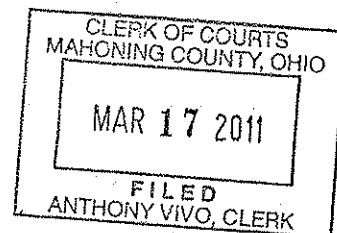


IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



STATE OF OHIO,

Plaintiff

ROBERT MCLAUGHLIN,

Defendant

CASE NO. 2010 CR 1422

JUDGE MAUREEN SWEENEY

STATE'S RESPONSE TO
MOTION TO DISMISS

The Defendant has been charged with three counts of Pandering Obscenity, felonies of the fifth degree, all in violation of R.C.2907.32 (A)(1)(C). Under Ohio law, "No person, with knowledge of the character of the material or performance involved, shall do any of the following: Create, reproduce, or publish any obscene material, when the offender knows that the material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when the offender is reckless in that regard."

The Defendant states that the conduct alleged in the indictment was not obscene and based on that presumption moves that the case be dismissed. However, that determination can only be made by the trier of fact at trial, pursuant to Ohio Criminal Rules of Procedure.

Criminal Rule 12(C) governs pretrial motions: "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."¹ Thus, a trial court may "consider evidence beyond the face of an indictment when ruling on a motion to dismiss an indictment *if* the matter is capable of determination without trial of a general issue."² (Emphasis added.)

¹ Crim.R. 12(C).

² *State v. Brady* (2008), 119 Ohio St.3d 375, 375, citing Crim.R. 12.

And where the general issue is not capable of determination without trial, the defendant is essentially moving for summary judgment.³ But, the Ohio Rules of Criminal Procedure do not provide for “summary judgment” on an indictment before trial.⁴ “As a general rule, ‘premature declarations,’ which is what the Defendant is moving for here, are strictly advisory and an improper exercise of judicial authority.”⁵

In an obscenity trial, the trier of fact must determine, among other factors, whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest.⁶

If the Court were to grant Defendant’s motion and exempt the Defendant from criminal liability based solely on the issue of obscenity, the Court would be granting summary judgment, which is prohibited by the Ohio Rules of Criminal Procedure.

For these reasons the State asks the Court to overrule Defendant’s Motion without a hearing.

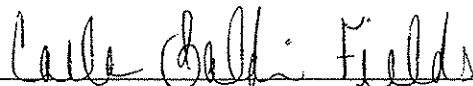
³ See *State v. Roman* (Aug. 27, 2007), 9th Dist. No. 06CA009025, 2007 Ohio 4341, ¶ 4.

⁴ See *State v. Varner* (9th Dist. 1991), 81 Ohio App.3d 85, 86, citing *State v. McNamee* (3rd Dist. 1984), 17 Ohio App.3d 175, 176, and *Akron v. Davis* (July 31, 1991), 9th Dist. No. 14989, unreported, 1991 WL 149743.

⁵ *Varner*, 81 Ohio App.3d at 86, citing *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14.

⁶ See *City of Urbana v. Downing* (1989), 43 Ohio St. 3d 109, 539 N.E. 2d 140, citing *Miller v. California* (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419.

Respectfully Submitted,



CARLA BALDWIN FIELDS (0084214)

Assistant County Prosecutor

21 W. Boardman Street, 6th Floor

Youngstown, Ohio 44503

Phone: (330) 740-2330

Fax: (330) 740-2008

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was sent on March 17, 2011, via regular mail to Attorney Ruth Fischbein-Cohen, Counsel for Defendant, at 3552 Severn Rd. #613, Cleveland, OH 44118.



CARLA BALDWIN FIELDS (0084214)

Assistant County Prosecutor