ORIGINAL

NO. 09-1469

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 91701

STATE OF OHIO

Plaintiff-Appellant

-vs-

STEVEN JOHNSON

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellant

WILLIAM D. MASON (0037540)
CUYAHOGA COUNTY PROSECUTOR

THORIN FREEMAN (0079999)
DANIEL VAN (0084614)
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellant
Robert Tobik (0029286)

JOHN MARTIN (0020606)
CULLEN SWEENEY (0077187)
310 Lakeside Avenue, 2nd Floor
Cleveland, Ohio 44113

FILED
AUG 13 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST 1

STATEMENT OF THE RELEVANT FACTS AND CASE 2

LAW AND ARGUMENT 3

Proposition of Law I: 3
When a disability is based on a prior conviction, the State is not required to prove that a defendant is reckless in his knowledge that a prior conviction creates a disability that criminalizes knowing possession of a firearm or dangerous ordnance.

CONCLUSION 7

CERTIFICATE OF SERVICE 8

Appendix
State v. Johnson (July 6, 2009), Cuyahoga App. No. 91701,

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

This is a matter of first impression. To prove a person possessed a weapon under a disability, the Eighth District requires the State prove that the defendant is reckless in knowing that a *prior conviction* is a disabling condition. The Eighth District is the first Court to insert a judicially interpreted mental element and have the State prove that a defendant is reckless in knowing that a prior conviction prevents possessing a firearm or dangerous ordnance.

After this Court's decision in *State v. Colon*, one of the most popular assignments of errors is a defective indictment for failure to allege a judicially inserted mental element.[1] Since *Colon*, this Court has accepted at least 4 cases to address *Colon* type issues.[2] This case presents an opportunity to determine whether recklessness is a judicially interpreted mental element for an individual's knowledge about a prior conviction that

---

[1] On Westlaw, the citing references for *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, show 395 documents. Colon has been Ohio law for approximately 1 and ½ years. This is approximately 26 documents every month that cite Colon.

[2] *State v. Dunlap*, 122 Ohiost.3d 1409, 2009-Ohio-2751. *State v. Rohrbaugh*, 112 Ohio St.3d 1449, 2009-Ohio-1820, *State v. Lester*, *State v. Owens*, 121 Ohio St.3d 83, 2009-Ohio-505.

prevents possessing a firearm or dangerous ordnance. Stated differently, is ignorance of the law now an excuse for criminal conduct?

Resolution is necessary because this is a common criminal offense in Cuyahoga County. In Cuyahoga County, *Johnson* had an immediate impact in approximately 436 pending cases. And this number does not include cases pending appeal.

The State's proposed proposition is what the State believes is the intent of the legislature in enforcing violations of having a weapon under a disability. Ultimately, the State is less concerned with acceptance of its exact proposition and more interested in knowing how to properly prosecute individuals that possess a firearm or dangerous ordnance under a disability and when a judicially interpreted mental element should be added to a statute.

Without this Court's guidance, the State is unable to properly prosecute these crimes or know when to apply a judicially interpreted metal element to criminal conduct. Jurisdiction should be exercised.

STATEMENT OF THE RELEVANT FACTS AND CASE

Johnson and two other men were partying with a few women and Johnson brought a gun into an apartment. A fight broke out and Johnson went to his bag and retrieved his gun.

The police arrived shortly thereafter, saw the women striking Johnson, and saw Johnson kneeling on the floor holding a firearm.

Johnson may not possess a firearm because he has two prior convictions for drug related offenses. Johnson stipulated that he had prior convictions for drug related offenses. The jury confirmed Johnson's guilt. He served one year in prison.

The Eighth District reversed because the indictment did not allege and the State did not prove that Johnson was reckless in knowing that he had prior convictions and that his prior convictions were disabling offenses.

LAW AND ARGUMENT

Proposition of Law I:

When a disability is based on a prior conviction, the State is not required to prove that a defendant is reckless in his knowledge that a prior conviction creates a disability that criminalizes knowing possession of a firearm or dangerous ordnance.

I. Question presented

When the legislature passed R.C. 2923.13(A)(3), no mental element was written into the subsection. By imposing a judicially interpreted mental element, it allows a defendant to argue ignorance of the law as a defense to this charge. Did the legislature intend to establish that

defendants could argue ignorance of the law by omitting a mental element in R.C. 2923.13(A)(3)?

II. R.C. 2923.13(A)(3) and the *Johnson* decision.

A person may not possess a firearm or dangerous ordnance if he has a prior conviction for a drug related offense.[3] The question presented Johnson is whether there is a judicially interpreted mental element when the disability is based on a *prior conviction.*

The Eighth District concluded that there is a judicially interpreted mental element when the disability is based on a prior conviction. Because the State failed to allege this judicially interpreted mental element the indictment was defective. The State failed to argue the additional mental element to the jury and the jury did not consider the additional mental element during deliberations. Despite Johnson's stipulation to the prior convictions, the Eighth District viewed the trial as structurally flawed.

This decision now allows a defendant to argue ignorance of the law. A defendant is now permitted to defendant against this charge by arguing that he was unaware that his prior conviction disabled him from possessing a firearm or dangerous ordnance.

---

[3] R.C. 2923.13(A)(2).

Neither the statute nor its history indicates a legislative intent to allow a defendant to argue ignorance of the law. Without an affirmative act from the legislature indicating that it intends to allow a defendant to plea ignorance of the law, a judicially interpreted mental element should not be added to a statute to allow a defendant to argue ignorance of the law.

This Court should accept this case to determine whether the Legislature intended to allow a defendant to plead ignorance of the law when a person possesses a firearm or dangerous ordnance *and has a prior disabling conviction.*

III. Does *State v. Clay* address the question presented in this request for an appeal?

The Eighth District's opinion implies that this Court's decision in *State v. Clay* controls their decision. *Clay* may be instructive but it is not controlling.

In *State v. Clay* this Court decided:

> "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.*"[4]

---

[4] *State v. Clay,* 120 Ohio St.3d 528, 2008-Ohio-6325, at ¶ 1. (emphasis added).

This Court answered the question in the negative and held that "R.C. 2923.13(A)(3) has no culpable mental state, nor does it contain any language that plainly indicates an intent to impose strict liability."[5] This Court then decided that recklessness applied when the disability is based on a "pending indictment."[6] This Court did not address whether a defendant must be reckless in his knowledge that a pending indictment or a prior conviction is in fact a disabling condition.

One reason that this Court found that reckless applied in *Clay* was that there was no indication outside the statute that the legislature intend to impose strict liability. This case is different because there is an indication outside the statute that the legislature intended to impose strict liability when a disabling condition is based on a *prior conviction*. There is no evidence the General Assembly has attempted to alter the axiom that ignorance of the law is not an excuse. But the Eighth District's opinion implies that a defendant is not criminally liable if he did not know that his prior conviction prevented possession of a firearm or dangerous ordnance. Ohio Courts should not insert a judicially interpreted metal element into a statute and assume the Legislature intended to allow ignorance of the law

---

[5] *Id.* at ¶ 28.

[6] *Id.*

to become an excuse for criminal conduct. This Court should invoke its jurisdiction and answer the question presented in this appeal.

CONCLUSION

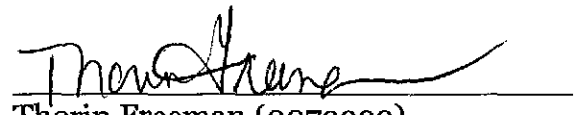
Jurisdiction should issue for two main reasons:

- whenever a court inserts an additional metal element in a statute this Court should accept that case to determine whether the State is being held to the requirements established by the Legislature and;

- resolution in this case will provide the State guidance so that it can better determine when to allege a judicially interpreted mental element so that resources are not wasted on trials that will be automatically reversed.

By consistently accepting these cases to determine when there is a judicially interpreted mental element, this Court acknowledges that these type cases are necessary to review. This case should be accepted to address the proposition and provide guidance when to apply a judicially interpreted mental element.

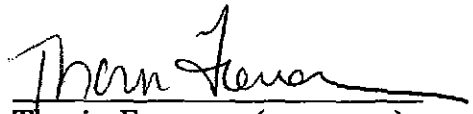
Respectfully submitted,
WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney



Thorin Freeman (0079999)
Daniel Van (0084614)
Assistant Prosecuting Attorneys
1200 Ontario St., Eighth Floor
Cleveland, Ohio 44113
(216) 443-7822
(216) 443-7806 *fax*
tfreeman@cuyahogacounty.us *email*

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 19 day of August 2009 to John Martin and Cullen Sweeney at 310 Lakeside Ave. Suite 200 Cleveland Ohio 44113.



Thorin Freeman (0079999)
Assistant Prosecuting Attorney

JUL 6 - 2009

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91701

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

STEVEN JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509170

BEFORE: Rocco, J., Gallagher, P.J., and Blackmon, J.

RELEASED: June 25, 2009

JOURNALIZED: JUL 6 - 2009

CA08091701 58371099

VOL 0685 PG 0345 1

ATTORNEYS FOR APPELLANT

Robert Tobik
Chief Public Defender

BY: John T. Martin
Cullen Sweeney
Assistant Public Defenders
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin Freeman
Daniel T. Van
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP. R. 22(E)

JUL 6 - 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

CA08091701 58188429

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JUN 25 2009

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

Defendant-appellant Steven Johnson appeals from his conviction after a jury found him guilty of having a weapon while under disability ("HWD").

Johnson presents four assignments of error. He takes issue with certain instructions the trial court provided to the jury, the admission of certain statements into evidence, and, in his fourth assignment of error, the wording of the indictment against him.

Upon a review of the record, this court finds that Johnson's fourth assignment of error falls under the supreme court's decision in *State v. Clay*, Slip Opinion No. 2008-Ohio-6325; 900 N.E.2d 1000. Due to the lack of the element of mens rea in the indictment for HWD, the entire proceeding against Johnson was structurally flawed. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624; *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749.

Johnson's fourth assignment of error is dispositive of his appeal. Since it must be sustained, Johnson's remaining assignments of error are rendered moot pursuant to App.R. 12(A)(1)(c), his conviction is reversed, and this case is remanded for further proceedings consistent with this opinion.

Johnson's indictment resulted from an incident that occurred in the early morning of April 3, 2008. Cleveland police officers Elbert Egglemeyer and Patrick Petranek received a broadcast indicating a man was "threatening with

685 0347 3

a gun"[1] at an address on Cedar Avenue.

Upon the officers' arrival at the address, they heard a woman screaming. The officers ran up the stairs to the apartment with their service revolvers drawn, pushed open the partially-ajar door, and entered a room to see Johnson crouching in a defensive position on the floor with a gun in his right hand. Johnson appeared "dazed" and bloody; one woman "was basically on top of him" and two others were directly behind him. A "metal pipe" lay on the floor near Johnson.

Petranek pushed Johnson completely to the floor and stepped on the gun before securing him. The officers summoned an ambulance for Johnson. They then interviewed each of the women.

According to Natasha Fentress's testimony, Johnson accused one of the three women, viz., Nicole Arnold, of "playing" him. Both he and Arnold became angry and began physically striking each other. The two other women attempted to break up the fight, and when Arnold obtained a knife from the kitchen, Johnson "pulled the gun on her." Lorrie Lockhart, the apartment's leaseholder, then hit Johnson in the head with a metal bat.

Johnson subsequently provided a written statement to the detective who

---

[1]Quotes indicate testimony presented at Johnson's trial.

had been assigned to the case. Johnson claimed that Arnold was giving oral sex to him in the apartment when he "felt her going through [his] pockets." He accused her of taking some of his money.

According to Johnson, during the argument that ensued, Lockhart "came in the room with a gun." Johnson stated that he wrested the gun away from her, and "was hit on the back of the head"; the gun fell to the floor and remained there when the police arrived.

Approximately a week after the incident, the Cuyahoga County Grand Jury returned an indictment against Johnson. Count one charged him with a violation of R.C. 2923.13(A)(3), HWD.[2]

In pertinent part, the indictment charged that Johnson "knowingly acquired, had, carried, or used a firearm *** having been convicted of an offense involving the illegal possession *** [of] any drug of abuse, to-wit: the said Steven Johnson, with counsel, on or about the 10th day of August 1994, *** having been convicted of the crime of Drug Possession, in violation of [R.C.] 2925.11 *** and/or on or about the 4th day of September 2003, *** having been convicted of the crime of Possession of Counterfeit Controlled Substance, in violation of [R.C.] 2925.37 ***." The charge additionally contained a forfeiture specification.

---

[2]The trial court granted Johnson's motion for acquittal on count two, receiving stolen property, after the state presented its case-in-chief.

Johnson's case proceeded to a jury trial. In instructing the jury, the court stated in pertinent part as follows:

"So before you can find the defendant guilty of having a weapon while under disability *** you must find beyond a reasonable doubt *** the defendant knowingly acquired, had, carried, or used a firearm *** having been convicted of an offense involving the illegal possession *** of any drug of abuse. That is, and this is a disability claimed by the State, that [defendant] with counsel on or about the 9th day of August 1994, *** ha[d] been convicted of the crime of drug possession, in violation of 2925.11 ***, and/or that on September 4th, 2003, ***ha[d] been convicted of the crime of possession of counterfeit controlled substance in violation of 2925.37 ***."

The trial court defined the element of "knowingly." As to the statutory word "disability," the trial court instructed the jury that it meant "a person who has previously been convicted of an offense involving the illegal possession, use, sale, distribution or trafficking in any drug of abuse." The court further instructed the jury that "there has been a stipulation" that Johnson had been convicted of the two offenses listed in count one of the indictment.

The jury found Johnson guilty of the offense. After the trial court imposed a prison term of one year for his conviction, Johnson filed a timely appeal.

Although he presents four assignments of error, only his fourth will be

addressed, since it is dispositive of this appeal, and the disposition renders his others moot.

Johnson's fourth assignment of error states:

"IV. The trial was structurally flawed because the indictment failed to allege, and the jury failed to consider, whether the defendant was aware that he had been convicted of a crime that prevented him from possessing a firearm."

Johnson argues in this assignment of error that an essential element was missing from the indictment, and the jury was not informed of the missing element. He contends the indictment was therefore defective, and that, pursuant to the supreme court's decisions in the *Colon* cases and *Clay*, the defect constituted structural error that permeated the entire proceeding.

In deciding this issue, the supreme court stated in *Clay* in relevant part as follows:

"Clay was convicted of having a weapon while under a disability. Therefore, we first examine R.C. 2923.13, which provides:

'(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, <u>if any of the following apply</u>:

" * * *

'(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 ***.

"*** In examining the structure of R.C. 2923.13, we find that the General Assembly intended the word 'knowingly' within R.C. 2923.13(A) to modify only the phrase 'acquire, have, carry or use any firearm or dangerous ordnance.' *** See generally *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, P 29, 767 N.E.2d 242 (in examining a statute structured similarly to the one herein, the court determined that 'knowledge is a requirement only for the discrete clause within which it resides').

"*** The General Assembly knows how to define a strict liability offense when it so desires, as evidenced in *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770. ***

"We stated that 'R.C. 2925.01(BB) makes it abundantly clear that the offender's mental state is irrelevant in determining whether an offender has committed an offense 'in the vicinity of a juvenile,' and therefore it imposes strict liability. Id. at P 36. In the instant case, we find no similar language in R.C. 2913.13(A)(3), or elsewhere in the Revised Code, that the General Assembly plainly intended to impose strict liability for this offense. Thus, we find that R.C. 2923.13(A)(3) has no culpable mental state, nor does it contain any

language that plainly indicates an intent to impose strict liability. ***

"Where a statute lacks a mental state and the General Assembly did not intend strict liability, the mental state of recklessness applies under R.C. 2901.21(B). Accordingly, for purposes of proving the offense of having a weapon while under a disability pursuant to R.C. 2923.13(A)(3), the mental state of recklessness applies in determining whether the defendant is aware that he or she is 'under indictment.'

"Because the trial court never determined whether Clay acted recklessly with regard to being aware that he was 'under indictment,' we remand the cause to the trial court to determine that issue. Accordingly, we reverse the judgment of the court of appeals and remand the cause to the trial court."

(Emphasis added.)

In *Clay*, the supreme court focused on the disability of being "under indictment" as contained in the initial portion of R.C. 2923.13(A)(3). In this case, Johnson was accused of having a weapon while under the second type of disability, viz., that he had been "convicted of" an offense that prohibited him from having a weapon. The applicability of *Clay*, however, is the same.

The record of this case demonstrates that, throughout, the offense was treated as a strict liability offense. Thus, the jury was never instructed that it must determine whether Johnson "acted recklessly with regard to being aware"

that he had been convicted of an offense that prohibited him from having a weapon. Rather, the trial court merely repeated the indictment as it was worded. Under these circumstances, the error in the indictment permeated the entire proceeding. *State v. Summers*, Cuyahoga App. No. 91676, 2009-Ohio-1883.

The state argues that since the court in *Clay* considered only the phrase "under indictment," the opinion should be limited to apply only to that phrase, and, thus, this case is distinguishable. However, the supreme court used broad language in determining that R.C. 2923.13(A)(3) lacks a culpable mental state and is not a strict liability offense.

As does the legislature, the Ohio Supreme Court "knows how to define" a determination when it so desires. The court nevertheless held the culpable mental state of "recklessness" applies to R.C. 2923.13(A)(3). Until the supreme court determines otherwise, the language the supreme court used applies equally to the other type of "disability" set forth in that section, and this court is constrained to follow the decision in *Clay*.

Consequently, Johnson's fourth assignment of error is sustained.

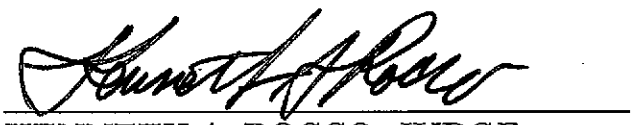
Johnson's conviction is reversed. This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

VOL 685 PG 0355 //