course of events, it appears doubtful that a person of ordinary intelligence would fail to understand what is meant by 'inconvenience, alarm, or annoyance,' and the term 'unreasonable noise,' when measured by common understanding, is not beyond the grasp of the average person." *Id.* The Second District reached the same result in another case with respect to a municipal ordinance whose language mirrored R.C. 2917.11(A)(2). See, generally, *Fairborn v. Grills* (June 8, 1994), 2d Dist. No. 92 CA 92. Applying its holding in *Livingston*, the *Fairborn* court concluded that when a defendant is charged with criminal conduct based solely on the volume of his noise without respect to its content, "the First Amendment analysis for content restrictions on speech is unnecessary, and the use of fighting words is not an element of the offense." *Id.*

{¶9} The application of the holding of *Dorso* in other contexts is also instructive. In *Columbus v. Kim*, 118 Ohio St.3d 93, 2008-Ohio-1817, for example, the Ohio Supreme Court considered whether an ordinance that prohibited harboring an animal that "emits audible sounds that are unreasonably loud or disturbing and which are of such character, intensity and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to life and health of any individual." *Id.* at ¶6. The Court concluded that by limiting the scope of the ordinance to animal noise that was "unreasonably loud or disturbing," an objective standard had been incorporated therein. *Id.* at ¶9.

{¶10} The Sixth District Court of Appeals reached a similar conclusion in *Kelleys Island v. Joyce* (2001), 146 Ohio App.3d 92. In that case, the defendant was charged with violating a municipal ordinance that prohibited any person from generating "noise or loud sound which is likely to cause inconvenience or annoyance to persons of ordinary sensibilities by means of a live performance, radio, phonograph, television, tape player, compact disc player, loudspeaker or any other sound amplifying device which is plainly audible at a distance of 150 feet or more from the source of the noise or loud sound." *Id.* at 95. The appellant argued that the phrase "plainly audible" was unconstitutionally vague, but the Sixth District disagreed, noting that the language of the ordinance at issue had the effect of limiting its reach to "only unreasonable noises or loud sounds." *Id.* at 100. See, also, *Columbus v. Kendall*, 154 Ohio App.3d 639, 2003-Ohio-5207; *State v. Cole*, 7th Dist. No. 01 CA 73, 2002-Ohio-5191. But, see, *State v. Compher* (Dec. 9, 1985), 4th Dist. Nos. 1174 and 1175.

{¶11} In short, Ohio courts have concluded that an ordinance that regulates the volume of noise - as distinguished from the content of speech - is not unconstitutionally vague if it incorporates a reasonable person standard. Carrick maintains that this Court has reached the opposite conclusion in several cases, but his argument misses its mark. In *Wooster v. Thompson* (July 6, 1977), 9th Dist. No. 1478, this Court concluded that an ordinance similar in content to R.C. 2917.11(A)(2) was unconstitutionally vague to the extent that it prohibited "[m]aking offensively coarse utterance, gesture or display, or communicating unwarranted and grossly abusive language to any person." We followed this holding in *State v. Russell* (Dec. 30, 1977), 9th Dist. No. 749; *State v. Hoffman* (Sep. 20., 1978), 9th Dist. No. 1535, reversed and remanded for hearing by *State v. Hoffman* (1979), 57 Ohio St.2d 129; and *Lorain v. Hogg* (Oct. 4, 1978), 9th Dist. No. 2729. In *Hogg*, this Court did not discuss the facts of that case or the statutory language at issue, and Carrick implies from this silence that this Court held R.C. 2917.11(A)(2) unconstitutional in its entirety. It is simply not possible to conclude from that opinion, however, that this Court considered the "unreasonable noise" language in the ordinance and found it unconstitutional. We reject Carrick's suggestion that this Court intended to extend its holding in the earlier cases to a different class of statutory language. Because R.C. 2917.11(A)(2) incorporates the objective standard of a reasonable person, we conclude that it is not unconstitutionally vague.

{¶12} Carrick has also argued that R.C. 2917.11(A)(2) is unconstitutionally overbroad. To demonstrate

overbreadth, one must establish beyond a reasonable doubt that the breadth of the statute in question prohibits conduct otherwise protected by the First Amendment. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, at ¶29. The overbreadth must be substantial. *Id.* at ¶30. Although a statute may, in its breadth, implicate the freedoms guaranteed by the First Amendment, "the question we must resolve is whether the First Amendment is abridged." *Lakewood v. Plain Dealer Pub. Co.* (1988), 486 U.S. 750, 769. Although a statute may implicate First Amendment freedoms, "[t]he First Amendment does not preclude reasonable restrictions relating to time, place and manner of expression so long as they (1) are content-neutral, (2) are tailored to serve a significant government interest, and (3) leave alternative channels of communication open." *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 59. With respect to regulating the volume of expressive conduct:

"[I]t can no longer be doubted that government ha[s] a substantial interest in protecting its citizens from unwelcome noise. This interest is perhaps at its greatest when government seeks to protect the well-being, tranquility, and privacy of the home, but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise." (Internal citations and quotations omitted.) *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 796.

{¶13} Consequently, the United States Supreme Court has held that when a statute reasonably regulates the volume of expression without respect to the content thereof, the statute is not overbroad. *Kovacs v. Cooper* (1949), 336 U.S. 77 (holding that a statute that prohibited the use of amplification devices attached to vehicles that emit loud and raucous noises was not unconstitutionally overbroad).

{¶14} R.C. 2917.11(A)(2) prohibits any person from recklessly causing inconvenience, annoyance, or alarm by making unreasonable noise. Although the unreasonable noise portion of the statute would undoubtedly include expression protected by the First Amendment, it does so without respect to content and with reference to a reasonable person standard. Consequently, to the extent that R.C. 2917.11(A)(2) pertains to expression protected by the First Amendment, it creates a reasonable restriction on the manner of expression and is not unconstitutionally overbroad.

{¶15} Because the unreasonable noise portion of R.C. 2917.11(A)(2) is neither unconstitutionally vague nor overbroad, Carrick's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"OHIO REVISED CODE 2917.11(A)(2) IS UNCONSTITUTIONAL AS APPLIED TO JASON CARRICK."

ASSIGNMENT OF ERROR III

"THE COURT ABUSED ITS DISCRETION AND COMMITTED ERROR OR PLAIN ERROR BY HEARING AND CONSIDERING AS PART OF ITS DECISION EVIDENCE THAT WAS CLEARLY IRRELEVANT TO THE CHARGE AGAINST HIM."

{¶16} Although Carrick has framed his second assignment of error as a challenge to the constitutionality of R.C. 2917.11(A)(2) as applied to him, the substance of his argument is that the trial court erred by considering events that occurred after the citation was written as evidence of unreasonable conduct on the part of Carrick. In other words, Carrick's second assignment of error is the same as his third, and they are, therefore, considered together.

{¶17} Carrick was cited for disorderly conduct twice. The first citation, which occurred at 12:20 a.m. on November 1, 2009, is at issue in this appeal. The charge reflected in the second citation, which issued shortly after 1:30 a.m. on the same date, was dismissed before trial. Carrick's second and third assignments of error argue that the trial court erred by considering irrelevant evidence of events that occurred between 12:20 a.m. and 1:30 a.m.

{¶18} Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable[.]" Evid.R. 401. When a criminal case is tried to the bench, it is presumed that the trial court "considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *State v. Post* (1987), 32 Ohio St.3d 380, 384.

{¶19} The testimony of three witnesses arguably relates to Carrick's second and third assignments of error. Sonia Golgosky, who lives in the vicinity of Carrick's property, testified about the noise that she heard on the night of October 31, 2009, and that she called law enforcement to complain three times. She stated that one of those calls was between 11:00 p.m. and 11:30 p.m.; she did not testify that any of her calls were after 12:20 a.m., although she also described events that took place after 12:20 a.m. The testimony of Joshua Klenz, another neighbor, included a description of noise that occurred after 1:00 a.m. Carrick objected to this testimony, and the trial court overruled the objection. Deputy Daniel Vaughn testified that he returned to Carrick's property after a complaint was received around 1:30 a.m. and issued a citation for disorderly conduct at that time. Carrick also objected to this testimony and, again, the trial court overruled the objection.

{¶20} Carrick points to the trial court's oral ruling as evidence that the trial court relied on irrelevant evidence:

"Sir, this [s]tatute is based on whether you were recklessly causing inconvenience, annoyance or alarm to another. Certainly, I don't think there was anything necessarily reckless about your conduct until the deputies had come and asked you to turn the music down. It was turned down and then it was increased again. Two more times the deputies came back a second time and then eventually a third time. At that time, I think your conduct was unreasonable. Three independent people had called about the level of noise and I don't, I think there is a distinction here that we can make between the loud bas[s] sound that was mentioned early in this case today and simply music. The loud bas[s] sound that is throbbing, vibrating the windows, keeping children awake after midnight is unreasonable. You may not be alert to that. Certainly the party sounded like a very appropriate fun type of event but once you were given notice that neighbors, independently, who are more than half a mile to a mile away, were being disturbed by the loud repetitive bas[s] sound, that your conduct meets the definition of Disorderly Conduct as this Court sees it. So I find you Guilty of this offense."

Although the trial court does make one reference to the fact that the deputies returned to Carrick's residence "a second time and then eventually a third time," some of which occurred after the citation in this case was issued, this reference is isolated. Indeed, the rest of the trial court's ruling is based on events that occurred before the citation issued. The trial court noted that Carrick's mental state met the requisite standard of recklessness at the point at which he had been warned about the noise; that three people had complained about the noise; and that the testimony established that the "throbbing" bass sound had affected nearby residents. Carrick seems to rely on the trial court's statement that his "conduct was unreasonable" at the point when the deputies returned a third time. When considered in the context of the trial court's complete ruling, however, it becomes apparent that the trial court's use of the word "unreasonable" was a general reference to Carrick's conduct rather than a characterization of the level of the noise as "unreasonable" at that point and not before.

{¶21} Although the trial court overruled Carrick's objections to testimony related to events after the citation was issued, he has not demonstrated that the trial court's ruling was based on that evidence. Carrick's second and third assignments of error are overruled.

ASSIGNMENT OF ERROR IV

"JASON CARRICK'S CONVICTION FOR MINOR MISDEMEANOR DISORDERLY CONDUCT WAS UNSUPPORTED BY SUFFICIENT EVIDENCE, OR OTHERWISE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AT TRIAL."

{¶22} Carrick's last assignment of error is that that his conviction is based on insufficient evidence and is against the manifest weight of the evidence. This Court disagrees.

{¶23} At the conclusion of the State's case, Carrick moved to dismiss the charge against him under Crim.R. 29(A), which provides:

"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶24} A challenge to the sufficiency of the evidence questions whether the evidence at trial was sufficient as a matter of law to support the defendant's conviction. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. "In determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, at ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶25} Carrick was convicted of disorderly conduct in violation of R.C. 2917.11(A)(2), which provides that "[n]o person shall recklessly cause inconvenience, annoyance, or alarm to another by [m]aking unreasonable noise[.]" R.C. 2901.22(C), in turn, defines recklessness:

"A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶26} Sonia Golgosky, who estimated that she lives one-quarter of a mile from Carrick's property, testified that on the evening of Halloween, "for the second night in a row, we heard very loud bas[s] banging music. If we stepped out on our deck, we could hear it very clear, precisely to the words." She characterized Carrick's property as "essentially in my backyard." She testified that the bass from the music could be heard from inside her house, "[o]n the other side of our home, actually, in our bedroom with all the windows closed." According to Ms. Golgosky, the music began at approximately 8:00 p.m. and she contacted law enforcement between 11:00 p.m. and 12:00 a.m. She stated that the music stopped, at least intermittently, after deputy sheriffs responded to her complaint.

{¶27} Joshua Klenz, another resident of the neighborhood, testified that beginning approximately between 8:00 p.m. and 9:00 p.m., he heard "loud noise coming from the back part of our woods." Mr. Klenz recalled that, from outside his house, he could identify what song was playing. He also testified that the noise could be heard throughout his house. He described the noise as "a loud bas[s], boom, boom, inside the house" that caused the windows in his house to vibrate, particularly toward the south end of the house. He agreed with the characterization of the noise as "throbbing." Mr. Klenz testified that by 11:30 or 12:00 p.m., he "was getting frustrated because my kids[,] trying to get them to sleep and all I would hear is a boom boom and my kids kept staying awake." A third resident, Juan McCloud, testified that he complained about noise "a little after midnight, " and he recalled that the noise prevented him and his wife from going to sleep.

{¶28} Deputy Daniel Vaughn went to Carrick's property in response to the complaints from residents. He testified that a complaint was received at 11:30 p.m. or "a little before" and drove to the area in question. He recalled that he could hear "loud bas[s]" from the road and was able to identify the location of the sound. Deputy Vaughn testified that he asked Carrick to lower the volume and warned him that he would be cited if the deputies had to return to the property. He stated that as he drove away, however, the music was turned back up to its previous level. After obtaining statements from Ms. Golgosky and Mr. Klenz as the noise continued, Deputy Vaughn returned to Carrick's property and issued a citation for disorderly conduct. Deputy Jason Gerber responded to the property as well. He testified that he could "[a] bsolutely" hear the music as he approached Carrick's property from the road at a distance of approximately one-quarter mile. He described it as "a thumping noise like the bass from a car stereo but it was obviously extremely loud."

{¶29} Viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Carrick recklessly caused annoyance to the residents of neighboring properties by playing music at an unreasonably loud level.

{¶30} Carrick has also argued that his conviction for disorderly conduct is against the manifest weight of the evidence. Specifically, he has argued that the defense witnesses, who characterized the noise level as lower than the State's witnesses, were more credible. When considering whether a conviction is against the manifest weight of the evidence, this Court must:

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

{¶31} To be sure, the defense witnesses offered a different description of the events than the State's witnesses. Carrick testified that about eighteen people attended the party at any given point in the evening. Shawn Kaylor, who is employed by Carrick, was an invited guest who characterized the Halloween party as "very calm" and testified that "everyone was able to hold normal conversations inside and outside the building." According to Mr. Kaylor, the volume of the music was turned completely off after Deputy Vaughn's visit. Tyson Berkey, who is "good friends" with Carrick, also attended the party. Mr. Berkey testified that he controlled the music for the party, which he described as "very contained." He estimated that the volume of the music in the "gymnasium" part of the building was "six being on a scale of one to ten." Mr. Berkey testified that the deputies required him to turn the music "completely off" He admitted that the music was turned back up, but estimated that it was "a little bit lower" in volume. Kelly Beery, who attended Carrick's party with a friend, testified that she was able to hold a conversation without difficulty during the party and did not hear music until she entered the building. Finally, Bob Wirth, a partygoer who also "haul[s] a lot of stuff for" Carrick, described the party as "kind of boring." He also testified that there was no difficulty in holding a conversation over the music.

{¶32} Carrick attributes the difference in the defense witnesses' description of the party to credibility problems on the part of the State's witnesses. Specifically, he draws this Court's attention to the fact that Ms. Golgosky admitted her annoyance with noise from Carrick's property on the night before the evening in question and to Mr. Klenz's acknowledgement that he had a confrontation with Carrick in the past. Carrick's own witnesses, however, were not free from questions regarding their credibility: they were partygoers who were also a friend, a business associate, and an employee of Carrick.

{¶33} Having reviewed the entire record and considered the credibility of both the State's and Carrick's witnesses, this Court cannot conclude that this is the exceptional case in which the weight of the evidence is heavily in favor of Carrick and a new trial is required. His conviction, therefore, is not against the manifest weight of the evidence.

{¶34} Carrick's fourth assignment of error is overruled.

III.

{¶35} Carrick's assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellant.

MOORE, J. DICKINSON, P. J. CONCUR

4.HTM

85-LW-4235 (4th)

State of Ohio, Plaintiff-Appellant

v

Roy E. Compher, Defendant-Appellee

City of Chillicothe, Plaintiff-Appellant

v.

Timothy J. Lovensheimer, Defendant-Appellee

Case No. 1174-1175

4th District Court of Appeals of Ohio, Ross County

Decided on December 9, 1985.

DECISION AND JUDGMENT ENTRY

APPEARANCES:

Mr. James E. Barrington, Director of Law, Chillicothe, Ohio, for Appellants.

Mr. Thomas M. Phillips, Chillicothe, Ohio, for Appellee Compher.

Mr. Timothy J. Lovensheimer, Chillicothe, Ohio, Pro Se.

Stephenson, P.J.

Two cases have been consolidated herein because they raise a common issue. This is an appeal from two judgments entered by the Municipal Court of Chillicothe, Ohio dismissing a complaint against Roy Compher, defendant below and appellee herein, which charged him with violating R.C. 2917.11(A)(2), and a complaint against Timothy J. Lovensheimer, defendant below and appellee herein, which charged him with violating section 509.03(a)(2) of the Revised Ordinances of the City of Chillicothe on the ground that the statutory sections under which they were charged were unconstitutionally vague.

The State of Ohio and the City of Chillicothe, plaintiffs below and appellants herein, assign the following error:

"The Court erred to the manifest prejudice of the State of Ohio by declaring R.C. 2917.11(A)(2)

unconstitutional and thereafter dismissing the criminal violation charged thereunder."

In case No. 1174, appellee Compher operated a bar known as the Cowboy Bar or the Cowboy Entertainment Center where liquor was sold and musical entertainment was provided. On June 2, 1984, a band entertained the bar with live music which William T. Whalen, a neighbor of the bar, found offensive. On June 6, 1984, Whalen filed a criminal complaint against appellee Compher averring that Compher, on June 2, 1984, did recklessly cause inconvenience, annoyance, or alarm to Whalen by making "unreasonable noise" and persisting in the disorderly conduct after reasonable warning or request to desist, in violation of R.C. 2917.11(A)(2), a misdemeanor of the fourth degree.

On August 17, 1984, appellee Compher filed a motion to dismiss the complaint on the grounds that R.C. 2917.11(A)(2) is unconstitutionally vague and overbroad. On September 4, 1984, the state filed a memorandum opposing dismissal. On September 14, 1984, the trial court filed an opinion granting appellee Compher's motion to dismiss the complaint on the basis that the "'statute, insofar as it applies to 'unreasonable noise' is void for vagueness." On the same date, the trial court entered a judgment reflecting its opinion.

In case No. 1175, on August 5, 1984, a criminal complaint was filed against appellee Lovensheimer by Randy M. Poole. The complaint averred that on August 5, 1984, appellee Lovensheimer recklessly caused inconvenience, annoyance, or alarm to Poole by "making unreasonable noise" and "communicating unwarranted and grossly abusive language to any person", in violation of Section 509.03(a)(2) of the Revised Ordinances of the City of Chillicothe, a minor misdemeanor. On September 18, 1984, the trial court entered a judgment dismissing the complaint "for the reasons set forth in the Compher case" which "found the statute involved in this case to be unconstitutional."

Appellants' assignment of error asserts that the trial court committed prejudicial error by declaring R.C. 2917.11(a)(2) unconstitutional and thereafter dismissing the complaints herein. R.C. 2917.11(a)(2) and the identical Section 509.03(a)(2) of the Revised Ordinances of the City of Chillicothe, provide in pertinent part as follows:

"(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another, by doing any of the following:

(2) Making unreasonable noise or offensively coarse utterance, gesture, or display, or communicating unwarranted and grossly abusive language to any person."

All legislative enactments enjoy a presumption of constitutionality. R.C. 1.47(A); Benevolent Assn. v. Parma (1980), 61 Ohio St.2d 375; State v. Meyer (1983), 14 Ohio App.3d 69. Courts must apply all presumptions and pertinent rules of construction so as to uphold, if possible, a statute or ordinance assailed as unconstitutional. State v. Sinito (1975), 43 Ohio St.2d 98; Meyer, supra.

As a matter of constitutional due process as protected by the Fifth and Fourteenth Amendments to the United States Constitution, a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, U.S. v. Harriss (1954), 347 U.S. 612, or is so indefinite that it encourages arbitrary and erratic arrests and convictions, Papachristou v. Jacksonville (1972), 405 U.S. 156, is unconstitutionally vague. See also Colautti v. Franklin (1979), 439 U.S. 379; State v. Dorso (1983), 4 Ohio St.3d 60. A statute is not void for vagueness merely because it could have been more precisely worded. dorso, supra; Roth v. U.S. (1957), 354 U.S. 476.

In case No. 1174, the trial court dismissed the complaint against appellee Compher on the rationale that the

statute as it applied to "unreasonable noise" was void for vagueness. In Dorso, supra, the Ohio Supreme Court upheld a Cincinnati anti-noise ordinance §1 on the ground that the ordinance could be interpreted so as to obviate any potential ambiguities. Chaplinsky v. New Hampshire (1942), 315 U.S. 568. As noted by the trial court in the case subjudice, the Cincinnati ordinance involved in Dorso was specifically aimed at a certain type of conduct sought to be proscribed.

In Dorso, supra, at p. 63, the Ohio Supreme Court stated that statutes must be interpreted so as to obviate any potential ambiguities. The Dorso court further stated, in upholding the Cincinnati anti-noise ordinance under a constitutional attack for vagueness therein as follows:

"Following the persuasive lead of the Chaplinsky tribunals, we construe the Cincinnati ordinance at issue to prohibit the playing of music, amplification of sound, etc., in a manner which could be anticipated to offend the reasonable person, i.e., the individual of common sensibilities the standard hereby adopted vitiates the claimed vagueness of the ordinance."

Ohio's disorderly conduct statute appears to be modeled after Section 250.2(1) of the Model Penal Code which provides as follows:

"A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

* * *

(b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present;

* * *

"Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood."

The limiting word "public" and its attendant definition, which is in Section 250.2(1) of the Model Penal Code does not appear in R.C. 2917.11(a)(2).

The New York Court of Appeals was recently confronted with a similar vagueness attack on an anti-noise ordinance in People v. New York Trap Rock Corp. (N.Y.1982), 442 N.E.2d 1222. In Trap Rock, a Poughkeepsie, New York ordinance provided a blanket proscription against "any unnecessary noise". The New York Court of Appeals struck down that section of the ordinance as unconstitutionally vague in that, in contrast to limited context legislation, broadly drafted anti-noise provisions provided no setting from which vague words could take on a reasonable degree of definitiveness. Trap Rock, supra, at p. 1226. Similarly, R.C. 2917.11(A)(2) proscribes "making unreasonable noise" without limiting the time, place, or duration as to which the proscription applies.

R.C. 2917.11(A)(2) contains none of the limiting language present in the ordinance in Dorso nor the limiting

word "public" utilized in the Model Penal Code. The narrowing construction used in Dorso, supra, to uphold the constitutionality of the ordinance therein, noise anticipated to offend an individual of common sensibilities, cannot save the statute here where no limitations are placed on the challenged language to the extent present in Dorso or the Model Penal Code. Rather, as the court in Trap Rock, supra, stated:

"Overall, in whole and in many of its parts, as indicated, the pervasive nature of its catchall effect makes the ordinance not only a ready candidate for ad hoc and discriminatory enforcement but one whose defects are not remediable by a narrowing construction (see Grayned v. City of Rockford, 408 U.S. 104, 111, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222, supra)."

Thus, we agree with the trial court that the language "making unreasonable noise" in R.C. 2917.11(A)(2) fails to give a person of ordinary intelligence fair notice that his contemplated conduct would violate the statute and encourages ad hoc and discriminatory enforcement. Harris, supra; Papachristou, supra; Grayned v. City of Rockford (1972), 408 U.S. 104. Accordingly, in case No. 1174, where appellee Compher was only charged with violating R.C. 2917.11(A)(2) as it related to "making unreasonable noise," appellant's assignment of error is overruled and the judgment of the trial court dismissing the complaint as unconstitutionally vague is affirmed.

In case No. 1175, the trial court dismissed the complaint against appellee Lovensheimer "for the reasons set forth" in Compher. However, in its opinion with regard to Compher, the trial court noted that partial invalidity of a statute on grounds of indefiniteness does not nullify the whole state if its provisions are severable, and stated that "making unreasonable noise" was severable from R.C. 2917.11(A)(2). 50 Ohio Jur.2d Statutes Section 358.

R.C. 2917.11(A)(2) and the identical Chillicothe ordinance section under which appellee Lovensheimer was charged proscribes not only recklessly causing inconvenience, annoyance, or alarm to another by "making unreasonable noise" but also by "communicating unwarranted and grossly abusive language to any person". If any provision of a section of the Revised Code is held invalid, the invalidity does not affect other provisions of the section which can be given effect without the invalid provision, and they are severable. R.C. 1.50. Thus, the trial court's holding of unconstitutionality with respect to the "making unreasonable noise" portion of R.C. 2917.11(A)(2) does not affect the viability of the rest of that statutory section.

Appellee Lovensheimer was charged with both "making unreasonable noise" and "communicating unwarranted and grossly abusive language to any person" in the criminal complaint. The issue is whether the latter phrase is also unconstitutionally vague.

A person may not be punished under R.C. 2917.11(A)(2) for recklessly causing inconvenience, annoyance or alarm to another by "communicating unwarranted and grossly abusive language to any person" unless the words spoken are likely by their very utterance to inflict injury or provoke the average person to an immediate retaliatory breach of peace. State v. Hoffman (1979), 57 Ohio St.2d 129, Syllabus One; see also Lewis v. New Orleans (1974), 415 U.S. 130. Although R.C. 2917.11(A)(2) as it pertains to spoken words may be unconstitutionally vague on its face, the statute must be authoritatively construed in light of the facts and the circumstances surrounding a case involving speech. Hoffman, supra at Syllabus Two.

Here, the trial court did not take evidence in order to construe the local ordinance that is identical to R.C. 2917.11(A)(2) in light of all the circumstances and the alleged speech of appellee Lovensheimer. Thus, we cannot say whether appellee Lovensheimer's "unwarranted and grossly abusive language" constituted language akin to "fighting words" not constitutionally protected. Accordingly, the appellant's assignment of error is sustained and the judgment of

the trial court in case No. 1175 is reversed and the cause remanded for further proceedings consistent with this opinion.

It is ordered that (appellant-appellee) recover of (appellant-appellee) costs herein taxes.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directed the Chillicothe Municipal 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. Exceptions.

JUDGMENT IN CASE NO. 1174 AFFIRMED

JUDGEMENT IN CASE NO. 1175 REVERSED

AND CAUSE REMANDED.

Abele, J., Concurs:

Grey, J., Concurs in # 1175:

Dissents in # 1174:

NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

GREY, J. DISSENTING:

I respectfully dissent. Frankly the subtlety of majority, and of the trial court, eludes me. The Dorso case is, I believe, controlling.

The distribution drawn here seems to me to be only glossolodical, i.e. the haggling over words without substantive distinction. I believe a person or ordinary intelligence would have no difficulty knowing what constitutes an "unreasonable noise." An ordinary driver of an automobile must have a muffler which, under R.C. 4513.22, prevents "(3) 27 excessive or unusual noise " Is this statutes likewise void for vagueness?

The majority is concerned about arbitrary or erratic arrests and convictions based, I presume, on the idea that what is an unreasonable noise is amorphous, that it varies with time, place, duration or the perceptions of the parties. I would counter by mentioning that many of the statutes which regulate conduct between people have the same sort of

lack of precision. Menacing under R.C. 2903.21 is in the eye of the beholder. To convict for menacing it is not enough to prove that the defendant made threat, but rather that it "caused another to believe that the offender will cause serious physical harm to the person." Importuning under R.C. 2907.07(B) is soliciting homosexual activity "when the offender knows such solicitation is offensive to the other person." Under 2917.12(A)(2), Disturbing a lawful meeting, one may not "Make any utterance, gesture, or display which outrages the sensibilities of the group."

In each of these examples, and there are many more in the code, what is illegal depends on the time, place, duration, and the perceptions of the listener. The Chillicothe ordinance, no more vague than any of these, adequately informs a person of what is prohibited.

Finally, I would add that I cannot understand why "unreasonable noise" is considered vague, "abusive language" is considered precise.

I would affirm in both cases.

Footnote 1 .The city ordinance in Dorso provided as follows:

"No person, association, firm or corporation, operating a restaurant, hotel, summer garden or other place of refreshment or entertainment, shall permit, nor shall any person in or about such restaurant, hotel, summer garden or other place of refreshment or entertainment engage in the playing or rendition of music of any kind, singing, loud talking, amplification of sound, or other noises on or about the premises, in such manner as to disturb the peace and quiet of the neighborhood, having due regard for the proximity of places of residence, hospitals or other residential institutions and to any other conditions affected by such noises."