

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 09-1469

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
	:	Cuyahoga County Court
	:	of Appeals, Eighth
STEVEN JOHNSON	:	Appellate District Court
	:	of Appeals
Appellee	:	CA: 91701

MEMORANDUM OF APPELLEE IN OPPOSITION TO JURISDICTION

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In Opposition to Proposition of Law I (as formulated by Appellant State of Ohio):

**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
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**EXPLANATION OF WHY THIS CASE DOES NOT RAISE
SUBSTANTIAL CONSTITUTIONAL QUESTIONS NOR IS A MATTER
OF EITHER GREAT GENERAL OR GREAT PUBLIC INTEREST**

In the instant case, the State of Ohio seeks to revisit a decision of this Court – *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325 – that was decided by a clear majority of the Court. Nothing about this case should cause this Court to modify a decision that is so recent and which reflected a consensus of almost the entire Court.

Clay stands for the unremarkable proposition that, because having a weapon under disability (HWD) is not a strict liability offense, one must be “reckless” with respect to the element of the disability specified in R.C. 2923.13(A)(3), which includes being under indictment or being previously convicted of certain drug offenses. In other words, it is not enough to knowingly possess a firearm; one must also be recklessly aware of their disabled condition under R.C. 2923.13(A)(3).

While *Clay* reached its holding in the context of a defendant’s awareness of a pending indictment for drug possession, nothing in the Court’s decision limited the scope of *Clay* to cases where the disability was a pending indictment as opposed to a prior conviction involving a drug of abuse. This is hardly surprising because the General Assembly lumped the disabilities of pending indictment and prior conviction into the same sentence that constitutes R.C. 2923.13(A)(3). Contrary to the State’s suggestion, the Eighth District did not expand *Clay*. Rather the Eighth District simply recognized that it could not limit *Clay* to only one portion of the single-sentence subsection when *Clay* had already examined the entire subsection.

Nor are the State’s dire predictions of uncertainty in the law likely to develop. In the nine months since it was decided, *Clay* has only been mentioned in five appellate cases throughout the

State, including the instant case.¹ And the instant case is the only one of those cases where a conviction was reversed on the basis of *Clay*.

It is hardly surprising that *Clay* would have so little adverse impact. As a practical matter, all *Clay* requires prosecutors to do is to add the word “recklessly” to HWD counts and instruct the jury on this simple concept with respect to HWD counts. Beyond that, the evidence presented at trial is not likely to change appreciably. By now, every county prosecutor should have implemented these changes in their form indictments and proposed jury instructions. The timing of Mr. Clay’s case just happened to be such that the issue was raised while *Clay* was pending in this Court – and thus before lower courts took measures to comply with *Clay*. This Court’s acceptance of this case would not have statewide impact.

The facts of the instant case demonstrate why the court of appeals in the instant case decided the matter correctly. Mr. Johnson’s two “disabilities” were such that a reasonable person would not have known of the disabling condition. The first disability was for *misdemeanor* possession of marijuana. The second was even more innocuous and, Mr. Johnson argued,² was not even a valid disability – misdemeanor possession of a *counterfeit* controlled substance as opposed to an actual drug of abuse.

The State voices concern that the instant case has undercut the legal principle that ignorance of the law is not an excuse. But this is not true in the instant case anymore than it was true in *Clay*. Mr. Johnson is not claiming a defense on the basis of ignorance of the underlying

¹ *Clay* was distinguished by this Court in *State v. Lester*, Slip Opinion 2009-Ohio-4225, and by the Eighth District in *State v. White*, 2009-Ohio-4034. *Clay* was cited by the Eighth District in *State v. Anderson*, 2009-3900 and held not to require reversal of the convictions in that case. *Clay* was also cited by the Tenth District in *State v. Ferguson*, 2008-Ohio-6677 in the context of addressing an ineffective assistance of counsel claim which the court rejected.

² This issue was never resolved in the court of appeals because it became moot in light of the holding in the Opinion Below.

statute, i.e. he is not saying that a person commits no crime because he or she he did not know it was illegal for persons with statutory disabilities to possess weapons. Rather, Mr. Johnson is arguing that, to be convicted, a person must be a least recklessly aware that he or she is one of those persons who has a disability. This distinction has been endorsed at least twice by the United States Supreme Court -- in *Morrisette v. United States* (1952), 342 U.S. 246 and *Liparota v. United States* (1985), 471 U.S. 419. The instant case's holding is in keeping with this clearly established United States Supreme Court precedent.

In the end, the State has petitioned the wrong branch of government if it wants R.C. 2923.13(A)(3) to be a crime of strict liability with respect to prior drug convictions. The problem for the State is that the General Assembly has not seen fit to override *Clay* by amending R.C. 2923.13(a)(3) into a strict liability offense. Unless the General Assembly does so, then *Morrisette* and *Liparotta* stand for the principle that the instant case has been properly decided. This Court should decline the State's invitation to amend legislation by judicial fiat and dismiss the instant case.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a jury trial in which the defendant was found guilty of possession of a weapon while under a disability in violation of R.C. 2923.13(A)(3). The indictment alleged that the defendant knowingly had a firearm while under a disability, to wit: a prior conviction for the possession of drugs and a prior conviction for possession of a controlled substance.

For purposes of this memorandum, Mr. Johnson does not wish to supplement the factual recitation set forth by Appellant.

ARGUMENT

In Opposition to Proposition of Law I (as formulated by Appellant State of Ohio):

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.

In December, 2008, the Ohio Supreme Court held, in *State v. Clay*, that R.C. 2923.13(A)(3)'s disabling conditions are not strict-liability conditions – the defendant must be at least reckless with respect to an awareness of the disabling condition. While, in *Clay*, the disabling condition was a pending indictment, nothing in *Clay* suggests that the other disabling conditions contained in the same subsection should be treated any differently. Accordingly, on the authority of *Clay*, the court of appeals correctly held that the State was required to allege and prove that Mr. Johnson was recklessly aware that he had a disabling condition, in this case a drug conviction.

It should be noted that requiring a mens rea of recklessness regarding a disabling condition is not contrary to the legal maxim that everyone is presumed to know the law. That maxim pertains to the *underlying* criminal law. Thus, Mr. Johnson is still presumed to know that, if he has a disabling condition, then he cannot possess a firearm. But whether he knew that he had been convicted of a disabling offense is an *elemental factual issue* for which the mens rea of recklessness applies. The Court in *Liparotta* explained the distinction in this manner:

Our holding today no more creates a “mistake of law” defense than does a statute making knowing receipt of stolen goods unlawful. . . . In both cases, there is a legal element in the definition of the offense. In the case of receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the “use, transfer, acquisition,” etc. were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a [7

U.S.C.] 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It *is*, however a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a [7 U.S.C.] 2024(b)(1) violation that one did not know that one's possession was unauthorized. See ALI Model Penal Code [Section] 2.02, Comment 11, p. 131 (Tent. Draft No. 4, 1955), *United States v. Freed* [(1971), 401 U.S. 601, 614-15 (Brennan, J. concurring)]. Cf. *Morissette v. United States* [(1952), 342 U.S. 246] (holding that it is a defense to a charge of "knowingly converting" federal property that one did not know that what one was doing was a conversion).

Liparota, 471 U.S. at 425 n.9.

Having established that the mens rea of recklessness was required in this case, the court of appeals then correctly concluded that reversal of the conviction was required because of the failure of the indictment to allege a mens rea and the failure of the trial court to have instructed the jury in this regard. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, clarified by 2008-Ohio-3749. This aspect of the court of appeals' opinion has not been challenged by the State in this appeal and thus will not be addressed further herein.

CONCLUSION

Wherefore, this Court should decline to exercise jurisdiction over this case.

Respectfully submitted,


JOHN T. MARTIN, ESQ.
Assistant Public Defender

SERVICE

A copy of the foregoing Memorandum in Opposition to Jurisdiction was sent via U.S. mail to William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 14th day of September, 2009.

Respectfully Submitted,


JOHN T. MARTIN, ESQ.
Assistant Public Defender