IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CRIMINAL DIVISION

STATE OF OHIO,	:	CASE NO. 91-CR-3477
Plaintiff,	:	(Judge Jeffrey E. Froelich)
-vs-	:	DECISION, VERDICT OF NOT GUILTY, FINAL JUDGMENT ENTRY
SCOTT SMITH,	:	
Defendant.	:	

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Although Crim. Rule 23(C) permits the court to make a general finding in a case tried without a jury, the attorneys who so competently and zealously advocated for their clients merit an explanation of the court's rationale.

The Defendant is charged with six counts of violating various provisions of Chapter 3734 of the Ohio Revised Code. Specifically R.C. 3734.11 states that "no person shall violate any section of the chapter, [or] any rule adopted under it. . . ." R.C. 3734.99(A) then provides a penalty for "whoever recklessly violates any section of this chapter. . . ." Therefore, the defendant is charged by indictment that he:

1. recklessly transported hazardous waste (count 4);
2. recklessly failed to prepare a hazardous waste manifest before transporting (count 7);
3. recklessly stored or transported hazardous waste without a generator ID number (count 8);

5. recklessly failed to obtain a detailed analysis of the waste (count 2);

6. recklessly failed to evaluate the waste to determine if it were hazardous (count 3).

The first question is what does the word "recklessly" modify. One option is that it modifies the verb (i.e. transport, store, fail to evaluate, etc.) and that whether or not the material involved is a "hazardous waste" is a separate fact to be determined. In this analysis, there is no reasonable doubt that the defendant recklessly did certain acts. It is admitted by his own testimony that he caused the material to be transported, that he did not have a manifest, that he had no generator ID number, that he stored the material, that he did not obtain a detailed analysis, and that he did not evaluate the waste to determine if it were hazardous. Therefore, since, as stated in R.C. 2901.22(E), either recklessness, knowledge, or purpose is sufficient culpability, the defendant would be guilty if the material in question were hazardous waste as that term is defined in R.C. 3734.40(J).

However, the intent of the criminal law is to punish or impact certain acts which the legislature has defined as offenses (R.C. 2901.03). In Chapter 3734, it is not to impact, e.g., transportation, but rather the transportation of something which the specific legislation controls -- in this case, hazardous waste. Therefore, to be found guilty, the defendant must be reckless with regard to the nature of the material which he is purposely, knowingly, or recklessly transporting, storing, failing to perform certain analysis, etc....

This interpretation is in accord with State v. Echols (March 15, 1995) Montgomery County, App. No. 14456, unreported. In Echols, it was charged that "the defendant knowingly possessed a counterfeit controlled substance." The Court of Appeals specifically held that it disagreed with any trial court's interpretation that the word "knowingly" modified only "possess" and not "counterfeit controlled substance."

According to R.C. 2901.22(C), 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 to be of a certain nature. A person is reckless with a respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

As stated in R.C. 2901.01(G), "risk" "means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist." Therefore, to be found guilty, it must be shown that the defendant acted with a heedless indifference to whether or not the items he transported (stored, etc.) constituted a hazardous waste. He is guilty if he acted with a heedless indifference to such consequences by perversely disregarding a significant possibility that the material was a hazardous waste, as contrasted with a remote possibility that the material constituted a hazardous waste.

The State argues that the defendant was reckless as to whether the material was hazardous waste. They contend he believed the material contained oil and/or "paint-related" substances; he attempted to solicit the aid of the Health District, the OEPA, and a licensed recycling company to determine the nature of the

material; and he finally told a subcontractor just to get rid of it and he did not care where it went. The defendant contends that "paint-related material" is not the same as "hazardous" material, that the previous owner of the drums indicated to the defendant that there was "no problem" with the material, and that the attempts of the defendant to check out the material were out of an abundance of caution, from which the court cannot infer that he was making inquiries because of a belief on his part that the material was "hazardous".

The Court finds that the State has not shown that the defendant perversely disregarded a known risk that the drums contained hazardous waste or that he acted with heedless indifference as to whether or not they did contain a hazardous waste. There was a known risk and he may have disregarded the known risk that these drums did contain hazardous waste, or even acted with an indifference as to whether or not they did contain hazardous waste. However, from all the facts adduced at trial the court cannot find beyond any reasonable doubt that he acted with a heedless indifference as to whether they contained hazardous waste and perversely disregarded the known risk that they may contain such waste.

According to the Committee comments to R.C. 2901.22(C), the definition of 'recklessness' follows the discussion of wantonness in Roszman v. Sammett Trucking Co. (1971), 26 Ohio St. 2d 94. In Roszman, the court held that negligence is not converted into wantonness unless the evidence establishes a disposition to perversity. "In order to establish wantonness, the conduct must be supported by evidence that shows a disposition to perversity, such

as acts of stubbornness, obstinacy or persistency in opposing that which is right, reasonable, correct or generally accepted as a course to follow in protecting the safety of others." Ibid at 97.

'Perverse' has been defined as meaning corrupt, incorrect, improper, contrary or wrong-headed. 'Heedless' means careless, not to pay attention, blind, or disregardful. The inclusion of these words must mean something. "The presumption always is that every word in a statute is designed to have some legal effect, and putting the same construction on a statute, every part of it is to be regarded and so expounded if practicable, as to give some effect to every part of it." Richards v. Market Exch. Bank Co. (1910), 81 Ohio St. 348. It is not sufficient that the defendant "merely" disregarded a known risk or acted with indifference to the consequences.

As a matter of fact, after five days of testimony and arguing among highly experienced and qualified experts and trial counsel, there are unresolved questions about what exactly is a hazardous waste and at what point such determination must be made. There is certainly not enough evidence from which the court can conclude that any "paint related" substances in the drum at Ashcraft constitute a hazardous waste. The defendant knew generally that these substances may have been a hazardous waste and attempted therefore to check with the OPEA, the Health District, and a recycling company. The defendant's ultimate actions in allowing a contractor to transport the waste may indeed have arisen from indifference, negligence, or frustration; however, again, from the facts, the court cannot find that the culpable mental state is present sufficient to impose felony liability.

In summary, the court determines that before the defendant can be found guilty, he must be shown to have acted (transported, stored, failed to prepare certain document, etc.) recklessly in relation to certain material concerning which he was reckless as to whether or not it were hazardous wastes. Since there is not proof beyond a reasonable doubt of such necessary element, the defendant is found not guilty.

APPROVED:

JEFFREY E. FROELICH, JUDGE

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

BRAD L. TAMMARO, Assistant Attorney General, Attorney for State, 30 East Broad Street, 25th Floor, Columbus, Ohio 43266-0410
JAMES E. PHILLIPS/PAUL J. COVAL, Attorneys for Defendant, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1000 614/464-5635
RAYMOND JOHNSON, Bailiff (513/225-4440)

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CRIMINAL DIVISION

STATE OF OHIO,	:	CASE NO. 91-CR-3477
Plaintiff,	:	(Judge Jeffrey E. Froelich)
-vs-	:	DECISION, ORDER & ENTRY DENYING MOTION TO DISMISS
SCOTT SMITH,	:	SEPTEMBER INDICTMENT
Defendant.	:	

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The Defendant has moved this Court for an Order dismissing the Indictment returned on September 2, 1994. There are three counts of this Indictment and after discussions with all counsel, it was agreed that the Motion is directed toward Counts 2 and 3. Count 1 is actually a narrowing of Count 6 of the Indictment of March 4, 1992. Count 6 has been dismissed since Count 1's inclusion in the new Indictment.

The Defendant contends that Count 2 (failure to obtain a detailed analysis) and Count 3 (failure to evaluate the waste and determine if it is hazardous) are based on facts known to the State at the time of the first Indictment and, therefore, their inclusion in the second Indictment was an act of vindictiveness based on the Defendant's successful appeal of his first conviction.

The State first requests that the Motion be denied based on its untimeliness pursuant to Rule 12 of the Ohio Rules of Criminal Procedure. However, the Court in its Scheduling Order dated October 28, 1994, a matter of only two or three days before the

November 1, 1994, deadline established under Rule 12, ordered the deadline for pretrial motions to be 45 days before the trial. The Defendant met this Court-imposed deadline. As stated in Rule 12 (C), "... the Court in the interest of justice may extend the time for making pretrial motions." Given the Rule, the Court's Order, and the Court's interest in seeing that matters are resolved on their merits rather than on technical objections, the Court finds the Motion to be timely.

However, based on the State's explanations as set forth in its pleadings and on the record, and the Court's hearing five days of testimony, the Court does not find an existence of a realistic likelihood of vindictiveness. United States v. Andrews (1980 6th Cir.), 633 F.2d 449; Therefore, the Motion to Dismiss the charges on the September Indictment is **DENIED**.

APPROVED:

JEFFREY E. FROELICH, JUDGE

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

BRAD L. TAMMARO, Assistant Attorney General, Attorney for Plaintiff, 30 East Broad Street, 25th Floor, Columbus, Ohio 43266-0410

JAMES E. PHILLIPS/PAUL J. COVAL, Attorneys for Defendant, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1000 614/464-5635

RAYMOND JOHNSON, Bailiff (513/225-4440)