

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

State of Ohio,)	Case No. CR 09-520875-A
)	
Plaintiff,)	
)	Judge Shirley Strickland Saffold
v.)	
)	
Abdul Hayes,)	Opinion
)	
Defendant.)	
)	
)	

Facts

On April 8, 2008, Defendant was approached by police while standing outside of his vehicle. Police searched the vehicle and seized a portable DVD player, DVDs, and CDs. On February 11, 2009, Defendant was indicted with two counts of criminal simulation and one count of possessing criminal tools. Counts One of the indictment specifically reads,

“...that the above-named Defendant unlawfully did, with purpose to defraud, or knowing that he was facilitating a fraud on the Motion Picture Association of America, practice deception in making, retouching, editing, or reproducing a DVD and the loss to the Motion Picture Association of America was five thousand dollars or more and was less than one hundred thousand dollars.”

Count Two of the indictment specifically reads,

“ ...that the above-named Defendant unlawfully did, with purpose to defraud, or knowing that he was facilitating a fraud on the Recording Industry Association of America, practice deception in making, retouching, editing, or reproducing CDs and the loss to the Recording Industry Association of America was five hundred dollars or more and was less than five thousand dollars.”

Analysis

Defendant filed a Motion to Dismiss Indictment for Lack of Jurisdiction on 3-30-09. When considering Defendant's Motion to Dismiss, this Court is confined to looking only at the face of the indictment. *State v. Varner* (1991), 81 Ohio App.3d 85, 86. The Court does not look at the weight of the evidence.

Defendant argues that the criminal simulation statute, Ohio Revised Code Section 2913.32, specifically requires that an individual be defrauded. Ohio Revised Code Section 2913.01 defines deception as,

“knowingly deceiving another or causing another to be deceived by any false or misleading representation...that creates, confirms or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.”

Ohio Revised Code Section 2913.01 defines defraud as,

“to knowingly obtain, by deception, some benefit for oneself or another, or knowingly cause, by deception, some detriment to another.”

A review of these definitions reveals the intent of the statute was to protect individuals from being harmed. The statutes use the word “another” as referring to an individual. The alleged victims in this case are the Motion Picture Association of America and the Recording Industry Association of America, which are organizations and not individual consumers.

Defendant relies heavily on *State v. Perry* to support his argument. *State v. Perry* (1998), 83 Ohio St.3d 41. *Perry* is a factually similar case in which the defendant was indicted under Ohio Revised Code Section 2913.04. The defendant operated an internet-based bulletin board where he uploaded computer software without the proper authorization. The defendant argued to the trial court that federal law preempted the state

statute and the indictment should be dismissed. The trial court disagreed, and ultimately the case reached the Ohio Supreme Court.

The Ohio Supreme Court disagreed with the trial court and held that the indictment should have been dismissed. The *Perry* court specifically stated, “courts have repeatedly recognized that allowing state claims where the core of the complaint centers on wrongful copying would render the preemption provisions of the Copyright Act useless.” *Id.* *Perry* stresses that federal copyright laws expressly preempt state statutes on the same issue. The only exception *Perry* provides for the state to survive a preemption challenge would be the inclusion on an extra element within the indictment that is not specifically covered by federal copyright law.

The defendant in *Perry* argued that the extra element was violation of the licensing agreement on the software. The Court did not find that argument to be persuasive. There was no evidence of a licensing agreement in the record. In the instant case, the State argues the extra element to avoid preemption is the Defendant’s selling of the copyrighted items. There is no mention of sale within the indictment in this case.

The State has opposed the motion to dismiss arguing that the holding in *Perry* was a narrow one and has no application to the facts in this case. The State argues that in *Perry* the defendant was posting computer software to an internet bulletin board, while in this case the Defendant was selling video and music content that was copied to DVDs and CDs. The State contends the *Perry* case should only apply to cases involving downloading and posting of computer software. This Court is not persuaded by that argument. The material contained on Defendant’s DVDs and CDs was copyrighted, just as the software in *Perry*. Further, the internet was simply the means of dissemination,

just as downloading the material onto discs was the means of distribution in this case. This Court finds no basis for not applying *Perry* simply because a different means of distribution was utilized.

In *State v. Demos*, the defendant was charged under the state criminal simulation statute for selling counterfeit designer clothing. *State v. Demos* (1998), 1998 Ohio App. LEXIS 4130. The Appeals Court for the Seventh District held that the defendant could not be charged under this statute because the purpose of the statute was clearly to protect the consumer, not the designer of the merchandise. This Court is persuaded by the reasoning in *Demos*. In the instant case, the indictment is clearly worded in a way that makes clear the crime was against the creator of the content, not the consumer. This Court finds, as did the *Demos* court that the statute was to protect the consumer, and as the State has shown no crime against the consumer the charges for criminal simulation must be dismissed.

The State argues that the burden of federal preemption is on the Defendant. This Court notes that, “there is a presumption against preemption, and the party arguing that the state law has been preempted by federal enactment has the burden to show that preemption was intended when the federal law or regulation was enacted.” *Anderson v. CSX Transp., Inc.* (1991) 74 Ohio App.3d 365, 371. For the reasons outlined above, this Court concludes that although there is a presumption against preemption, the State has not shown any additional element to the charges that would negate preemption. Accordingly, Counts One and Two of the Indictment are hereby dismissed.

Count Three of the Indictment, Possessing Criminal Tools, pertains to Defendant’s possession of a portable DVD player. As the counts regarding the criminal

simulation have been dismissed, this Court must also dismiss Count Three as the possession of a DVD player has no criminal purpose standing alone.

In summation this Court concludes that federal law preempts the state's criminal simulation statute in this instance, and the indictment is hereby dismissed in its entirety.

IT IS SO ORDERED.

Judge Shirley Strickland Saffold

Date