

NOS. 2007-1802 & 2007-1852

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

MERIT BRIEF OF APPELLEE

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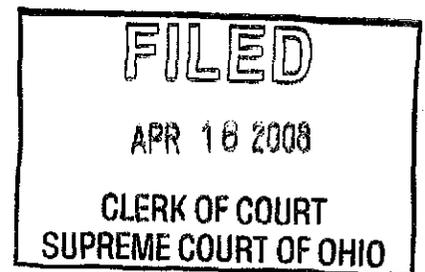


TABLE OF CONTENTS

| | |
|--|----|
| Introduction and Summary of Argument..... | 1 |
| Statement of the case and facts | 2 |
| Law and Argument | 3 |
| Certified Question..... | 3 |
| Whether knowledge of the pending indictment is required for a conviction for having a weapon while under disability pursuant to R.C. 2923.13(A)(3) when the disability is based on a pending indictment? | 3 |
| Appellant’s Proposition of Law I..... | 3 |
| Knowledge of the disabling condition (e.g. a pending indictment for a drug offense) is an essential element of having a weapon under disability. | 3 |
| Answer to Certified Question and Alternative Proposition of Law I | 4 |
| Appellant’s Proposition of Law II | 10 |
| As a matter of due process, a criminal defendant may not be convicted of having a weapon under disability unless he has received notice of the disabling condition... .. | 10 |
| Conclusion | 11 |
| SERVICE..... | 12 |
| Appendix R.C. §2923.13 | |

TABLE OF AUTHORITIES

Cases

Erie R. Co. v. Peck (Dec. 16, 1953), 160 Ohio St. 322, 325-326, 116 N.E. 2d 304, 306. 12
Powell v. State of Tx. (1968), 392 U.S. 514, 535 11
Staples v. U.S. (1994), 511 U.S. 600..... 6, 8
State v. Burks (June 22, 1990), Sandusky App. No. S-89-13 3
State v. Jordan (2000), 89 Ohio St. 3d 488, 493 5, 6
State v. Maxwell 94 Ohio St.3d 254, 2002-Ohio-2121 5, 6, 7, 12
State v. Saxon 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824..... 9, 10
State v. Schlosser (1997), 79 Ohio St. 3d 329, 1998-Ohio-716..... 10, 11
State v. Webb 113 Ohio St.3d 254, 864 N.E.2d 629, 2007-Ohio-1789 9, 10
State v. Webb Cuyahoga App. No. 85318, 2005-Ohio-3839.....9

Statutes

R.C. §2901.21(B) 5
R.C. §2901.22 (A)-(D)..... 5
R.C. §2923.13 4, 5, 6, 8, 12
R.C. §2923.13 (A)(3)..... 4

Other Authorities

Stephen King, *On Writing: A Memoir of the Craft* 125 (Simon & Schuster 2000)..... 11

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Introduction and Summary of Argument

This Court must resolve a conflict:

Whether knowledge of the pending indictment is required for a conviction for having a weapon while under disability pursuant to R.C. 2923.13(A)(3) when the disability is based on a pending indictment?

Consistent with statutory construction, recent precedent, and R.C. 2923.13's history, subdivision (A)(3) imposes strict liability. By omitting an element of intent in subdivision (A)(3) for persons that possess a weapon while an indictment is pending, the legislature

indicated a purpose to impose strict liability. The certified question should be answered in the negative.

Clay has also advanced two propositions:

Appellant's proposition of law I

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

Appellant's 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.

Strict liability is the element of intent in subdivision (A)(3). These propositions will not advance or clarify this Court's jurisprudence and should be dismissed.

Statement of the case and facts

On August 4, 2005, Clay was indicted for drug possession and trafficking in CR-05-468990. While that case was pending, Clay shot Christopher Graham. For that crime, Clay was indicted for felonious assault and having a weapon under disability. The disability was Clay's pending drug possession and trafficking indictment in CR-05-468990.

The two indictments were joined for trial. At trial, Clay stipulated that he was under indictment for drug trafficking and

possession. He argued that he did not have knowledge of the drug trafficking and possession indictment and could not be convicted of having a weapon under disability.

The trial court disagreed. Clay was convicted of felonious assault and having a weapon under disability. The drug trafficking and possession case was then dismissed with prejudice.

The Eighth District affirmed Clay's conviction and certified that its decision imposing strict liability in subdivision (A)(3) was in conflict with a Sixth District opinion, *State v. Burks*.¹ This Court accepted the certified question. Clay also filed a notice of appeal and advanced two propositions of law, which were accepted for review.

Law and Argument

Certified Question

Whether knowledge of the pending indictment is required for a conviction for having a weapon while under disability pursuant to R.C. 2923.13(A)(3) when the disability is based on a pending indictment?

Appellant's Proposition of Law I

Knowledge of the disabling condition (e.g. a pending indictment for a drug offense) is an essential element of having a weapon under disability.

¹ (June 22, 1990), Sandusky App. No. S-89-13.

Answer to Certified Question and Alternative Proposition of Law I

The single adverb, “knowingly,” in division (A) of R.C. §2923.13 does not apply to subdivision (3). The *exclusion* of an element of intent in subdivision (3) indicates a purpose by the legislature to impose strict liability.

Analysis

Clay argues that R.C. §2923.13 requires the State to prove actual knowledge of the pending indictment. He also argues that if the statute is ambiguous this Court must construe it in his favor. But this Court’s pronouncement and application of its statutory construction rules, mandates a finding of strict liability on the disabling condition in R.C. §2923.13 (A)(3). Thus, actual knowledge of the pending indictment is not an essential element.

- 1. Clay argues that knowingly in division (A) modifies subdivision (3) in R.C. 2923.13. But exclusion of an intent element in subdivision (3) is evidence that the legislature intends to impose strict liability.**

In Ohio, the four culpable mental states are purposely, knowingly, recklessly, and negligently.² Some criminal conduct requires no culpable mental state. Absence of criminal intent is known as strict liability.³

“It is undisputed that the General Assembly can ‘enact legislation with the purpose to impose strict criminal liability.’ In addition, there is no question that the General Assembly can specify the mental element required for each element of an offense.” *State v. Maxwell*.⁴

In *Maxwell*, this Court had to determine the intent of R.C. 2907.321. The statute analyzed in *Maxwell* and R.C. §2923.13 are structurally identical. Both statutes have a division that contains an element of intent, knowingly, within a discrete clause. Both statutes have multiple subdivisions that contain no element of intent.

This Court held that the inclusion of an intent element in the division but not in the subdivision plainly indicates a purpose to

² R.C. §2901.22 (A)-(D).

³ R.C. §2901.21(B).

⁴ 95 Ohio St. 3d 254, 2002-Ohio-2121 at ¶ 9 (citing *State v. Jordan* (2000), 89 Ohio St. 3d 488, 493).

impose strict liability in the subdivision.⁵ Therefore, by excluding a culpable mental state in the subdivision (A)(3) of R.C. §2923.13, the legislature plainly indicated a purpose to impose strict liability in the subdivision.

Clay argues that *Staples v. U.S.*⁶ “is particularly instructive and applicable to the instant case.”⁷ But this Court limits *Staples* in interpreting Ohio’s statutes for two reasons.

First, *Staples* announced how the United States Supreme Court interprets federal statutes. The decision has limited application to this Court’s interpretation of Ohio’s statutes.⁸ Second, the statute interpreted in *Staples* had no intent element while R.C. §2923.13 contains an intent element.⁹ For these reasons, this Court should continue to limit the application of *Staples* when interpreting Ohio’s statutes.

In addition, the below side-by-side comparison helps illustrate the identical structure of the statute in *Maxwell* and R.C. §2923.13.

⁵ *Id.* at ¶ 29.

⁶ (1994), 511 U.S. 600.

⁷ Clay’s Merit Brief at 7.

⁸ *State v. Jordan* (2000), 89 Ohio St. 3d 488, 491.

⁹ *Id.*

| R.C. 2923.13 | R.C. 2907.321 (Maxwell) |
|--|---|
| (A) ***, no person shall <i>knowingly</i> acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: | (A) No person, with <i>knowledge</i> of the character of the material or performance involved, shall do any of the following: |
| (1) The person is a fugitive from justice. | (1) Create, reproduce, or publish any obscene material that has a minor as one of its participants or portrayed observers; |
| (2) The person is under indictment for *** any felony offense of violence ***. | (2) Promote or advertise for sale or dissemination; sell, deliver, disseminate, display, exhibit, present, rent, or provide; or offer or agree to sell, deliver, disseminate, display, exhibit, present, rent, or provide, any obscene material that has a minor as one of its participants or portrayed observers; |
| (3) The person is under indictment for *** any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse ***. | (3) Create, direct, or produce an obscene performance that has a minor as one of its participants; |
| (4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic. | (4) Advertise or promote for presentation, present, or participate in presenting an obscene performance that has a minor as one of its participants; |
| (5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by | (5) Buy, procure, possess, or control any obscene material, that has a minor as one of its participants; |

| | |
|---|--|
| <p>a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation. * * *.</p> | |
| | <p>(6) Bring or cause to be brought into this state any obscene material that has a minor as one of its participants or portrayed observers.</p> |

Because these statutes are identically structured, this Court should continue to limit the application of *Staples* and follow its recent precedent and answer the certified question in the negative.

2. **The history of this statute has never included an element of intent within any subdivision. This is evidence of the General Assembly's purpose to impose strict liability on the disabling conditions.**

R.C. §2923.13 became effective January 1, 1974.¹⁰ It was twice amended.¹¹ When amending the statute, the legislature chose not to insert additional elements of intent. This is within the legislature's province. The legislature intends the disabling conditions to contain no element of intent.

¹⁰ 1972 H 511.

¹¹ 1995 S 2 & 2004 H 12.

Clay's interpretation is an attempt to insert or read another culpable mental state into the statute's subdivision where one does not and has never resided. The legislature chose not to insert additional elements of intent in the statute's subdivisions; knowledge of the indictment is not required.

3. Assuming this Court holds that the State failed to prove an essential element of R.C. 2923.13, Clay is not entitled to a new sentencing.

Clay argues that, if he prevails, he is entitled to a new sentencing. Specifically, he argues that *State v. Saxon*¹² does not apply when a conviction is vacated. But this Court recently rejected this argument in *State v. Webb*.¹³

In *Webb*, the defendant was convicted of various offenses. On appeal, certain convictions were vacated. The Eighth District ordered a complete resentencing.¹⁴ The State appealed and this Court accepted the case for review.

¹² 109 Ohio St. 3d 176, 2006-Ohio-1245, 846 N.E. 2d 824.

¹³ 113 Ohio St. 3d 254, 864 N.E. 2d 629, 2007 -Ohio- 1789.

¹⁴ Cuyahoga App. No. 85318, 2005-Ohio-3839.

Based on the authority of *Saxon* and *Evans*, this Court reversed--Webb was not entitled to a sentencing.¹⁵ If Clay prevails, *Saxon*, *Evans*, and *Webb* control his remedy. He is not entitled to a resentencing.

Appellant's Proposition of Law II

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

Clay argues that due process prohibits a strict liability interpretation of this statute. Clay's argument is wrong for three reasons. First, the statute contains an intent element. Second, this Court has affirmed offenses that have no intent element.¹⁶ Third, the State has a legitimate interest in prohibiting unfit individuals from possessing a firearm or dangerous ordnance.

R.C. 2923.13 is not devoid of an intent element. The State is required to prove that a defendant knowingly possessed, had, carried, or used a firearm or dangerous ordnance. The statute has an intent element and is not wholly a strict liability offense.

¹⁵ *Webb*, 113 Ohio St. 3d 254, 2007-Ohio-1789.

¹⁶ *State v. Schlosser* (1997), 79 Ohio St. 3d 329, 1998-Ohio-716.

Additionally, the United States Supreme Court “has never articulated a general constitutional doctrine of mens rea.”¹⁷ And the elimination of criminal intent “does not violate due process.”¹⁸

The State has a compelling interest in protecting its citizens from violence associated with possession of firearms and dangerous ordnances by unfit persons. The General Assembly accomplishes this goal by making the possession of these items while certain indictments are pending a criminal offense.

The General Assembly’s decision to impose strict liability under subdivision (3) of this statute does not violate due process.

Conclusion

This Court’s recent precedent makes statutory construction simple and avoids adding words in a statute. Clay wants this court to add an adverb in subdivision (A)(3). But “the road to hell is paved with adverbs * * *.”¹⁹ And “adjectives and adverbs seem to be the chief trouble makers in problems of statutory construction for the obvious reason that they may mean one thing to one mind and

¹⁷ *Powell v. State of Tx.* (1968), 392 U.S. 514, 535.

¹⁸ *Schlosser*, 79 Ohio St. 3d at 333, 1998-Ohio-716.

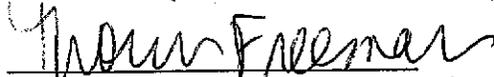
¹⁹ Stephen King, *On Writing: A Memoir of the Craft* 125 (Simon & Schuster 2000).

something different to another.”²⁰ Clay’s attempt to insert an additional adverb in this statute will confuse recent precedent and should be rejected.

Maxwell is directly on point and should be applied to interpret R.C. §2923.13. The certified question should be answered in the negative and the propositions dismissed.

Respectfully submitted,

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A copy of the foregoing Merit Brief of Appellee has been mailed this 15th day of April, 2008, to CULLEN SWEENEY, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113.


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²⁰ *Erie R. Co. v. Peck* (Dec. 16, 1953), 160 Ohio St. 322, 325-326, 116 N.E. 2d 304, 306.

2923.13 Having weapons while under disability

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

- (1) Such person is a fugitive from justice;
- (2) Such person is under indictment for or has been convicted of any felony of violence, or has been adjudged a juvenile delinquent for commission of any such felony;
- (3) Such person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse, or has been adjudged a juvenile delinquent for commission of any such offense;
- (4) Such person is drug dependent or in danger of drug dependence, or is a chronic alcoholic;
- (5) Such person is under adjudication of mental incompetence.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the fourth degree.

HISTORY: 1972 H 511, eff. 1-1-74

2923.13 Having weapons while under disability

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

- (1) The person is a fugitive from justice.
- (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.
- (3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.
- (4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.
- (5) The person is under adjudication of mental incompetence.

(B) No person who has been convicted of a felony of the first or second degree shall violate division (A) of this section within five years of the date of the person's release from imprisonment or from post-release control that is imposed for the commission of a felony of the first or second degree.

(C) Whoever violates this section is guilty of having weapons while under disability. A violation of division (A) of this section is a felony of the fifth degree. A violation of division (B) of this section is a felony of the third degree.

HISTORY: 1995 S. 2, eff. 7-1-96
1972 H 511, eff. 1-1-74