

[Cite as *State v. Chappell*, 2009-Ohio-5371.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92455

STATE OF OHIO

PLAINTIFF-APPELLANT/
CROSS-APPELLEE

vs.

WELTON CHAPPELL

DEFENDANT-APPELLEE/
CROSS-APPELLANT

**JUDGMENT:
AFFIRMED; CROSS APPEAL DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-495988

BEFORE: McMonagle, P.J., Blackmon, J., and Boyle, J.

RELEASED: October 8, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Plaintiff-appellant/cross-appellee the state of Ohio (the “State”) appeals from the judgment of the trial court dismissing a charge of possession of criminal tools against defendant-appellee/cross-appellant Welton Chappell. Chappell cross appeals from the trial court’s denial of his motion to suppress. We affirm the dismissal of the possession of criminal tools charge and dismiss Chappell’s cross appeal as untimely filed.

I

{¶ 2} Chappell was indicted in a four-count indictment on two counts of criminal simulation of music and movies in violation of R.C. 2913.32, one count of receiving stolen property (a laptop computer) in violation of R.C. 2913.51, and one count of possessing criminal tools (i.e., money, an automobile, hard drives, a laptop computer, and packaging material) in violation of R.C. 2923.24. The charges stemmed from allegedly bootlegged DVDs and CDs found in Chappell’s car during the execution of a search warrant.

{¶ 3} The trial court subsequently denied Chappell’s motion to suppress. At trial, the trial court granted Chappell’s Crim.R. 29 motion in part and dismissed the receiving stolen property count. The jury could not reach a verdict on the other counts and the trial court declared a mistrial.

{¶ 4} The court subsequently granted Chappell's motion to dismiss the criminal simulation counts, leaving only the possession of criminal tools charge for retrial. Under R.C. 2923.24, regarding possessing criminal tools, "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 5} Chappell then moved for dismissal of that charge as well. After a hearing, the trial court denied Chappell's motion and ruled that the indictment adequately set forth the offense of possession of criminal tools under R.C. 2923.24.

{¶ 6} Chappell then moved to compel a response to his second motion for a bill of particulars, in which he had asked the State to identify, among other things, his alleged criminal purpose in using the alleged criminal tools. In its supplemental bill of particulars, the State asserted that it intended to introduce evidence at trial that Chappell possessed the criminal tools with the intent to violate federal copyright infringement law.

{¶ 7} Chappell then again moved to dismiss the possession of criminal tools charge. After a hearing, the trial court granted his motion and dismissed the indictment. The trial judge found that the intent to use an item criminally must arise from an intended violation of Ohio law and that "the State is not free to use the law of any jurisdiction or federal law in order to support its claim." The State appeals the dismissal; we find no error.

II

{¶ 8} Ohio is a code state; it has no common law offenses. *Charles Gruenspan Co. v. Thompson*, 8th Dist. No. 80748, 2003-Ohio-3641, ¶35. As such, “no conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.” R.C. 2901.03(A). “An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.” R.C. 2901.03(B). Sections of the Revised Code defining offenses are to be strictly construed against the State and liberally construed in favor of the accused. R.C. 2901.04.

{¶ 9} Under these sections, it is apparent that prosecution under Ohio law must emanate from violations of offenses defined in the Revised Code, i.e., a violation of state law. Violating federal copyright law is not defined as an offense in the Revised Code nor does the Code provide any penalty for it. Thus, even assuming Chappell possessed tools and intended through their use to violate federal copyright law, such intent is not a crime that can be prosecuted by the State under the Ohio Revised Code, as there would have been no intended violation of state law.

{¶ 10} The State argues, however, that a motion to dismiss cannot properly be granted where the indictment is valid on its face. It contends that R.C. 2923.24 does not indicate that the underlying intent to use the

items criminally must be an intended violation of state law and because the indictment properly set forth the elements of possessing criminal tools, the trial court erred in dismissing it. The State contends that the trial court went beyond the face of the indictment by considering its supplemental bill of particulars in ruling on the motion to dismiss and improperly considered whether the State would be able to satisfy its burden of proof at trial.

{¶ 11} Crim.R. 12(C) permits pretrial motions regarding “any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue.” In deciding a Crim.R. 12(C) motion, the court may decide such a motion “based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.” Crim.R. 12(F).

{¶ 12} A motion to dismiss tests the sufficiency of the indictment, without regard for the quantity or quality of evidence that may be produced by either the State or the defendant. *State v. Patterson* (1989), 63 Ohio App.3d 91, 95; *State v. Varner* (1991), 81 Ohio App.3d 85. “The proper determination is whether the allegations contained in the indictment ma[k]e out offenses under Ohio law.” *Patterson* at 95. If they do, it is premature for the trial court to determine, in advance of trial, whether the State can satisfy its burden with respect to the charges. *Id.*

{¶ 13} We disagree that the trial court impermissibly decided the issue for trial in ruling on Chappell's motion to dismiss. Chappell's motion did not embrace what would be the general issue for trial (whether he possessed tools with criminal intent); rather, it alleged that the indictment failed to make out any offense under Ohio law because a violation of federal copyright law is not an offense under the Ohio Revised Code. Because Chappell's motion did not require a determination of the general issue for trial, the trial court could consider the motion under Crim.R. 12(C). Further, as Crim.R. 12(F) allows the court to consider briefs, affidavits, testimony, and other exhibits, the trial court could properly consider the supplemental bill of particulars in deciding the motion. See, e.g., *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶18.

{¶ 14} As the trial court did not err in granting Chappell's motion to dismiss, appellant's assignment of error is overruled.

III

{¶ 15} Chappell cross appeals from the trial court's denial of his motion to suppress. We dismiss his cross appeal as untimely filed.

{¶ 16} Under App.R. 4(A), a party shall file its notice of appeal within 30 days of the judgment or order appealed. App.R. 4(B)(1) states that if a notice of appeal is timely filed by a party, "another party may file a notice of appeal

within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.”

{¶ 17} The trial court rendered its judgment granting Chappell’s motion to dismiss on November 7, 2008. The State filed its notice of appeal on November 21, 2008. At that point, Chappell had the choice of filing his cross appeal within ten days of the State’s filing its notice of appeal, or within the traditional 30-day window created by App.R. 4. Under the rules, the latest that Chappell could have filed his cross appeal was December 8, 2008 (December 7, 2008 was a Sunday, so Chappell could have filed on Monday, December 8). The record reflects that Chappell filed his appeal on December 9, 2008, one day beyond the required time limit of App.R. 4. The time requirements for filing a cross appeal pursuant to App.R. 4 are mandatory and jurisdictional. *Kaplysh v. Takieddine* (1988), 35 Ohio St.3d 170. Thus, this court cannot address the merits of Chappell’s untimely cross appeal as we lack jurisdiction and the cross appeal is dismissed.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

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