

NO. 07-1852

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 88823

STATE OF OHIO
Plaintiff-Appellee

-vs-

HOWARD CLAY
Defendant-Appellant

MEMORANDUM IN RESPONSE TO JURISDICTION

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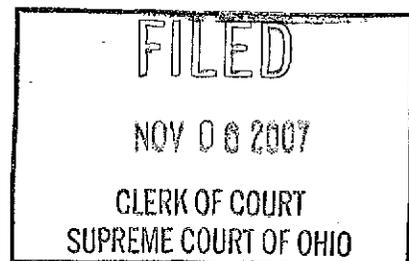


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**Why This Felony Case is Not a Case of Great Public or Great
General Interest and Does Not Involve a Substantial
Constitutional Question**

This Court has already determined that two similar cases did not raise substantial constitutional questions nor are these cases of great public or general interest. Although somewhat factually distinct, this Court rejected jurisdiction of a similar proposition of law.¹ In *Toddy*, the defendant advanced the following proposition:

“When an indictment places a person in the membership of a restricted class of persons subject to disability, due process requires that the state notify the person of their status and the attendant disability.”²

This Court did not accept jurisdiction.³

Jurisdiction was also declined when the State advanced a similar proposition.⁴ In *Varney*, the State presented the following proposition:

“R.C 2923.13 does not require proof that the defendant had knowledge of his underlying personal disability, rather, it requires only that the defendant knowingly acquired, had, carried, or used a firearm or dangerous ordinance while such a disability existed. In the context of the statute, the adverb knowingly modifies the verb acquire, have, carry, and views as

¹ *State v. Toddy* (March 30, 2001), Ashtabula App. No. 2000-A-0004, jurisdiction declined by *State v. Toddy*, 92 Ohio St. 3d 1445 (Table).

² *Toddy*, Memorandum in support of jurisdiction, proposition of law I.

³ *State v. Toddy*, 92 Ohio St. 3d 1445.

⁴ *State v. Varney* (1991), 62 Ohio St. 3d 274.

such conduct specifically prohibited by categories naming their respective class, therefore, it is not necessary for the State to prove Appellant's knowledge of his own disability as an element of the offense."⁵

This Court initially accepted jurisdiction, then dismissed as improvidently granted.

These issues have been presented to this Court. But it has consistently refused to accept jurisdiction. Nothing has changed. The issue presented did not and continues not to raise substantial constitutional questions nor does it involve great public interest. This Court should not accept jurisdiction and dismiss the certified question issued in Supreme Court Case No. 2007-1802.

Statement of the case and facts

After being indicted for a drug offense, Clay shot Christopher Graham in the leg and fired a second shot at the automobile in which Graham was a passenger. For Clay's actions, he was convicted of two counts of felonious assault⁶, gun specifications⁷, and having a weapon under disability⁸.

⁵ *Varney*, Memorandum in support of jurisdiction, proposition of law I.

⁶ R.C. 2903.11.

⁷ R.C. 2941.141, 2941.145.

⁸ R.C. 2923.13.

Clay's drug offense indictment was dismissed with prejudice because the State failed to produce witnesses after jeopardy attached. After stipulating to the drug indictment, Clay argued that because he did not have knowledge of the drug indictment he could not be guilty of having a weapon under disability.

The trial court relied on Eighth District precedent and found Clay guilty.

On appeal, Clay argued that because the State did not prove knowledge of the underlying indictment his conviction was not supported by sufficient evidence. The Eighth District did not agree. Citing its prior ruling, "R.C. 2923.13 only requires that defendant be under indictment, not that defendant have knowledge of the indictment" Clay's conviction was affirmed.⁹

The Eighth District certified a conflict between its decision and *State v. Burks* (June 22, 1990), Sandusky App. No. S-89-13.¹⁰

⁹ *State v. Clay*, Cuyahoga App. No. 88823, 2007-Ohio-4295 at ¶ 20 (citing *State v. Gaines* (June 10, 1993), Cuyahoga App. Nos. 62756 & 62757).

¹⁰ Supreme Court Case Number 2007-1802.

Law and argument

Proposed proposition of law I:

Knowledge of the disabling condition is an essential element of having a weapon while under disability.

In the guise of statutory construction, Clay asks this Court to insert the word knowingly into additional sections of R.C. 2923.13. The first proposition asks this Court to reverse its prior holding that “court[s] should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting the statute.”¹¹

In Clay’s first proposition, he asserts that this Court must insert the word knowingly immediately before the words “under indictment” in sections A(2), A(3) and A(5) of R.C. 2923.13. In order to accept Clay’s position, this Court would have to overrule its prior position that R.C. 2923.13 is clear, unambiguous, and needs no interpretation.

The Second District has held that knowingly only modifies the four verbs that follow.¹² Thus, other districts agree with the Eight District that

¹¹ *State v. Taniguchi*, 74 Ohio St. 3d 154, 156, 1995-Ohio-163.

¹² *State v. Smith* (1987), 39 Ohio App. 3d 24, 25.

knowingly should not be inserted into additional sections of the statute in the guise of statutory interpretation.

Clay relies on a Sixth District opinion that has been certified to be in conflict with the Eighth District’s decision in this case.¹³ But a comparison of these two opinions shows that there is no conflict:

CONFLICT RESOLUTION DIAGRAM	
Holding of <i>State v. Clay</i> , Cuyahoga App. No. 88823	Holding of <i>State v. Burks</i> , Sandusky App. No. S-89-13
“R.C. 2923.13 only requires that defendant be under indictment, not that defendant have knowledge of the indictment.”	“this court finds that, in order to obtain a conviction under R.C. 2923.13 when the disability stems solely from a prior indictment, the state must prove that the defendant had been given notice of his status as a member of a restrictive class under R.C. 2923.13

This Court in *State v. Taniguchi*¹⁴ rejected the holding in *Burks*. These two holdings contemplate different concepts.

This Court can only accept Clay’s proposition of law by inserting words in R.C. 2923.13. This should not be done and his proposition should be rejected.

¹³ *State v. Burks* (June 22, 1990), Sandusky App. No. S-89-13.

¹⁴ (1995), 74 Ohio St. 3d 154.

Proposed proposition of law II:

As a matter of due process, a criminal defendant may not be convicted of having a weapon while under disability unless he has received notice of the disabling condition.

This Court has held that when a mental element is included in a division of a statute but not a subsection section of the same statute there is an attempt by the legislature to impose strict liability within the subsection.¹⁵

In *Maxwell*, this Court had to determine whether R.C. 2907.321(A)(6) required an additional mental element. This Court answered in the negative and held that the absence of a mental element in the additional section of the statute indicated an intent to impose strict liability.

R.C. 2923.13 is similar to R.C. 2907.321(A)(6). R.C. 2923.13 requires that a defendant knowingly have, carry, acquire, or use a firearm or dangerous ordinance. But the conditions that create disabilities do not contain mental elements. This is an attempt by the legislature to impose strict liability.

The concept of strict liability is not foreign to firearms regulations. Firearm offenses, like sex related offenses against minors in *Maxwell*, are a heavily regulated area that commonly imposes strict liability.

¹⁵ *State v. Maxwell*, 95 Ohio St. 3d 254, 2002-Ohio-2121 at ¶ 22 (citing *State v. Wac* (1981), 68 Ohio St. 2d 84).

Clay's second proposition finds no support in the precedent of this Court. This Court should decline jurisdiction and deny the certified conflict.

Conclusion

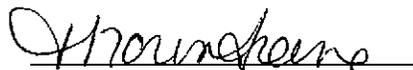
This Court should not accept jurisdiction or accept the certified conflict because:

- This Court has already held that R.C. 2923.13 is clear and unambiguous and words should not be inserted in a guise of statutory construction;
- the legislature intended to make R.C. 2923.13 a strict liability offense and;
- a reading of the holdings in each opinion shows there is no conflict between the Eighth and Sixth District Court of Appeals.

Ohio Supreme Court precedent is on point and in the State's favor. The State respectfully requests this Court to decline jurisdiction and deny the certified conflict.

Respectfully submitted,

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Certificate of service

A copy of the foregoing Memorandum in Response to Jurisdiction of Appellant was mailed by regular U.S. Mail on the 1st day of November 2007, to Cullen Sweeney 310 Lakeside Ave Suite 200 Cleveland Ohio 44113.



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