

IN THE  
SUPREME COURT OF OHIO

State of Ohio	)	
	)	CASE NO.: 11-0230
Plaintiff-Appellee,	)	
	)	
vs.	)	On Appeal from the
	)	Wayne County Court of Appeals,
Jason T. Carrick	)	Ninth Appellate District
	)	
Defendant-Appellant.	)	Court of Appeals Case No.: 09-CA-0077
	)	

---

MERIT BRIEF OF APPELLEE  
STATE OF OHIO

---

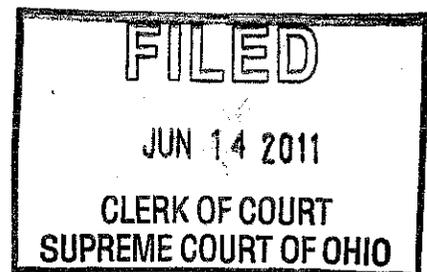
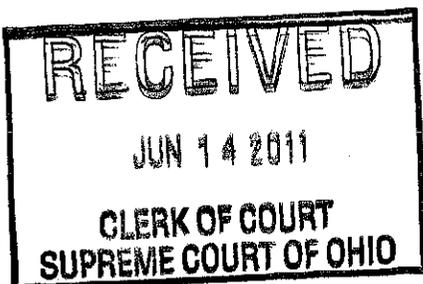
Clarke W. Owens  
132 S. Market St., Suite 204  
Wooster, OH 44691  
Phone: (330) 262-2667  
Fax: (330) 262-3778  
cwowstr@aol.com

Counsel for Defendant-Appellant,  
Jason T. Carrick

Daniel R. Lutz (#0038486)  
Wayne County Prosecuting Attorney

Latecia E. Wiles (#0077353)  
Assistant Prosecuting Attorney and  
Counsel of Record  
115 W. Liberty St.  
Wooster, OH 44691  
Phone: 330-262-3030  
Fax: 330-287-5412  
lwiles@countyprosecutor.com

Attorney for Plaintiff-Appellee,  
State of Ohio



## Table of Contents

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE AND FACTS .....	1
ARGUMENT.....	4
<b><u>APPELLEE STATE OF OHIO’S PROPOSITION OF LAW:</u></b>	
<i>R.C. 2917.11(A)(2) is not unconstitutionally void for vagueness to the extent that it prevents a person from recklessly causing inconvenience, annoyance, or alarm to another by making unreasonable noise .....</i>	<i>4</i>
A. Standard of Review .....	5
B. The Ninth District’s Decision and the Reasonable Person Standard .....	6
C. The Fourth District’s Decision in <i>Compher</i> .....	9
D. Policy Considerations and Concerns .....	11
E. Factual Findings and Arguments Related to Witness Testimony.....	15
CONCLUSION.....	16
CERTIFICATE OF SERVICE .....	16

## Table of Authorities

Cases	Page(s)
<i>City of Alliance v. Carbone</i> , 181 Ohio App.3d 500, 2009-Ohio-1197, 909 N.E.2d 688.....	13
<i>State v. Anderson</i> (1991), 57 Ohio St.3d 168, 566 N.E.2d 1224 .....	5, 6, 12
<i>State v. Carrick</i> , 9 <sup>th</sup> Dist. No. 09CA0077, 2010-Ohio-6451 .....	2, 6
<i>Chaplinsky v. New Hampshire</i> (1942), 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 .....	7
<i>Coates v. Cincinnati</i> (1971), 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 .....	5
<i>Colten v. Kentucky</i> (1972), 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584.....	12
<i>City of Columbus v. Kim</i> , 118 Ohio St.3d 93, 2008-Ohio-1817, 886 N.E.2d 217.....	5-6, 13
<i>State v. Compher</i> , No. 1160, 1986 WL 3406.....	9, 10, 14
<i>State v. Dorso</i> (1983), 4 Ohio St.3d 60, 446 N.E.2d 449. ....	5, 6, 7, 9
<i>Eastman v. State</i> (1936), 131 Ohio St. 1, 1 N.E.2d 140 .....	7
<i>United States v. Harriss</i> (1954), 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 .....	5, 9
<i>Kiefer v. State</i> (1922), 106 Ohio St. 285, 139 N.E. 852 .....	7
<i>City of Norwood v. Horney</i> , 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.....	5, 8
<i>United States v. Petrillo</i> (1947), 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 .....	5, 9
<i>Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho</i> (1990), 52 Ohio St. 3d 56, 556 N.E.2d 157.....	10
<i>State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals</i> (1992), 63 Ohio St.3d 354, 588 N.E.2d 116.....	5
<i>State v. Reeder</i> (1985), 18 Ohio St.3d 25, 479 N.E.2d 280 .....	12
<i>Robinson v. United States</i> (1945), 324 U.S. 282, 65 S.Ct. 666, 89 L.Ed. 944.....	6

**Statutes, Rules and Constitutional Provisions**

R.C. 2901.22 ..... 13

R.C. 2917.11 ..... 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

R.C. 2917.12 ..... 14

R.C. 4513.22 ..... 14

**Other Authorities**

2 Restatement of the Law 2d, Torts (1965) 13, Section 283, Comment c..... 8, 13

## STATEMENT OF THE CASE AND FACTS

Beginning at approximately 8:00 p.m. on October 31<sup>st</sup>, and extending into the early morning hours of November 1st, Sonia Golgosky and neighbor Joshua Klenz were disturbed by “very loud bass banging music” coming from property located approximately one-fourth mile away, owned by Jason Carrick. [Tr. 5, 6, 8, 15-16, 18]. Ms. Golgosky testified that she could hear the noise in her home, and specifically could hear the precise words to the music when she stepped outside onto her deck. [Tr. 5-6]. Mr. Klenz testified that the noise could be heard at all locations in his home and that his windows would vibrate from the bass. [Tr. 16]. He also stated that he could determine what song was playing by stepping outside his house. [Tr. 17]. This was the second night in a row the neighbors had tolerated Carrick’s music well into the early morning hours. [Tr. 6-7, 21].

Both Ms. Golgosky and Mr. Klenz have small children who were kept awake by the music. [Tr. 6, 18]. They both were becoming quite upset by the noise. [Tr. 8, 18]. Both individuals eventually called the Sheriff’s Office between 11:00 p.m. and 12:00 a.m. to complain about the music. [Tr. 6, 18].

Juan McCloud, an off-duty officer for Wooster Police, returned home with his family after attending a Halloween party on October 31, 2009. [Tr. 26]. Officer McCloud resides inside the city limits a little over a mile away from the Carrick property [Tr. 25]. He too complained of the bass noise of the music and called an on-duty Sergeant with Wooster Police shortly after midnight who advised him that several other complaints had been received and that sheriff deputies were in the process of responding. [Tr. 25-27]. Deputy Vaughn and Deputy Gerber of the Wayne County Sheriff’s Office responded to the calls.

Deputy Vaughn and Deputy Gerber testified that they could hear the music while in route and prior to reaching the Carrick property. Deputy Gerber testified that he could hear the music from Smithville Western Road, the road on which Ms. Golgosky and Mr. Klenz reside. [Tr. 31-32]. He testified that he heard the bass and that it was “a thumping noise sound...like bass from a car stereo but it was obviously extremely loud.” [Tr. 32]. Deputy Vaughn likewise testified that he could hear the bass from Smithville Western Road as he was responding to the call. [Tr. 35]. Upon arriving at the Carrick property, deputies had Mr. Carrick turn down the music and warned him that if they had to return to the property again, he would be issued a citation. [Tr. 30]. As the deputies were leaving the residence, Mr. Carrick immediately turned the music back up. [Tr. 36]. Deputy Vaughn testified that he did not return to the Carrick party immediately, but instead went to Ms. Golgosky’s residence to obtain a written statement. [Tr. 37]. He also obtained a statement from Mr. Klenz. [Tr. 37]. Deputy Vaughn then returned to the Carrick property a second time, approximately 20 to 25 minutes later, and issued Mr. Carrick a citation shortly after midnight. [Tr. 37].

Jason Carrick was charged and convicted of disorderly conduct in violation of R.C. 2917.11(A)(2). He was found guilty and subsequently appealed his conviction to the Ninth District Court of Appeals asserting four separate assignments of error. The Ninth District upheld Carrick’s conviction finding that R.C. 2917.11(A)(2) was not unconstitutionally vague, that the trial court did not improperly consider irrelevant evidence, and that Carrick’s conviction was not against the manifest weight of the evidence presented at trial. *State v. Carrick*, 9<sup>th</sup> Dist. No. 09CA0077, 2010-Ohio-6451. Carrick subsequently filed a motion requesting that this case be certified to the Ohio Supreme Court due to the existence of a conflicting opinion issued by the

Fourth District Court of Appeal, which held that R.C. 2917.11(A)(2) is unconstitutionally vague. That motion was granted and this Court subsequently accepted the case for review asking the parties to brief the sole issue of whether “the ‘making unreasonable noise’ provision of Ohio Revised Code 2917.11(A)(2) is unconstitutionally void for vagueness.

## ARGUMENT

On Halloween night in between 11:00 p.m. and 12:00 a.m., residents of Wayne County were quickly becoming annoyed at the music and resounding bass thumps coming from a neighbor's property. [Tr. 6, 18]. Jason Carrick was having a party and playing music that was vibrating the windows of homes of surrounding neighbors. This was the second night in a row that neighbors were forced to endure this. [Tr. 6-7, 16, 21]. Deputies went out to the Carrick property to address the problem and told Carrick that if they had to return to the property, he would be issued a citation. [Tr. 30]. As soon as the deputies departed, however, the music returned to its previous level. [Tr. 36]. When deputies returned to the property a second time, Jason Carrick was cited for disorderly conduct under Ohio Revised Code §2917.11(A)(2) for making unreasonable noise.

### **Appellee State of Ohio's Proposition of Law:**

*R.C. 2917.11(A)(2) is not unconstitutionally void for vagueness to the extent that it prevents a person from recklessly causing inconvenience, annoyance, or alarm to another by making unreasonable noise.*

R.C. 2917.11(A)(2) provides that "No person shall recklessly cause inconvenience, annoyance, or alarm to another by...making 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." The language regulating a person's speech by preventing offensively coarse utterances is not at issue. The sole question presented on appeal is whether the language of R.C. 2917.11(A)(2) that prevents unreasonable noise is void for vagueness.

A. Standard of Review.

This Court must presume that legislative enactments are constitutional and must apply all presumptions and pertinent rules of construction in favor of upholding a statute or ordinance alleged to be unconstitutional. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449.

A criminal statute requires sufficient clarity for ordinary people to understand what conduct is prohibited. *United States v. Harriss* (1954), 347 U.S. 612, 812, 74 S.Ct. 808, 98 L.Ed. 989. A party who alleges a statute is void for vagueness must show that the statute does not specify a standard of conduct. *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224 (citing *Coates v. Cincinnati* (1971), 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214). It is not enough that a statute could have been more precisely worded when it was drafted. *City of Norwood v. Horney* (2006), 110 Ohio St.3d 353, 380, 2006-Ohio-3799, 853 N.E.2d 1115 (citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals* (1992), 63 Ohio St.3d 354, 358, 588 N.E.2d 116).

The Constitution does not mandate a burdensome specificity. *Dorso*, 4 Ohio St.3d at 62. If the statute plainly describes a general class of offenses, the statute should not be struck down as vague even though in marginal cases doubts could arise. *Harriss*, 347 U.S. at 618 (citing *United States v. Petrillo* (1947), 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877). If a statute “can be made constitutionally definite by a reasonable construction, this Court is under a duty to give the statute that construction.” *Harriss*, 347 U.S. at 618. Thus, every reasonable interpretation is to be made in favor of the statute. *Dorso*, 4 Ohio St.3d at 61. A defendant challenging the constitutionality of a statute must prove that the statute is so unclear that an individual of ordinary intelligence would not understand what is prohibited beyond a reasonable doubt. *City of*

*Columbus v. Kim*, 118 Ohio St.3d 93, 94, 2008-Ohio-1817, 886 N.E.2d 217 (citing *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224).

B. The Ninth District's Decision and the Reasonable Person Standard.

The court of appeals below, in keeping with precedent set by this Court in *State v. Dorso* (1983), 4 Ohio St.3d 60, 446 N.E.2d 449, construed R.C. 2917.11(A)(2) within the context of a reasonable person standard and held that it was not unconstitutionally vague. This objective "reasonable person" standard protects a person whose conduct disturbs only the hypersensitive and serves to eliminate claims of vagueness. *State v. Carrick*, 9<sup>th</sup> Dist. No. 09CA0077, 2010-Ohio-6451, \*2, citing *Dorso*, 4 Ohio St.3d at 63-64.

In *Dorso*, this Court analyzed Cincinnati's "Loud Musical Noises" ordinance, which prevents certain noises that "disturb the peace and quiet" of the "neighborhood." The Appellant in *Dorso* argued that the terms "disturb the peace and quiet" and "neighborhood" are unconstitutionally vague and that the term "disturb the peace and quiet" lacks any objective means for measuring what conduct is prohibited, just as Carrick argues now. In upholding the statute, this Court held that a municipality cannot reasonably be expected to quantify the term "neighborhood" by metes and bounds or other specificity. The concept of "neighborhood" is generally understood and is not likely to confuse people of ordinary intelligence. Moreover, the phrase "disturb the peace of quiet" means "in a manner which could be anticipated to offend the reasonable person, *i.e.*, the individual of common sensibilities." *Dorso*, 4 Ohio St.3d at 63-64.

As this Court noted in *Dorso*, many statutes will have some inherent vagueness since English words are not always definitive and language is not an exact science like arithmetic. *Id.* at 62, citing *Robinson v. United States* (1945), 324 U.S. 282, 286, 65 S.Ct. 666, 89 L.Ed. 944.

The legislature does not need to define every word it uses in an enactment. *Dorso*, 4 Ohio St.3d at 62, citing *Kiefer v. State* (1922), 106 Ohio St. 285, 139 N.E. 852. Words are to be construed using the meanings commonly attributed to them. *Dorso*, 4 Ohio St.3d at 62, citing *Eastman v. State* (1936), 131 Ohio St. 1, 1 N.E.2d 140. Thus, this Court held that Cincinnati's ordinance provides fair warning to residents of the type of conduct that is prohibited and is not unconstitutionally vague.

By holding in *Dorso* that courts are to employ a reasonable person standard, this Court chose to adopt the approach endorsed by the United States Supreme Court in *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. In *Chaplinsky*, the U.S. Supreme Court considered a New Hampshire law that prohibited persons from using offensive, derisive or annoying words when addressing another person in a public place. *Chaplinsky*, 315 U.S. at 569. The Court stated that the word 'offensive' is not to be defined in terms of what a particular listener thinks, but instead is a question of what men of common intelligence would understand 'offensive' words to be, i.e. what a reasonable person would think. *Id.* at 573. Consequently, this Court in *Dorso* followed suit finding Cincinnati's ordinance prohibiting noise that "disturbs the peace and quiet" is to be interpreted as that which could be anticipated to offend a reasonable person or an individual of common sensibilities. *Dorso*, 4 Ohio St.3d at 63-64.

The Ninth District, in considering Carrick's assertions that the "unreasonable noise" provision of R.C. 2917.11(A)(2) is void for vagueness, required an objective reasonable person means of analysis. This approach is consistent with this Court's prior holding in *Dorso* and the U.S. Supreme Court's holding in *Chaplinsky*, but it is also inherent in the concept of "unreasonable noise." The very nature of the term requires that an objective reasonable person

standard be employed. R.C. 2917.11(A)(2) does not seek to prevent mere noise that causes inconvenience, annoyance, or alarm to another, but rather it prohibits the making of “unreasonable noise.” The legislature, in seeking to regulate the amount of noise that one person can make while in the vicinity of other individuals, chose to restrict the term “noise” to that which is considered “unreasonable.” By the very nature of term “unreasonable noise,” the legislature adopted a reasonable person standard.

By limiting noise to that which is “unreasonable” and by requiring an objective reasonable person analysis, the statute does not impose criminal liability on individuals who are hypersensitive and serves to protect against the concerns Carrick describes in his brief.<sup>1</sup> Reasonableness is an objective standard. See 2 Restatement of the Law 2d, Torts (1965) 13, Section 283, Comment c. The statute does not allow hypersensitive people to impose criminal liability on others. Rather, only noise that is considered unreasonable by a person of normal sensibilities may generate a criminal complaint, assuming the other elements of the statute are met. An individual who is annoyed by the sounds coming from his neighbor’s home cannot impose criminal liability on his neighbor solely because he dislikes the sounds coming from his neighbor’s home, as Carrick asserts. Since reasonableness is an objective standard, only noise which is considered unreasonable by a person of normal sensibilities will meet this element of the offense.

---

<sup>1</sup> The Appellant’s brief at p. 4 cites *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, for the proposition that the term “unreasonable noise” is “susceptible to many meanings and to manipulation” and because it is “impermissibly vague,” it “does not afford fair warning.” *Norwood v. Horney* does not stand for this proposition, but instead is in reference to the term “deteriorating area” as found in a code provision of the City of Norwood that pertains to the taking of private property.

C. The Fourth District's Decision in *Compher*.

Previously in *State v. Compher*, the Fourth District Court of Appeals issued a decision that conflicts with the Ninth District's decision in *Carrick*. In *Compher*, the court of appeals found R.C. 2917.11(A)(2) unconstitutional because (1) it did not limit "inconvenience, annoyance or alarm" to "public inconvenience, annoyance or alarm" as was once provided for in the Model Penal Code and (2) the term "unreasonable noise" does not contain language limiting its application to specific times, places, and durations. *State v. Compher*, 4<sup>th</sup> Dist. No. 1160, 1986 WL 3406, at \*3. Adopting such a holding in this case would be inconsistent with the reasoning this Court has adopted in the past in applying the reasonable person standard and would only serve to reinforce the notion that statutes must be written with foolproof exactitude in order to be enforceable.

A statute is not void for vagueness simply because it could have been more precisely worded. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449, 451. All legislative enactments enjoy a presumption of constitutionality. *Id.* at 61. If the statute plainly describes a general class of offenses, the statute should not be struck down as vague even though in marginal cases doubts could arise. *United States v. Harriss* (1954), 347 U.S. 612, 618, 74 S.Ct. 808, citing *United States v. Petrillo* (1947), 332 U.S. 1, 7, 67 S.Ct. 1538, 91 L.Ed. 1877. If a statute "can be made constitutionally definite by a reasonable construction, this Court is under a duty to give the statute that construction." *Harriss*, 347 U.S. at 618.

The Fourth District's first reason for holding that R.C. 2917.11(A)(2) is unconstitutional is not convincing. The court states that because R.C. 2917.11(A)(2) does not include the word

“public,” which was present in the preceding version found in the Model Penal Code, the language of the statute is too broad. While the Model Penal Code prevented a person from causing “public inconvenience, annoyance or alarm” by making unreasonable noise, the Revised Code prevents a person from recklessly causing “inconvenience, annoyance, or alarm to another” by making unreasonable noise. The distinction is one without significance. The Model Penal Code uses the word “public” while the Revised Code uses the word “another.” The statute serves to protect the same people. While the State acknowledges that the Model Penal Code limited inconvenience to “public inconvenience,” as the term “public” was defined, the fact that the Ohio legislature in writing R.C. 2917.11(A)(2) chose to use the term “another” does not in and of itself make the statute unconstitutional. As the dissent in *Compher* stated, the distinction is only “glossolodical, i.e. the haggling over words without substantive distinction.” *State v. Compher*, 4<sup>th</sup> Dist. No. 1160, 1986 WL 3406 (Grey, J., dissenting).

The second difficulty with the Fourth District’s holding is that it serves to require time, place, and duration restrictions to be written into the statute in order for it to be valid. Where a regulation is found to be content-neutral, reasonable restrictions on the time, place, or manner of protected speech may be imposed, provided that the restrictions are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information. *Planned Parenthood Ass’n of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St. 3d 56, 556 N.E.2d 157. There is no affirmative requirement that comprehensive time, place, and manner restrictions be imposed. Furthermore, one could argue that the limitation imposed by the legislature that noise not be “unreasonable,” is a content-neutral time, place, or manner restriction. A significant governmental interest is served by not allowing noise which

offends a reasonable person, such as loud music after midnight in this case. The State's interest is to protect its citizens from unwelcomed and excessive noise. Also, by prohibiting only noise which rises to the level of being "unreasonable," R.C. 2917.11(A)(2) is narrowly tailored and leaves open alternative means of communication. In this case, Carrick could have conducted the activity during normal waking hours or at a lesser volume. There was no restriction on type of music that Mr. Carrick played. Deputies merely sought to limit the volume at which was played given the time of night.

D. Policy Considerations and Concerns.

Public policy would favor this Court upholding the constitutionality of this statute. People want there to be limits on how much noise can be made and this case presents a prime example of why such a limitation needs to remain in effect. When an individual throws a party and plays loud music that lasts into the early morning hours, ignoring directions by law enforcement to turn the music down and resulting in neighbors not being able to sleep and shaking windows, people must be entitled to some sort of relief. Drafting laws to prevent noise will always be challenged as vague or overbroad since by their very nature they require drafting that is flexible enough to apply using a multiplicity of variables, but specific enough for people to understand.

The State rejects the notion that R.C. 2917.11(A)(2) encourages ad hoc and discriminatory enforcement by failing to provide adequate notice of what conduct is prohibited. While the State acknowledges that the concept of "unreasonable noise" is not defined as a specific volume or a specific sound, it would be nearly impossible for the legislature to set forth specific time, place, and manner restrictions within the statute to cover all possible scenarios so

as to eliminate all questions, as Carrick proposes. Laws need not be drafted with scientific precision in order to be enforceable. *State v. Anderson* (1991), 57 Ohio St.3d 168, 174, 566 N.E.2d 1224. “[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions.” *Anderson*, 57 Ohio St.3d at 174. As the U.S. Supreme Court stated in *Colten v. Kentucky* (1972), 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584, while upholding Kentucky's disorderly conduct statute, “[t]he root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” *Colten*, 407 U.S. at 110.

In addition, the term “unreasonable noise” is not so vague in that a reasonable person would be unable to understand what is or is not permitted. A reasonable person would surely expect a party lasting beyond midnight with loud music that causes neighboring property owners to call the police to fall within the range of what is not permitted. In *State v. Reeder*, this Court determined that language contained in R.C. 2917.11(A)(1) of the disorderly conduct statute was not unconstitutionally vague. In *Reeder*, this Court examined the statutory language prohibiting “turbulent behavior” and concluded that it fairly informs a person of ordinary intelligence and understanding what conduct is prohibited by law. *State v. Reeder* (1985), 18 Ohio St.3d 25, 27, 479 N.E.2d 280. Likewise, when looking at the language contained in R.C. 2917.11(A)(2) of the disorderly conduct statute, a person of average intelligence and understanding, or a reasonable

person, can understand what is considered “unreasonable noise” in much the same way as the prohibition against “turbulent behavior.”

*City of Alliance v. Carbone*, as cited by Carrick, is neither controlling nor a correct application of the law on this matter. *City of Alliance v. Carbone*, 181 Ohio App. 3d 500, 2009-Ohio-1197, 909 N.E.2d 688. Despite what the court of appeals says in *Carbone*, reasonableness is an objective standard. 2 Restatement of the Law 2d, Torts (1965) 13, Section 283, Comment c; *City of Columbus v. Kim*, 118 Ohio St.3d 93, 97, 2008-Ohio-1817, 886 N.E.2d 217 (O’Donnell, J., concurring). The statute does not allow hypersensitive people to impose criminal liability on others, nor does it allow law enforcement to create whatever definition they see fit. Only noise that is considered unreasonable under the circumstances by a person of normal sensibilities will give rise to criminal liability.

Furthermore, the elements of this offense must be considered as a whole and upholding this statute will not create a ban on all loud or annoying noises. The offense prohibited by R.C. 2917.11(A)(2) is one in which a person recklessly causes inconvenience, annoyance, or alarm to another by making unreasonable noise. A person acts recklessly when he or she acts with heedless indifference to the consequences and perversely disregards a known risk that their conduct is likely to cause a certain result or is likely to be of a certain nature. R.C. 2901.22. Carrick’s proposition to this Court that a person can be found guilty of disorderly conduct if he or she has flatulence misses the mark. The fact that the statute seeks to prevent unreasonable noise does not mean that all noise is prohibited. A reasonable person standard is inherent in the language of the statute and only noise that a reasonable person would find excessive or unwarranted under the circumstances is problematic. Additionally, the statute as a whole must be

considered. R.C. 2917.11(A)(2) does not prevent a person from merely making unreasonable noise. Rather it prevents a person from recklessly causing inconvenience, annoyance, or alarm by way of making unreasonable noise. Carrick's example fails to take into account that a person must act with heedless indifference to the consequences and perversely disregard a known risk when they engage in the act of making unreasonable noise in order to violate this statute. R.C. 2917.11(A)(2) does not serve as a blanket proscription against all noisy acts and there is simply no risk of prosecution to the individual who cannot control his bodily functions as Carrick would have this Court believe.

Likewise, R.C. 2917.11(A)(2) does not allow hypersensitive people to impose criminal liability on others. Only noise that is considered unreasonable by a person of normal sensibilities may generate a criminal complaint, assuming the other elements of the statute are met. An individual who is annoyed by the sounds coming from his neighbor's home is not able to criminalize his neighbor's actions, as Carrick asserts. The conduct must be deemed unreasonable by a person of normal sensibilities and the other elements of the statute must first be met, i.e. evidence indicating that the neighbor was acting with heedless indifference and perversely disregarding a known risk. Simply disliking one's neighbor will not result in a charge of disorderly conduct.

Finally, as the dissent points out in *Compher*, the wording of R.C. 2917.11 is no more unclear than words used in other statutes. R.C. 4513.22 prohibits "excessive or unusual noise" exhaust from mufflers. R.C. 2917.12(A)(2) requires that no person can "make any utterance, gesture or display which outrages the sensibilities of a group" present a lawful meeting. *State v. Compher*, 4<sup>th</sup> Dist. No. 1160, 1986 WL 3406 (Grey, J., dissenting). There will always be statutes

and ordinances that will be attacked on the basis that they are not specific enough. To hold that a person cannot be found guilty of disorderly conduct by virtue of making unreasonable noise is to call into question the constitutionality of other statutes that depend on other people's perceptions in order to determine whether a violation has occurred.

E. Factual Findings and Arguments Related to Witness Testimony

Beginning on page 10 of the Appellant's brief, Carrick begins discussing factual findings made by the trial court and the reasoning employed by the appellate court on various assignments of error raised to the Ninth District Court of Appeals. These arguments are irrelevant to the issue at hand and extend beyond the scope of this Court's order that the parties brief solely the issue of whether R.C. 2917.11(A)(2) is unconstitutionally void for vagueness.

In this section of his brief, Carrick argues that the trial court ignored certain testimony presented by defense witnesses because the court deemed the witnesses not entirely credible. He argues that the court based its finding of guilt on events occurring after the citation was issued. He argues that the responding officers, complaining neighbors, and the complaining off-duty officer who could hear the music from his house, were all overzealous and prejudiced against him. And, he takes issue with a comment made the trial court judge when finding him guilty. Although Carrick acknowledges that the weight of evidence presented on the charge of disorderly conduct is not an issue before this Court, he continues to discuss issues related to witness credibility and factual findings made by the trial court. These arguments were dealt with and dispensed with by the appellate court. These issues are not properly before this Court for review and are beyond the scope of what the parties were ordered to brief. For these reasons,

much of what is stated on pages 10 through 15 is irrelevant and does not further analysis by this Court.

### CONCLUSION

Based upon for the foregoing reasons, the State respectfully requests that this Court uphold the “unreasonable noise” provision of R.C. 2917.11(A)(2) and affirm the decision of the Ninth District Court of Appeals below.

Respectfully submitted,

Daniel R. Lutz  
Wayne County Prosecuting Attorney

  
\_\_\_\_\_  
Latecia E. Wiles (# 0077353)  
Assistant Prosecuting Attorney  
115 West Liberty Street  
Wooster, Ohio 44691  
Phone: (330) 262-3030  
Fax: (330) 287-5412

Attorney for Appellee, State of Ohio

### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee State of Ohio was served by U.S. mail this 13th day of June, 2011, upon the following counsel:

Clarke W. Owens  
132 S. Market St., Suite 204  
Wooster, OH 44691

  
\_\_\_\_\_  
Latecia E. Wiles (# 0077353)  
Assistant Prosecuting Attorney