[Cite as *State v. Carrick*, 2010-Ohio-6451.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C.A. No. 09CA0077
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JASON T. CARRICK	WAYNE COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO
Appellant	CASE Nos. CRB 09-11-01613 CRB 09-11-01612

DECISION AND JOURNAL ENTRY

Dated: December 29, 2010

CARR, Judge.

{¶1} Appellant, Jason Carrick, appeals the judgment of the Wayne County Municipal Court. This Court affirms.

I.

{¶2} On October 31, 2009, Carrick hosted a Halloween party in a building that he owned near West Smithville-Western Road in Wayne County. Shortly after midnight, Deputies of the Wayne County Sherriff's Office issued Carrick a minor misdemeanor citation for disorderly conduct in violation of R.C. 2917.11(A)(2). The trial court found him guilty and fined him $150.

{¶3} On appeal, Carrick raises four assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED BY OVERRULING JASON CARRICK'S MOTION TO STRIKE UNCONSTITUTIONAL STATUTORY LANGUAGE BECAUSE THE PERTINENT SECTION OF OHIO REVISED CODE 2917.11(A)(2) IS UNCONSTITUTIONALLY VAGUE ON ITS FACE."

{¶4} In his first assignment of error, Carrick argues that R.C. 2917.11(A)(2) is unconstitutionally vague in its entirety. Although not set forth in his statement of this assignment of error, Carrick also argues that R.C. 2917.11(A)(2) is unconstitutionally overbroad. This Court disagrees in both respects.

{¶5} R.C. 2917.11(A)(2) provides: "No person shall recklessly cause inconvenience, annoyance, or alarm to another by *** [m]aking unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person[.]" At issue in this appeal is the statute's prohibition of recklessly causing "inconvenience, annoyance, or alarm" by "making unreasonable noise." "To withstand a claim of vagueness, a criminal statute must define a criminal offense with sufficient clarity for ordinary people to understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶238. This Court must presume that legislative enactments are constitutional and will "apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional." *State v. Dorso* (1983), 4 Ohio St.3d 60, 61. With respect to a challenge to the constitutionality of a criminal statute based on vagueness, a statute will not be held to be unconstitutional if the statute can be subject to a reasonable construction that makes the class of offenses criminalized "constitutionally definite." Id.

{¶6} In *Dorso*, the Ohio Supreme Court considered the constitutionality of a municipal ordinance that prohibited "the playing or rendition of music of any kind, singing, loud talking, amplification of sound, or other noises on the premises, in such manner as to disturb the peace and quiet of the neighborhood[.]" Id. at 60. Responding to the argument that the ordinance was unconstitutionally vague with respect to the phrase "to disturb the peace and quiet," the Court construed the statute to include a reasonable person standard:

> "[W]e construe the Cincinnati ordinance at issue to prohibit the playing of music, amplification of sound, etc., in a manner which could be anticipated to offend the reasonable person, i.e., the individual of common sensibilities. Specifically, we find the ordinance to proscribe the transmission of sounds which disrupt the reasonable conduct of basic human activities, e.g., conversation or sleep." Id. at 63-4.

The Court observed that this holding "does not permit the imposition of criminal liability upon a party whose conduct disturbs only the hypersensitive *** [and] vitiates the claimed vagueness of the ordinance." Id. at 64.

{¶7} In *State v. Reeder* (1985), 18 Ohio St.3d 25, the Ohio Supreme Court considered a different portion of the disorderly conduct statute and concluded that the prohibition of "engaging in *** violent or turbulent behavior" in R.C. 2917.11(A)(1) is not unconstitutionally vague. The Court held that "the enactment fairly informs a person of ordinary intelligence and understanding what conduct is prohibited by law." *Reeder*, 18 Ohio St.3d at syllabus. Specifically, the Court noted that the word "turbulent," when considered in its context, fairly informed a reasonable person of the conduct prohibited. Id. at 27.

{¶8} In *State v. Livingston* (Oct. 2, 1986), 2d Dist. No. CA9641, the Second District Court of Appeals considered whether the "unreasonable noise" portion of R.C. 2917.11(A)(2) was unconstitutionally vague. In that case, a minister was charged with violating R.C. 2917.11(A)(2) by making unreasonable noise after refusing to lower the level of an amplification

system during an outdoor event. The Second District Court of Appeals concluded that the statute was not unconstitutionally vague because "[i]n the usual course of events, it appears doubtful that a person of ordinary intelligence would fail to understand what is meant by 'inconvenience, alarm, or annoyance,' and the term 'unreasonable noise,' when measured by common understanding, is not beyond the grasp of the average person." Id. The Second District reached the same result in another case with respect to a municipal ordinance whose language mirrored R.C. 2917.11(A)(2). See, generally, *Fairborn v. Grills* (June 8, 1994), 2d Dist. No. 92 CA 92. Applying its holding in *Livingston*, the *Fairborn* court concluded that when a defendant is charged with criminal conduct based solely on the volume of his noise without respect to its content, "the First Amendment analysis for content restrictions on speech is unnecessary, and the use of fighting words is not an element of the offense." Id.

{¶9} The application of the holding of *Dorso* in other contexts is also instructive. In *Columbus v. Kim*, 118 Ohio St.3d 93, 2008-Ohio-1817, for example, the Ohio Supreme Court considered whether an ordinance that prohibited harboring an animal that "emits audible sounds that are unreasonably loud or disturbing and which are of such character, intensity and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to life and health of any individual." Id. at ¶6. The Court concluded that by limiting the scope of the ordinance to animal noise that was "unreasonably loud or disturbing," an objective standard had been incorporated therein. Id. at ¶9.

{¶10} The Sixth District Court of Appeals reached a similar conclusion in *Kelleys Island v. Joyce* (2001), 146 Ohio App.3d 92. In that case, the defendant was charged with violating a municipal ordinance that prohibited any person from generating "noise or loud sound which is likely to cause inconvenience or annoyance to persons of ordinary sensibilities by means of a

live performance, radio, phonograph, television, tape player, compact disc player, loudspeaker or any other sound amplifying device which is plainly audible at a distance of 150 feet or more from the source of the noise or loud sound." Id. at 95. The appellant argued that the phrase "plainly audible" was unconstitutionally vague, but the Sixth District disagreed, noting that the language of the ordinance at issue had the effect of limiting its reach to "only unreasonable noises or loud sounds." Id. at 100. See, also, *Columbus v. Kendall*, 154 Ohio App.3d 639, 2003-Ohio-5207; *State v. Cole*, 7th Dist. No. 01 CA 73, 2002-Ohio-5191. But, see, *State v. Compher* (Dec. 9, 1985), 4th Dist. Nos. 1174 and 1175.

{¶11} In short, Ohio courts have concluded that an ordinance that regulates the volume of noise – as distinguished from the content of speech - is not unconstitutionally vague if it incorporates a reasonable person standard. Carrick maintains that this Court has reached the opposite conclusion in several cases, but his argument misses its mark. In *Wooster v. Thompson* (July 6, 1977), 9th Dist. No. 1478, this Court concluded that an ordinance similar in content to R.C. 2917.11(A)(2) was unconstitutionally vague to the extent that it prohibited "[m]aking *** offensively coarse utterance, gesture or display, or communicating unwarranted and grossly abusive language to any person." We followed this holding in *State v. Russell* (Dec. 30, 1977), 9th Dist. No. 749; *State v. Hoffman* (Sep. 20., 1978), 9th Dist. No. 1535, reversed and remanded for hearing by *State v. Hoffman* (1979), 57 Ohio St.2d 129; and *Lorain v. Hogg* (Oct. 4, 1978), 9th Dist. No. 2729. In *Hogg*, this Court did not discuss the facts of that case or the statutory language at issue, and Carrick implies from this silence that this Court held R.C. 2917.11(A)(2) unconstitutional in its entirety. It is simply not possible to conclude from that opinion, however, that this Court considered the "unreasonable noise" language in the ordinance and found it unconstitutional. We reject Carrick's suggestion that this Court intended to extend its holding in

the earlier cases to a different class of statutory language. Because R.C. 2917.11(A)(2) incorporates the objective standard of a reasonable person, we conclude that it is not unconstitutionally vague.

{¶12} Carrick has also argued that R.C. 2917.11(A)(2) is unconstitutionally overbroad. To demonstrate overbreadth, one must establish beyond a reasonable doubt that the breadth of the statute in question prohibits conduct otherwise protected by the First Amendment. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, at ¶29. The overbreadth must be substantial. Id. at ¶30. Although a statute may, in its breadth, implicate the freedoms guaranteed by the First Amendment, "the question we must resolve is whether the First Amendment is abridged." *Lakewood v. Plain Dealer Pub. Co.* (1988), 486 U.S. 750, 769. Although a statute may implicate First Amendment freedoms, "[t]he First Amendment does not preclude reasonable restrictions relating to time, place and manner of expression so long as they (1) are content-neutral, (2) are tailored to serve a significant government interest, and (3) leave alternative channels of communication open." *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St.3d 56, 59. With respect to regulating the volume of expressive conduct:

> "[I]t can no longer be doubted that government ha[s] a substantial interest in protecting its citizens from unwelcome noise. This interest is perhaps at its greatest when government seeks to protect the well-being, tranquility, and privacy of the home, but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise." (Internal citations and quotations omitted.) *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 796.

{¶13} Consequently, the United States Supreme Court has held that when a statute reasonably regulates the volume of expression without respect to the content thereof, the statue is not overbroad. *Kovacs v. Cooper* (1949), 336 U.S. 77 (holding that a statute that prohibited the

use of amplification devices attached to vehicles that emit loud and raucous noises was not unconstitutionally overbroad).

{¶14} R.C. 2917.11(A)(2) prohibits any person from recklessly causing inconvenience, annoyance, or alarm by making unreasonable noise. Although the unreasonable noise portion of the statute would undoubtedly include expression protected by the First Amendment, it does so without respect to content and with reference to a reasonable person standard. Consequently, to the extent that R.C. 2917.11(A)(2) pertains to expression protected by the First Amendment, it creates a reasonable restriction on the manner of expression and is not unconstitutionally overbroad.

{¶15} Because the unreasonable noise portion of R.C. 2917.11(A)(2) is neither unconstitutionally vague nor overbroad, Carrick's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"OHIO REVISED CODE 2917.11(A)(2) IS UNCONSTITUTIONAL AS APPLIED TO JASON CARRICK."

ASSIGNMENT OF ERROR III

"THE COURT ABUSED ITS DISCRETION AND COMMITTED ERROR OR PLAIN ERROR BY HEARING AND CONSIDERING AS PART OF ITS DECISION EVIDENCE THAT WAS CLEARLY IRRELEVANT TO THE CHARGE AGAINST HIM."

{¶16} Although Carrick has framed his second assignment of error as a challenge to the constitutionality of R.C. 2917.11(A)(2) as applied to him, the substance of his argument is that the trial court erred by considering events that occurred after the citation was written as evidence of unreasonable conduct on the part of Carrick. In other words, Carrick's second assignment of error is the same as his third, and they are, therefore, considered together.

{¶17} Carrick was cited for disorderly conduct twice. The first citation, which occurred at 12:20 a.m. on November 1, 2009, is at issue in this appeal. The charge reflected in the second citation, which issued shortly after 1:30 a.m. on the same date, was dismissed before trial. Carrick's second and third assignments of error argue that the trial court erred by considering irrelevant evidence of events that occurred between 12:20 a.m. and 1:30 a.m.

{¶18} Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable[.]" Evid.R. 401. When a criminal case is tried to the bench, it is presumed that the trial court "considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *State v. Post* (1987), 32 Ohio St.3d 380, 384.

{¶19} The testimony of three witnesses arguably relates to Carrick's second and third assignments of error. Sonia Golgosky, who lives in the vicinity of Carrick's property, testified about the noise that she heard on the night of October 31, 2009, and that she called law enforcement to complain three times. She stated that one of those calls was between 11:00 p.m. and 11:30 p.m.; she did not testify that any of her calls were after 12:20 a.m., although she also described events that took place after 12:20 a.m. The testimony of Joshua Klenz, another neighbor, included a description of noise that occurred after 1:00 a.m. Carrick objected to this testimony, and the trial court overruled the objection. Deputy Daniel Vaughn testified that he returned to Carrick's property after a complaint was received around 1:30 a.m. and issued a citation for disorderly conduct at that time. Carrick also objected to this testimony and, again, the trial court overruled the objection.

{¶20} Carrick points to the trial court's oral ruling as evidence that the trial court relied on irrelevant evidence:

> "Sir, this *** [s]tatute is based on whether you were recklessly causing inconvenience, annoyance or alarm to another. Certainly, I don't think there was anything necessarily reckless about your conduct until the deputies had come and asked you to turn the music down. It was turned down and then it was increased again. Two more times the deputies **** came back a second time and then eventually a third time. At that time, I think your conduct was unreasonable. Three independent people had called about the level of noise and I don't, I think there is a distinction here that we can make between the loud bas[s] sound that was mentioned early in this case today and simply music. The loud bas[s] sound that is throbbing, vibrating the windows, keeping children awake after midnight is unreasonable. You may not be alert to that. Certainly the party sounded like a very appropriate fun type of event but once you were given notice that neighbors, independently, who are more than half a mile to a mile away, were being disturbed by the loud repetitive bas[s] sound, that your conduct meets the definition of Disorderly Conduct as this Court sees it. So I find you Guilty of this offense."

Although the trial court does make one reference to the fact that the deputies returned to Carrick's residence "a second time and then eventually a third time," some of which occurred after the citation in this case was issued, this reference is isolated. Indeed, the rest of the trial court's ruling is based on events that occurred before the citation issued. The trial court noted that Carrick's mental state met the requisite standard of recklessness at the point at which he had been warned about the noise; that three people had complained about the noise; and that the testimony established that the "throbbing" bass sound had affected nearby residents. Carrick seems to rely on the trial court's statement that his "conduct was unreasonable" at the point when the deputies returned a third time. When considered in the context of the trial court's complete ruling, however, it becomes apparent that the trial court's use of the word "unreasonable" was a general reference to Carrick's conduct rather than a characterization of the level of the noise as "unreasonable" at that point and not before.

{¶21} Although the trial court overruled Carrick's objections to testimony related to events after the citation was issued, he has not demonstrated that the trial court's ruling was based on that evidence. Carrick's second and third assignments of error are overruled.

ASSIGNMENT OF ERROR IV

> "JASON CARRICK'S CONVICTION FOR MINOR MISDEMEANOR DISORDERLY CONDUCT WAS UNSUPPORTED BY SUFFICIENT EVIDENCE, OR OTHERWISE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AT TRIAL."

{¶22} Carrick's last assignment of error is that that his conviction is based on insufficient evidence and is against the manifest weight of the evidence. This Court disagrees.

{¶23} At the conclusion of the State's case, Carrick moved to dismiss the charge against him under Crim.R. 29(A), which provides:

> "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶24} A challenge to the sufficiency of the evidence questions whether the evidence at trial was sufficient as a matter of law to support the defendant's conviction. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. "In determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, '[t]he 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. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, at ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶25} Carrick was convicted of disorderly conduct in violation of R.C. 2917.11(A)(2), which provides that "[n]o person shall recklessly cause inconvenience, annoyance, or alarm to another by *** [m]aking unreasonable noise[.]" R.C. 2901.22(C), in turn, defines recklessness:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to

> circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶26} Sonia Golgosky, who estimated that she lives one-quarter of a mile from Carrick's property, testified that on the evening of Halloween, "for the second night in a row, we heard very loud bas[s] banging music. If we stepped out on our deck, we could hear it very clear, precisely to the words." She characterized Carrick's property as "essentially in my backyard." She testified that the bass from the music could be heard from inside her house, "[o]n the other side of our home, actually, in our bedroom with all the windows closed." According to Ms. Golgosky, the music began at approximately 8:00 p.m. and she contacted law enforcement between 11:00 p.m. and 12:00 a.m. She stated that the music stopped, at least intermittently, after deputy sheriffs responded to her complaint.

{¶27} Joshua Klenz, another resident of the neighborhood, testified that beginning approximately between 8:00 p.m. and 9:00 p.m., he heard "loud noise coming from the back part of our woods." Mr. Klenz recalled that, from outside his house, he could identify what song was playing. He also testified that the noise could be heard throughout his house. He described the noise as "a loud bas[s], boom, boom, inside the house" that caused the windows in his house to vibrate, particularly toward the south end of the house. He agreed with the characterization of the noise as "throbbing." Mr. Klenz testified that by 11:30 or 12:00 p.m., he "was getting frustrated because my kids[,] trying to get them to sleep and all I would hear is a boom boom *** and my kids kept staying awake." A third resident, Juan McCloud, testified that he complained about noise "a little after midnight," and he recalled that the noise prevented him and his wife from going to sleep.

{¶28} Deputy Daniel Vaughn went to Carrick's property in response to the complaints from residents. He testified that a complaint was received at 11:30 p.m. or "a little before" and

drove to the area in question. He recalled that he could hear "loud bas[s]" from the road and was able to identify the location of the sound. Deputy Vaughn testified that he asked Carrick to lower the volume and warned him that he would be cited if the deputies had to return to the property. He stated that as he drove away, however, the music was turned back up to its previous level. After obtaining statements from Ms. Golgosky and Mr. Klenz as the noise continued, Deputy Vaughn returned to Carrick's property and issued a citation for disorderly conduct. Deputy Jason Gerber responded to the property as well. He testified that he could "[a]bsolutely" hear the music as he approached Carrick's property from the road at a distance of approximately one-quarter mile. He described it as "a thumping noise *** like the bass from a car stereo but it was obviously extremely loud."

{¶29} Viewing the evidence in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Carrick recklessly caused annoyance to the residents of neighboring properties by playing music at an unreasonably loud level.

{¶30} Carrick has also argued that his conviction for disorderly conduct is against the manifest weight of the evidence. Specifically, he has argued that the defense witnesses, who characterized the noise level as lower than the State's witnesses, were more credible. When considering whether a conviction is against the manifest weight of the evidence, this Court must:

> "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶31} To be sure, the defense witnesses offered a different description of the events than the State's witnesses. Carrick testified that about eighteen people attended the party at any given

point in the evening. Shawn Kaylor, who is employed by Carrick, was an invited guest who characterized the Halloween party as "very calm" and testified that "everyone was able to hold normal conversations inside and outside the building." According to Mr. Kaylor, the volume of the music was turned completely off after Deputy Vaughn's visit. Tyson Berkey, who is "good friends" with Carrick, also attended the party. Mr. Berkey testified that he controlled the music for the party, which he described as "very contained." He estimated that the volume of the music in the "gymnasium" part of the building was "six being on a scale of one to ten." Mr. Berkey testified that the deputies required him to turn the music "completely off." He admitted that the music was turned back up, but estimated that it was "a little bit lower" in volume. Kelly Beery, who attended Carrick's party with a friend, testified that she was able to hold a conversation without difficulty during the party and did not hear music until she entered the building. Finally, Bob Wirth, a partygoer who also "haul[s] a lot of stuff for" Carrick, described the party as "kind of boring." He also testified that there was no difficulty in holding a conversation over the music.

{¶32} Carrick attributes the difference in the defense witnesses' description of the party to credibility problems on the part of the State's witnesses. Specifically, he draws this Court's attention to the fact that Ms. Golgosky admitted her annoyance with noise from Carrick's property on the night before the evening in question and to Mr. Klenz's acknowledgement that he had a confrontation with Carrick in the past. Carrick's own witnesses, however, were not free from questions regarding their credibility: they were partygoers who were also a friend, a business associate, and an employee of Carrick.

{¶33} Having reviewed the entire record and considered the credibility of both the State's and Carrick's witnesses, this Court cannot conclude that this is the exceptional case in

which the weight of the evidence is heavily in favor of Carrick and a new trial is required. His conviction, therefore, is not against the manifest weight of the evidence.

{¶34} Carrick's fourth assignment of error is overruled.

III.

{¶35} Carrick's assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.