

**STATE OF OHIO, COUNTY OF BELMONT
COURT OF COMMON PLEAS**

Michael DeWine, Ohio Attorney General

Plaintiff

Case No.: 13 CV 263

Vs.

JUDGMENT ENTRY

Fred's Party Center, Inc., et al.,

Defendants

FILED
COMMON PLEAS COURT
BELMONT CO., OHIO
2013 SEP 24 AM 10 16
CYNTHIA K. MCGEE
CLERK OF COURT

The Court, having considered the facts of this case in light of RC §3719.41 (XLR11 Schedule I, Controlled Substance), RC §3729.10 (Nuisance), RC §4729.35 (Public Nuisance), and RC §2925.03 (Sale of Controlled Substance), hereby finds by clear and convincing evidence, that Defendants, Fred's Party Center, Inc., d/b/a Martins Ferry Party Center and Bridgeport Party Center; Frederick P. Fryman, Individually and as Owner of Fred's Party Centers, Inc.; Frederick & Joyce Fryman, as property owners of Martins Ferry Party Center, and Frederick Fryman as property owner of Bridgeport Party Center, did commit and participate in the commission of felony violations of RC §2925.03, Trafficking in Drugs and are, therefore, liable for maintaining a nuisance under RC §3719.10.

In addition, the Court finds by clear and convincing evidence that said Defendants have committed, and/or participated in the commission of violations of R.C. §2925.03, an Ohio law controlling the distribution of a drug of abuse, are also liable for maintaining a public nuisance pursuant to RC §4729.35.

Such violations of law are declared to be inimical, harmful, and adverse to the public welfare and they unreasonably interfere with the public's right to health, safety, peace, and comfort, and, as a result, said parties are hereby permanently enjoined from engaging in such acts.

The Court further finds that, as the result of Defendants' violations of RC §2925.03, RC §3719.10 and RC §4729.25, they have, in effect, maintained a nuisance and public nuisance subject to abatement pursuant to RC §3767.02 through §3767.11.

In accord with the Court's findings, it is hereby Ordered that said Defendants, Fred's Party Center, Inc., d/b/a Martins Ferry Party Center and Bridgeport Party Center; Frederick P. Fryman, Individually and as Owner of Fred's Party Centers, Inc.; Frederick & Joyce Fryman, as property owners of Martins Ferry Party Center, and Frederick Fryman as property owner of Bridgeport Party Center, are permanently enjoined from selling any potpourri or incense and maintaining a nuisance (sale of controlled substance disguised as "incense" and "potpourri" or otherwise) at any location in the State of Ohio.

It is further Ordered, in accordance with RC §3767.06, that all personal property and contents used in conducting or maintaining the nuisance (all personal property and contents confiscated by law enforcement authorities) shall be forfeited and disposed of in accord with law and that the two places wherein the public nuisance has been found to exist, shall be closed for any purpose and remain closed for a period of one (1) year, beginning October 1, 2013 thru September 30, 2014, unless sooner released, pursuant to RC §3767.06.

This is a final appealable Order.

FINDINGS OF FACT

1. XLR11 is listed in RC §3719.41 as a Schedule 1 controlled substance.
2. This synthetic compound has been identified as contained in packets of products that are often sold in convenient stores and gas stations as "potpourri" or "incense."
3. Defendants, Fredrick and Joyce Fryman ("the Frymans"), own Defendants, Fred's Party Centers, Inc. ("Fred's"), Bridgeport Party Center ("Bridgeport"), and Martins Ferry Party Center ("Martins Ferry").
4. The Frymans, Fred's, Bridgeport and Martins Ferry, became the subject of undercover law enforcement investigations in early 2013 because the party centers were suspected of selling or offering to sell to consumers products that were

represented as "incense" and/or "potpourri" that were found to contain the synthetic compound known as XLR11.

5. In late 2011, the Frymans learned that in Bridgeport and Martins Ferry "there was a market" for products with names like "Diablo", "Kush", and "Klimax."
6. Based on a "recommendation from an employee that was buying elsewhere, and said we should get into it," Mr. Fryman "had [his] manager get online" to find a supplier for the products "to be able to try some."
7. After finding an online supplier who sold the products, Fred's began placing orders and receiving weekly shipments to sell at Bridgeport and Martins Ferry.
8. Mr. Fryman testified that a lab report came with each shipment that he purchased.
9. He testified that all of the lab reports that came with the products at issue in this case indicated that the products did not contain any illegal substance.
10. The individual packets of the product were labeled with statements such as "Not for Human Consumption." "100% legal" "It's Legal in 50 States." and "Contains no Prohibited Chemicals or Materials."
11. According to Mr. Fryman's testimony, these products were only sold to customers over 18, though he further testified he knew the products did not contain tobacco.
12. On February 20, 2013, February 22, 2013, and March 22, 2013, officers from the Belmont County Drug Task Force conducted controlled undercover buys of the products at issue at Bridgeport and Martins Ferry. At each location, the undercover officers purchased packets of products with names like "Diablo", "Kush", and "Klimas."

13. Although the labels on the packets claimed that the contents were free of illegal substances, when the State crime lab tested the contents of the packets, XLR11 was identified.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter, issues and parties pursuant to RC §1345.04; RC §3767.03; and RC §4729.53.
2. The Court has venue to hear this case, pursuant to Ohio Civ. R. 3(B)(1)-(3) in regard to the transactions complained of herein, which occurred in Belmont County, Ohio.
3. The Ohio Attorney General is the proper party to commence these proceedings under the authority of RC §1345.07 and RC §3767.02 thru §3767, and by virtue of his statutory and common law authority to protect the interests of the citizens of the State of Ohio.
4. Because XLR12 is a Schedule 1 Controlled Substance, the sale of this controlled substance at Bridgeport and Martins Ferry constitutes trafficking in drugs in violation of RC §2925.03(A)(1).
5. RC §3719.10 provides that premises on which felony violations of Chapter 2925 occur are public nuisances subject to abatement.
6. By controlling the distribution of a drug of abuse, the Frymans, Fred's, Bridgeport and Martins Ferry, violated a state law and may be personally enjoined pursuant to RC §4729.34.

7. The sale of a controlled substance by the Frymans and Fred's, on the premises of Bridgeport and Martins Ferry unreasonably interferes with the public right to health, safety, peace, and comfort, and thereby creates a public nuisance subject to abatement.
8. RC §3719.10 states that "[p]remises or real estate . . . on which a felony violation of Chapter 2925 or 3719, of the Revised Code occurs constitute a nuisance subject to abatement pursuant to Chapter 3767, of the Revised Code." This section does not require a felony conviction, but simply a felony violation, which can be proven by clear and convincing evidence.
9. Evidence produced at the hearing revealed that the Frymans sold certain products labeled as "incense" or "potpourri" that was found to contain XLR11, at their Fred's locations in Bridgeport and Martins Ferry. XLR11 became illegal on December 20, 2012. Under RC §3719.41(C)(41), XLR11 is a controlled substance listed in Schedule 1.
10. Based on the evidence produced at the hearing, the products sold at Fred's in Bridgeport and Martins Ferry were, in fact, illegal.
11. A mistake of fact can, in appropriate circumstances, negate the "knowingly" element of a specific intent crime. However, a close examination of RC §2925.03(A)(1) and pertinent Ohio law reveals that the "knowingly" element only modifies "sell or offer to sell" not the words, "a controlled substance."
12. This Court has already held in **Michael DeWine, Ohio Attorney General v. Shadyside Party Center, et al.**, Belmont County, Ohio, Case No.

13CV112 (2013) and again concludes that the culpable-mental state of "knowingly" when applied to the sale of drugs, is an adverb which modifies the verb, "offer" and pertinent Ohio law, therefore, reveals that the "knowingly" element modifies the words "sell or offer to sell", but not the words, "a controlled substance."

13. Consequently, since the Frymans are not claiming a mistake of fact as to whether the products were sold or offered for sale, a mistake of fact defense is not applicable to this case.
14. Moreover, "a person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. *A person has knowledge of circumstances when he is aware that such circumstances probably exist.*" RC §2901.22 (emphasis added). As pointed out above, knowledge that the products were illegal is not an element of the proof in this case; however, based on the evidence presented it is nevertheless clear that the Frymans were in fact aware that the products they were selling were illegal.
15. XLR11 became illegal December 20, 2012. Defendants continued to sell the same. Increased sales volume occurred. Complaints were received. Requests for the items were made by asking for "fake weed." A package of the "fake weed" incense/potpourri was sold for \$22.00 per package but an incense stick sold for 25 cents. The Chief Law Enforcement Officer of the County advised Defendants in writing on March 6, 2013 that Defendants could

not rely upon the labels of these products because they did in fact contain illegal substances and asked that the products "be immediately removed from [their] shelves." Defendants continued to sell said products even after said written notice by the Prosecuting Attorney. Defendants, interestingly enough, however, despite claiming a lack of knowledge, chose (along with the unknown distributor) not to sell the same to minors (despite knowing that they contained no tobacco). Defendant incredibly explained he wanted to make sure they [minors] had enough money to buy the product, meaning Walmart apparently, according to Defendant, cannot sell an expensive bicycle to a seventeen year old. Defendants' explanation was quite telling.

16. Under RC §4729.35, a violation by a person controlling the "distribution of a drug of abuse . . . constitute(s) a public nuisance." A drug of abuse is defined as "any controlled substance as defined in §3719.01 of the Revised Code, preparation, or substance included in Schedule I, II, III, IV, or V" XLR11 is Schedule 1 Controlled Substance. RC §3719.41(C) (41).

17. Defendants sold XLR11 on the premises of Fred's in Bridgeport and Martins Ferry, in violation of state law RC §2925.03(A)(1). This violation constitutes a public nuisance on the premises pursuant to RC §4929.35. Injunctive relief is proper.

ORDER

- 18. In accord with the Court's findings, it is hereby Ordered that said Defendants, Fred's Party Center, Inc., d/b/a Martins Ferry Party Center and Bridgeport Party Center; Frederick P. Fryman, Individually and as Owner of Fred's Party Centers, Inc.; Frederick & Joyce Fryman, as property owners of Martins Ferry Party Center, and Frederick Fryman as property owner of Bridgeport Party Center, are permanently enjoined from selling any potpourri or incense and maintaining a nuisance (sale of controlled substance, disguised as "incense" and "potpourri" or otherwise) at any location in the State of Ohio.**
- 19. It is further Ordered, in accord with RC §3767.06, that all personal property and contents used in conducting or maintaining the nuisance (all personal property and contents confiscated by law enforcement authorities) shall be forfeited and disposed of in accord with law and that the Fred's Party Center, Inc. d/b/a Martins Ferry Party Center and Bridgeport Party Center, the places wherein the public nuisance has been found to exist, shall be closed for any purpose and remain closed for a period of one (1) year, beginning October 1, 2013 thru September 30, 2014, unless sooner released, pursuant to RC §3767.06.**

This is a final appealable Order.

Frank A. Fregiato
FRANK A. FREGIATO - JUDGE

ENDED

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ALL THE PARTIES OR
THEIR ATTORNEYS *WR3*