

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

City of Vermilion

Court of Appeals No. E-12-037

Appellee

Trial Court No. CRB 1100268

v.

Gary Meinke

DECISION AND JUDGMENT

Appellant

Decided: May 31, 2013

* * * * *

Margaret O'Bryon, City of Vermilion Prosecuting Attorney,
for appellee.

Fritz Byers and William F. Pietrykowski, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Gary Meinke, appeals a judgment of the Vermilion Municipal
Court wherein he was found guilty of conducting a commercial fishing operation

business in violation of the Vermilion Codified Ordinance 1270.10(b). For the reasons that follow, we affirm.

{¶ 2} Appellant was charged with the violation on June 16, 2011. The complaint reads as follows:

Complainant, being first duly sworn, states that defendant Gary Meinke, owner of premises located at Anchorpoint Drive (PPN 18-01145.000), Vermillion, OH 44089, Erie County, on or about May 27, 2011 and continuing did as owner or agent or other person having actual possession of, or have charge, care or control of said premises, failed to comply with permitted uses by conducting a commercial fishing operation/business on premises in violation of Vermilion Codified Ordinance 1270.10(b) RL-1 EXISTING LAGOON DISTRICT A MISDEMEANOR OF THE FOURTH DEGREE ALL of this being contrary to and in violation of Section 1270.10(b) of the codified ordinances of the CITY OF VERMILION OHIO.

{¶ 3} On July 5, 2011, appellant entered a not guilty plea to the charge. On January 18, 2012, he filed a motion to dismiss the complaint. The court denied the motion on March 6, 2012. Appellant subsequently withdrew his not guilty plea and entered a no contest plea. The court accepted his plea and found him guilty. Imposition of his sentence was stayed pending this appeal. Appellant now asserts the following assignment of error:

The trial court erred in overruling Defendant-Appellant's motion to dismiss the complaint.

{¶ 4} Crim.R. 12(C) sets forth the pretrial motions which may be made and considered by the trial court. The rule states that “prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue.”

{¶ 5} Crim.R. 12(C) “makes clear that a pretrial motion to dismiss can only raise matters that are capable of determination without a trial on the general issue. The Ohio Rules of Criminal Procedure do not provide for the equivalent of a civil motion for summary judgment.” *State v. Gaines*, 193 Ohio App.3d 260, 2011-Ohio-1475, 951 N.E.2d 814, ¶ 16 (12th Dist.). (Citation omitted). In a criminal context, a motion to dismiss must “test the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced by either the state or the defendant.” *State v. Patterson*, 63 Ohio App.3d 91, 95, 577 N.E.2d 1165 (2d Dist.1989).

{¶ 6} The proper determination under Crim.R. 12(C), is whether the language within the charging instrument alleges the offense. *Gaines, supra, State v. Howard*, 7th Dist. No. 10-MA-154, 2011-Ohio-4754.

{¶ 7} In support of his assignment of error, appellant has cited *State v. Palmer*, 131 Ohio St.3d 278, 2012-Ohio-580, 964 N.E.2d 406. In that case, the Supreme Court of Ohio addressed the application of Crim.R. 12(C) in a case involving a defendant who had been convicted of a sexually oriented offense in 1995. He was sentenced to serve one

and one-half years of incarceration. In 2009, he was indicted on one count each of failure to provide notice of change of address in violation of R.C. 2950.05 and failure to verify current address in violation of R.C. 2950.06, both felonies of the third degree. Palmer responded with a Crim.R. 12(C) motion to dismiss arguing that he was not subject to the provisions set forth in R.C. 2950 because of the date of his conviction. He cited *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098, 832 N.E.2d 718. The *Champion* court held that only offenders who were sentenced on or after July 1, 1997, released after that date, or declared a habitual sexual offender immediately prior to that date were subject to the registration and verification requirements of R.C. Chapter 2950. *Id.* at ¶ 3-6.

{¶ 8} The trial court granted Palmer's motion to dismiss. On appeal, the Tenth District Court of Appeals reversed the decision stating that because:

[Palmer's] motion to dismiss did not challenge the face of the indictment, but rather contended the state would not be able to prove [Palmer] violated R.C. 2950.05 or 2950.06 due to the date of defendant's release from imprisonment, defendant's motion exceeded the permissible bounds of a pretrial motion under Crim.R. 12(C). *State v. Palmer*, 10th Dist. No. 09AP-956, 957, 2010-Ohio-2421.

{¶ 9} The Supreme Court of Ohio reversed the appellate court decision based on the fact that R.C. 2950 could never apply to Palmer because of the date of his conviction.

The answer is clear. Under Crim.R. 12(C)(2), trial courts may judge before trial whether an indictment is defective. Without a doubt, an

indictment is defective if it alleges violations of R.C. Chapter 2950 by a person who is not subject to that chapter. There is no set of circumstances under which such a person can violate the law's requirements. * * *

Contrary to the Tenth District's analysis * * *, such a determination does not embrace the general issue for trial. The general issue for trial in this context is whether the accused violated the law as set forth in the indictment. Where the law simply does not apply, the trial court is well within its authority to dismiss the indictment before trial. *Palmer* at ¶ 23-24.

{¶ 10} Unlike the defendant in *Palmer*, the zoning ordinance in this case clearly applies to appellant. It is undisputed that appellant owns the property in question. He was charged with violating Vermilion Codified Ordinance 1270.10(b) RL-1. That ordinance states in pertinent part:

In the RL-District, no building or land shall be used or changed in use and no building shall be located, erected or structurally altered, unless otherwise provided herein, except for one or more of the following uses:

- A. Single-family residences.
- B. Schools and other public uses.
- C. Churches.
- D. Customary accessory uses.

{¶ 11} The complaint accuses him of operating a commercial fishing operation in an RL-District. This is not one of the allowed uses set forth in Vermilion Codified Ordinance 1270.10(b). As such, this is a general issue for trial. Accordingly, we find that the trial court did not err in denying appellant's motion to dismiss on the basis that the charging instrument was adequate on its face. Appellant's sole assignment of error is found not well-taken.

{¶ 12} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Vermilion Municipal Court is affirmed. Court costs of this appeal are assessed to appellant 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.

Arlene Singer, P.J.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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