

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,**

**Plaintiff-Appellee,**

**vs.**

**BARRY A. MENTSER,**

**Defendant-Appellant.**

\* **Case No. 2009-0273**  
\*  
\* **On Appeal from the**  
\* **Warren County Court of**  
\* **Appeals, Twelfth Appellate**  
\* **District**  
\*  
\* **Court of Appeals**  
\* **Case Nos. CA2008-06-075**  
\* **and CA2008-06-076**

---

**MERIT BRIEF OF APPELLEE, STATE OF OHIO**

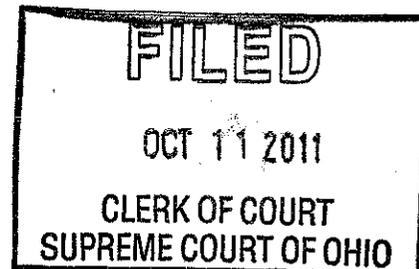
---

DAVID P. FORNSHELL, #0071582  
Warren County Prosecuting Attorney  
MICHAEL GREER, #0084352  
Assistant Prosecuting Attorney  
Warren County Prosecutor's Office  
500 Justice Drive  
Lebanon, Ohio 45036  
(513) 695-1325  
Facsimile: (513) 695-2962

Counsel for Appellee, State of Ohio

GEORGE C. LUTHER, #0031940  
536 South High Street  
Columbus, Ohio 43215  
(614) 224-7210

Counsel for Appellant, Barry A.  
Mentser



I. TABLE OF CONTENTS

II. STATEMENT OF THE CASE AND FACTS ..... 1

III. ARGUMENT..... 3

The offenses of which the Appellant was convicted occurred on October 31, 2007, and, thus, the offenses were committed after S.B. 10 was enacted on June 30, 2007.

**CASES**

*State v. Williams*, 129 Ohio St. 3d 344, 2011-Ohio-3374 ..... 3

IV. CONCLUSION..... 4

V. CERTIFICATE OF SERVICE..... 5

VI. APPENDIX..... 6

Indictment, T.d. 04-07CR24636 .....A-1

Indictment, T.d. 07CR-8287 .....A-2

## II. STATEMENT OF THE CASE AND FACTS

In *State v. Mentser*, Warren Trial No. 07CR24636, the Appellant, Barry A. Mentser, was indicted on December 21, 2007 by a Warren County Grand Jury and charged with Importuning, R.C.<sup>1</sup> § 2907.07(D)(2), a felony of the fifth degree. See attached Indictment, T.d. 04-07CR24636. The indictment in 07CR24636 set forth the date of the offense as October 31, 2007. *Id.*

On April 8, 2008, the Appellant pled guilty to Importuning. Change of Plea and Entry, T.d. 23-07CR24636. On May 15, 2008, the Warren County Court of Common Pleas sentenced the Appellant to serve three years of community control. Judgment Entry of Sentence, T.d. 28-07CR24636. The trial court classified the Appellant as a Tier II sex offender pursuant to R.C. § 2950.04 as amended by Senate Bill 10 (S.B. 10). Entry Designating Defendant as an Offender of a Sexually Oriented Offense and Explanation of Duties to Register as a Sex Offender, T.d. 29-07CR24636.

In *State v. Mentser*, Warren Trial No. 08CR24893, the Appellant, Barry A. Mentser, was originally indicted in Franklin County, Ohio on January 11, 2008 in Franklin Trial No. 07CR-8287 and charged with Attempted Unlawful Sexual Conduct with a Minor, R.C. § 2923.02 and R.C. § 2907.04, a felony of the fourth degree, and with Disseminating Matter Harmful to Juveniles, R.C. § 2907.31, a felony of the fifth degree. See attached Indictment, T.d. 07CR-8287. The indictment in Franklin Trial No. 07CR-8287/Warren Trial No. 08CR24893 set forth the date of the offenses as October 31, 2007. *Id.* The Appellant's case was

---

<sup>1</sup> Ohio Revised Code.

transferred to the Warren County Court of Common Pleas and given the case number 08CR24893.

On April 1, 2008, the Appellant pled guilty to Attempted Unlawful Sexual Conduct with a Minor in exchange for dismissal of the Dissemination charge. Change of Plea and Entry, T.d. 03-08CR24893. On May 15, 2008, the trial court sentenced the Appellant to serve three years of community control. Judgment Entry of Sentence, T.d. 09-08CR24893. The trial court classified the Appellant as a Tier II sex offender pursuant to R.C. § 2950.04 as amended by S.B. 10. Entry Designating Defendant as an Offender of a Sexually Oriented Offense and Explanation of Duties to Register as a Sex Offender, T.d. 10-08CR24893.

Regarding both 07CR24636 and 08CR24893, the Appellant appealed his designation as a Tier II sex offender to the Warren County Court of Appeals, Twelfth Appellate District. The Appellant challenged the constitutionality of S.B. 10 on numerous grounds, arguing, among other things, that S.B. 10 violated the prohibition against retroactive laws found in the Ohio Constitution. The Twelfth District consolidated the two appeals and affirmed the Appellant's sex offender classification, holding that S.B. 10 was constitutional. *State v. Mentser*, Warren App. Nos. CA2008-06-075 & CA2008-06-076, Judgment Entry, T.d. 20.

This Court accepted jurisdiction over the Appellant's appeals and held briefing in abeyance until the resolution of *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753, and *State v. Williams*, 129 Ohio St. 3d 344, 2011-Ohio-3374.

On September 22, 2011, this Court ordered “that the parties shall file briefs to clarify the exact date on which the offenses of which the appellant was convicted occurred and whether the offenses occurred prior to the enactment of S.B. 10.” Entry, 2009-0273, T.d.

### III. ARGUMENT

**The offenses of which the Appellant was convicted occurred on October 31, 2007, and, thus, the offenses were committed after S.B. 10 was enacted on June 30, 2007.**

As previously mentioned, this Court ordered the parties in this present case to “file briefs to clarify the exact date on which the offenses of which the appellant was convicted occurred and whether the offenses occurred prior to the enactment of S.B. 10.” Entry, 2009-0273, T.d. (emphasis added). The Appellant was convicted of Importuning and Attempted Unlawful Sexual Conduct with a Minor, and the indictments in 07CR24636 and 08CR24893 demonstrate that the exact date on which the Appellant committed these sex offenses was October 31, 2007.

The Senate passed S.B. 10 on May 16, 2007, and the House passed it on June 27, 2007. 2007 Bill Tracking OH S.B. 10. Gov. Strickland signed the bill on June 30, 2007. *Id.* Thus, S.B. 10 was enacted on June 30, 2007 when it was signed into law by the Governor. Moreover, this Court has recognized that S.B. 10 was enacted in 2007. *Williams*, 2011-Ohio-3374 at ¶4 (“The current statutory scheme, S.B. 10, was enacted in 2007[.]”). Since S.B. 10 was enacted on June 30, 2007 and since the Appellant committed the offenses of which he was

convicted on October 31, 2007, he committed those sex offenses after the enactment of S.B. 10.

In the Appellant's brief, he focuses January 1, 2008, the effective date of S.B. 10's registration requirements. However, that date is not dispositive. According to section 5 of S.B. 10, it was emergency legislation that went into effect immediately, so it was immediately effective. The effective date of certain provisions was delayed until January 1, 2008; however, for the purpose of determining whether S.B. 10 violated the prohibition against retroactive laws, the point of reference should be when the bill became law, and the bill became law when the Governor signed it on June 30, 2007.

#### IV. CONCLUSION

Since S.B. 10 was enacted on June 30, 2007 and since the Appellant committed his crimes on October 31, 2007, he committed the sex offenses of which he was convicted after the enactment of S.B. 10.

Respectfully submitted,



---

**MICHAEL GREER #0084352**  
Assistant Warren County Prosecutor  
(COUNSEL OF RECORD)  
Warren County Prosecutor's Office  
500 Justice Drive  
Lebanon, Ohio 45036  
(513) 695-1327  
(513) 596-2962-Fax

COUNSEL FOR STATE OF OHIO

V. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered upon to Mr. George C. Luther, 536 South High Street, Columbus, Ohio 43215 on this 4<sup>th</sup> day of October, 2011 by ordinary U.S. mail.



---

**MICHAEL GREER, #0084352**  
Assistant Prosecuting Attorney

VI. APPENDIX

COMMON PLEAS COURT  
WARREN COUNTY OHIO  
FILED

07 DEC 21 PM 3:35

JAMES L. SPAETH  
CLERK OF COURTS  
STATE OF OHIO, WARREN COUNTY

COMMON PLEAS COURT

STATE OF OHIO,

CASE NO. 07CR24636

Plaintiff

\*

\*

VS.

INDICTMENT

\*

BARRY A. MENTSER,

\*

Defendant.

COUNT ONE  
IMPORTUNING

OF the term NOVEMBER, in the year Two Thousand and Seven, THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 31st day of October, 2007, in the State of Ohio, County of Warren, the defendant, BARRY A. MENTSER,

did solicit another by means of a telecommunications device, as defined in Section 2913.01 of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and the other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age, said offense a Felony of the 5th degree, contrary to and in violation of Section 2907.07(D)(2) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

RACHEL A. HUTZEL  
Warren County Prosecuting Atty.  
Atty. Reg. #0055757



A-1

COMMON PLEAS COURT

NOVEMBER, 2007 CASE NO. 07CR24636

WARREN COUNTY, OHIO

THE STATE OF OHIO VS. BARRY A. MENTSER

INDICTMENT FOR: IMPORTUNING 2907.07(D)(2) F5

*Rachel A. Hutzel*  
RACHEL A. HUTZEL  
PROSECUTING ATTORNEY  
ATTY. REG. #0055757

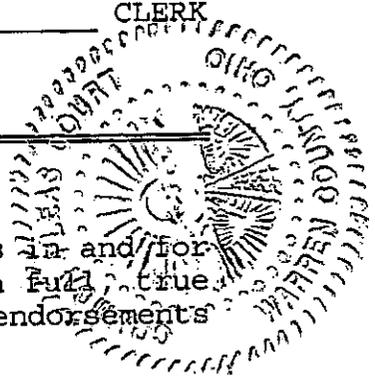
A TRUE BILL  
*W. J. Ferrell*  
GRAND JURY FOREPERSON

FILED: December 21, 2007

James L. Spaeth CLERK

BY: *Jan K. Kiegre*

DEPUTY CLERK



THE STATE OF OHIO, WARREN COUNTY.

I, the undersigned, Clerk of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the original indictment, with the endorsements thereon, now on file in my office.

WITNESS MY HAND AND SEAL OF SAID COURT, AT  
Lebanon, Ohio, this

21<sup>st</sup> day of December, 2007

James L. Spaeth Clerk

BY: *Jan K. Kiegre* Deputy

NOTICE TO APPEAR

~~BARRY A. MENTSER, YOU HAVE BEEN INDICTED BY THE GRAND JURY OF WARREN COUNTY, OHIO, AND YOU ARE HEREBY ORDERED TO PERSONALLY APPEAR AT 8:30 A.M. JANUARY 11, 2007 AT THE COMMON PLEAS COURT AT THE JUSTICE CENTER, 500 JUSTICE DRIVE, LEBANON, OHIO OR IF YOU ARE INCARCERATED YOU WILL BE SCHEDULED FOR A VIDEO ARRAIGNMENT AND THAT FAILURE TO APPEAR WILL RESULT IN A WARRANT FOR ARREST, FORFEITURE OF BOND, IF ANY, OR ADDITIONAL CRIMINAL CHARGES FOR FAILURE TO APPEAR UNDER REVISED CODE 2937.99.~~

State of Ohio,  
Franklin County, ss:

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2008 JAN 11 PM 2:01  
CLERK OF COURTS

**INDICTMENT FOR: Attempt Unlawful  
Sexual Conduct With A Minor (2923.02  
R.C.) (F-4) (1 Count) and Disseminating  
Matter Harmful To Juveniles (2907.31  
R.C.) (F-5) (1 Count); (Total: 2 Counts)**

In the Court of Common Pleas, Franklin County, Ohio, of the Grand Jury term beginning September fourteenth, in the year of our Lord, Two Thousand Seven.

Count 1

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Barry Alan Mentser late of said County, on or about the 31st day of October in the year of our Lord, 2007, within the County of Franklin aforesaid, in violation of section 2923.02 of the Ohio Revised Code, did knowingly engage in conduct that if successful, would have constituted or resulted in the offense of Unlawful Sexual Conduct with a Minor, a violation of section 2907.04 of the Ohio Revised Code, in that the said Barry Alan Mentser attempted to in violation of section 2907.04 of the Ohio Revised Code, being eighteen (18) years of age or older, did engage in sexual conduct, to wit: vaginal intercourse and/or cunnilingus and/or fellatio, with Jane Doe (AKA OhioSoccerGirl14), ~~not his spouse, the said Barry Alan Mentser knowing that Jane Doe (AKA OhioSoccerGirl14) was thirteen (13) years of age or older but less than sixteen (16) years of age, or the said Barry Alan Mentser being reckless in that regard, and the said Barry Alan Mentser was ten (10) or more years older than the victim Jane Doe (AKA OhioSoccerGirl14),~~

ON COMPUTER A-2

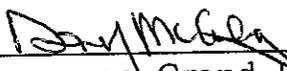
Count 2

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, upon their oath do find and present that Barry Alan Mentser late of said County, from on or about May 2, 2006 to October 30, 2007, within the County of Franklin aforesaid, in violation of section 2907.31 of the Ohio Revised Code, with knowledge of its character or content, did recklessly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a law enforcement officer posing as a juvenile, to wit: Lt. Jeff Braley, any material or performance that is obscene and harmful to juveniles, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio.

RON O'BRIEN  
Prosecuting Attorney  
Franklin County, Ohio

**A TRUE BILL**

  
Assistant Prosecuting Attorney

  
Foreperson Grand Jury

State of Ohio v. Barry Alan Mentser  
Address: 1267 Harrison Pond Drive, New Albany, Ohio 43054  
DOB: 3-26-59  
Sex/Race: male white  
Date of Arrest: 10-31-07  
SSN: 268-54-4493  
Police Agency: CPD  
Municipal Reference: 27927-07  
ITN #:

Count 1: Attempt Unlawful Sexual Conduct With A Minor  
2923.02 F-4  
Count 2: Disseminating Matter Harmful To Juveniles  
2907.31 F-5

Case No. 07CR-8287