[Cite as *Toledo v. Gewarges*, 2013-Ohio-1260.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio/City of Toledo — Court of Appeals No. L-12-1071

Appellee — Trial Court No. CRB-11-04075

v.

Johnny Gewarges — **DECISION AND JUDGMENT**

Appellant — Decided: March 29, 2013

* * * * *

David L. Toska, City of Toledo Chief Prosecuting Attorney,
and Arturo Quintero, Assistant Prosecuting Attorney, for appellee.

Jeffrey C. Zilba, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from the Toledo Municipal Court, which denied appellant's motion to dismiss in connection to charges of illegally operating a sexually oriented business, in violation of R.C. 2907.40(B), a misdemeanor of the first degree. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Johnny Gewarges, sets forth the following sole assignment of error:

> The trial court erred in denying the defendant's motion to dismiss and/or in failing to dismiss this cause following the defendant's plea of no contest.

{¶ 3} The following undisputed facts are relevant to this appeal. This matter stems from an investigation conducted by the Ohio Department of Public Safety of a business located in downtown Toledo, Ohio. The business operated at the relevant times herein as "Marilyn's on Monroe." Appellant served as the operator of the business. The business was a sexually oriented business. The business possessed a license to serve alcohol and was thereby governed by multiple state statutes concerning adult businesses that also serve alcohol. In 2011, appellant was charged with multiple counts of illegally operating a sexually oriented business, in violation of R.C. 2907.40 (B), misdemeanors of the first degree.

{¶ 4} On December 30, 2011, counsel for appellant filed with the trial court a motion to dismiss the charges. Appellant argued that while the statute allows the business itself to be convicted of the offense, it does not permit the individual operator to be found guilty of a violation of R.C. 2907.40(B). On February 14, 2012, the trial court denied the motion to dismiss, holding in pertinent part that individual operators can be found guilty of the offense charged. On February 15, 2012, appellant filed a motion for reconsideration of the motion to dismiss. It was denied. On February 16, 2012, the

matter was set for a bench trial. Appellant entered a voluntary plea of no contest to one count of illegally operating a sexually oriented business, in violation of R.C. 2907.40(B), a misdemeanor of the first degree. In exchange, multiple remaining counts of the same offense were dismissed. This appeal ensued.

{¶ 5} In the sole assignment of error, appellant maintains that the trial court erred in denying the motion to dismiss and in allowing the case to proceed against appellant as an individual. In support, appellant asserts that the relevant statutory term "whoever" refers solely to sexually oriented business entities but does not encompass individual operators of such businesses.

{¶ 6} R.C. 2907.40(A)(7) defines the operator of a sexually oriented business as any individual, "who causes the business to function or who puts or keeps in operation the business or who is authorized to manage the business." As applied to the instant case, it is not disputed that appellant was the operator and manager of the applicable sexually oriented business at all times relevant to this case.

{¶ 7} R.C. 2907.40(B) prohibits sexually oriented businesses which are open for business between midnight and 6:00 a.m. and possess a liquor permit from furnishing nude performances during those hours of operation. In conjunction with the prohibition delineated in R.C. 2907.40(B), R.C. 2907.40 (D) establishes that, "Whoever violates division (B) of this section is guilty of illegally operating a sexually oriented business, a misdemeanor of the first degree." The essence of appellant's dispute of his conviction is

that the term "whoever" contained in R.C. 2907.40(D) refers solely to the underlying sexually oriented business entity and not to the individual operators of the business.

{¶ 8} In order to assess the propriety of appellant's assertion that R.C. 2907.40(B) and (D) do not apply to individuals, we are guided by the plain meaning doctrine. The plain meaning doctrine establishes the proposition that courts have no authority to bypass or modify the plain meaning of unambiguous legislative language. The practical implication is that judicial application must be constrained to the confines of the plain meaning of the precise language at issue. *State v. Hoselton*, 6th Dist. No. L-09-1150, 2011-Ohio-1396.

{¶ 9} In conjunction with the above legal guidelines, it is well-settled that the provisions of a penal statute are not to be subjected to artificial or forced limited construction in order to exonerate persons plainly committing acts in violation of the statute. *State v. Brooker*, 170 Ohio App.3d 570, 2007-Ohio-588, 868 N.E.2d 683 (4th Dist.).

{¶ 10} In applying these parameters to the instant case, we find no controlling or compelling caselaw in support of appellant's contention that individuals are not included by the term "whoever" as set forth in R.C. 2907.40(D). On the contrary, a common sense and plain meaning reading of R.C. 2907.40(D) clearly encompasses individual operators as falling within the reach of the statute. The statute unambiguously establishes, "Whoever violates division (B) of this section is guilty of illegally operating a sexually oriented business, a misdemeanor of the first degree." The plain and clear statutory

language of R.C. 2907.40 in its entirety in no way limits its application solely to business entities. It in no way suggests that individual operators of sexually oriented businesses are excluded or exempt from prosecution for violations of R.C. 2907.40(B).

{¶ 11} Given the plain and unambiguous meaning of the language of the relevant statutory provisions, we find that the trial court did not err in denying the motion to dismiss and likewise did not err in failing to dismiss the one count to which appellant pled no contest. We find appellant's sole assignment of error not well-taken.

{¶ 12} The judgment of the Toledo Municipal Court is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE