

[Cite as *State v. Christley*, 2009-Ohio-6635.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92546

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDWARD CHRISTLEY

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506995

BEFORE: Gallagher, J., Cooney, A.J., and Stewart, J.

RELEASED: December 17, 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).

SEAN C. GALLAGHER, J.:

{¶ 1} Defendant-appellant, Edward Christley, appeals his conviction for trademark counterfeiting from the Cuyahoga County Court of Common Pleas. Finding merit to his appeal, we reverse.

{¶ 2} On October 4, 2007, the Cleveland police and representatives of Major League Baseball conducted an investigation of alleged counterfeit merchandise being sold in and around the Cleveland Indians stadium. Special Agent Deak from the Department of Immigration and Customs Enforcement testified that they were looking for counterfeit merchandise being sold by street vendors.

{¶ 3} Agent Deak testified that he observed Christley pulling a shopping cart containing 109 red T-shirts and blue T-shirts with the phrase “IT’S TRIBE TIME NOW” printed in block letters on them. Christley indicated that he bought the T-shirts from another vendor and was now selling them for \$10.00 each. Agent Deak inspected the merchandise and determined that the T-shirts were counterfeit. Christley was arrested for trademark counterfeiting.

{¶ 4} James Dimitrijevs, a partner at the law firm Baker & Hostetler, which represents Major League Baseball, testified that he was called by police and Agent Deak to assist in counterfeit identification on October 4, 2007. He indicated that the applicant and owner of the trademark “IT’S

TRIBE TIME NOW” printed in block letters, affixed to a T-shirt, was the Cleveland Indians Baseball Company, and that the trademark was registered with the Ohio Secretary of State on October 3, 2007. He stated that Major League Baseball and the Cleveland Indians started using the slogan in early 2007, built the slogan throughout the season, and began selling T-shirts with the slogan at the end of the season. He testified that Major League Baseball and specific clubs work together to enforce trademarks. He explained that there are certain standards for the quality of goods for their merchandise, and that Major League Baseball indicates that the goods are legitimate with “hang tags,” “holograms,” and trademark notices affixed to the goods. Dimitrijevs testified that the T-shirts sold by Christley were “substantially identical” and “confusingly similar” to the T-shirts sold by the Cleveland Indians, but did not contain the proper “hang tags,” “holograms,” or trademark notices.

{¶ 5} Christley was found guilty of trademark counterfeiting in violation of R.C. 2913.34(A)(4) after a bench trial. He was sentenced to 12 months of community control sanctions. Christley appeals his conviction, raising three assignments of error for our review.

{¶ 6} I. “The state failed to present sufficient evidence to sustain appellant’s conviction.”

{¶ 7} When an appellate court reviews a record upon a sufficiency challenge, “the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 8} Christley was charged with trademark counterfeiting in violation of R.C. 2913.34(A)(4), which prohibits a person from knowingly selling, offering for sale, or otherwise disposing of goods with the knowledge that a counterfeit mark is attached to, affixed to, or otherwise used in connection with the goods. A “counterfeit mark” means a spurious trademark or a spurious service mark that satisfies both of the following:

“(i) It is identical with or substantially indistinguishable from a mark that is registered on the principal register in the United States patent and trademark office for the same goods or services as the goods or services to which or in connection with which the spurious trademark or spurious service mark is attached, affixed, or otherwise used * * * and the owner of the registration uses the registered mark, whether or not the offender knows that the mark is registered in a manner proscribed in division (F)(1)(a)(i) of this section.

“(ii) Its use is likely to cause confusion or mistake or to deceive other persons.” R.C. 2913.34(F)(1)(a).

{¶ 9} Christley argues that the state failed to prove that he sold the T-shirts knowing that a spurious trademark was affixed. Christley points

out that the trademark for “IT’S TRIBE TIME NOW” was obtained the day before his arrest and only placed on T-shirts as of September 22, so he could not have known he was selling counterfeit merchandise.

{¶ 10} The state argues that the statute imposes strict liability and thus Christley’s knowledge regarding whether the trademark was registered with the Secretary of State is irrelevant.

{¶ 11} As the state points out, Ohio’s trademark counterfeiting statute is substantially similar to the federal trademark counterfeiting statute, 18 U.S.C. §2320(a), which prohibits someone from intentionally trafficking or attempting to traffic in goods or services and knowingly using a counterfeit mark on or in connection with such goods or services.

{¶ 12} In *United States v. Infurnari* (1986), 647 F.Supp. 57, 58, the United States District Court held that “an individual cannot be convicted under the statute unless he knows the mark is counterfeit, as defined in section 2320(d)(1)(A). For example, if a defendant did not know the mark was spurious, or that it was likely to cause confusion, he could not know the mark was counterfeit.” The court reasoned that the definition of “counterfeit mark” contains an aspect for which knowledge is explicitly not required, implying that knowledge is necessary for the remaining parts of the definition. The statute specifically provides that the defendant need not know whether the mark is actually registered; however, the defendant must

know that the mark is counterfeit: “that he knew that the mark is spurious, that it is used in connection with trafficking in goods or services, that it is identical to or virtually indistinguishable from another mark, and that it is likely to cause confusion, mistake, or to deceive.” *Id.* Although the legitimate mark must have been registered with the patent office, whether defendant was aware of that fact is immaterial. *Id.* at 59.

{¶ 13} The Ohio statute is similar, requiring “knowledge that a counterfeit mark is attached to, affixed to, or otherwise used in connection with the goods.” Under the definition of “counterfeit trademark,” the statute indicates that it does not matter “whether or not the offender knows that the mark is registered.”

{¶ 14} Although the defendant does not have to know the trademark is registered, the state must still prove that Christley knew that “IT’S TRIBE TIME NOW” printed in block letters affixed to a T-shirt was being used by the Cleveland Indians in that manner. The slogan was used by the Cleveland Indians in a promotional song, in advertising, and on a banner before the T-shirts were produced and the trademark was registered. On September 17, 2007, for the first time, the Cleveland Indians personnel wore red T-shirts with “IT’S TRIBE TIME NOW” on it. These same T-shirts were sold only in the stadium starting September 22. According to the trademark application entered into evidence, the trademark “IT’S TRIBE TIME NOW”

in block letters to be affixed to T-shirts was applied for on September 28, and obtained on October 3. Christley was arrested on October 4 for selling counterfeit merchandise.

{¶ 15} R.C. 2901.22(B) states that “A person has knowledge of circumstances when he is aware that such circumstances probably exist.” We find that there was no evidence set forth to prove that Christley knew that the T-shirts he sold were counterfeit. The use of the slogan “IT’S TRIBE TIME NOW” affixed to a T-shirt was only in use a total of 17 days prior to Christley’s arrest. Further, there is no evidence in the record regarding the number of games, if any, at which the T-shirts were sold. Such sales at the stadium might have alerted Christley that he was probably selling counterfeit merchandise. Finally, the only merchandise Christley would have seen would not have contained the “hang tags,” “holograms,” or a trademark notice because at the time the Cleveland Indians sold the T-shirts, the slogan was not registered.

{¶ 16} Christley’s first assignment of error is sustained.

{¶ 17} In light of our ruling on the first assignment of error, the remaining two assignments of error are rendered moot.

Judgment reversed. Appellant discharged.

It is ordered that appellant recover from appellee 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.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, J., CONCURS;
COLLEEN CONWAY COONEY, A.J., DISSENTS
(WITH SEPARATE OPINION)

COLLEEN CONWAY COONEY, A.J., DISSENTING:

{¶ 18} I respectfully dissent.

{¶ 19} The majority points out that both state and federal law do not require that an offender know the mark is registered. The slogan and its block letters were in use the entire baseball season. The T-shirts were available for purchase beginning September 22, 17 days before Christley's arrest. I do not agree with the majority's finding the number of games at which the shirts were sold to be a critical factor, nor is it necessary that Christley observe "hang tags" or "holograms" on the authentic merchandise before he has knowledge that the shirts he offered for sale were counterfeit. Therefore, I would affirm.