

ORIGINAL

NO. 2009-1825

09-1469

IN THE SUPREME COURT OF OHIO

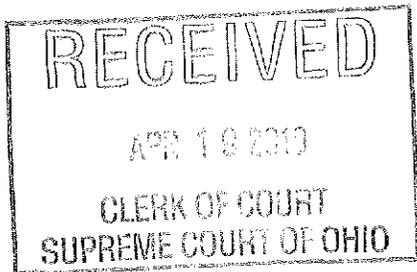
APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 91701

STATE OF OHIO
Plaintiff-Appellant

-vs-

STEVEN JOHNSON
Defendant-Appellee

REPLY BRIEF



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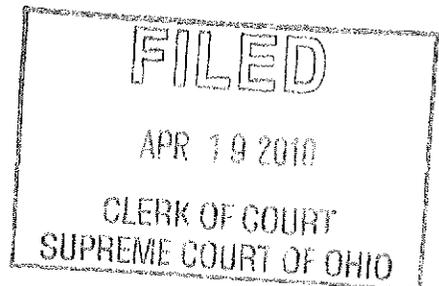


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Summary of Reply

“The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”¹ This case is before this Court because Johnson refused to read and follow a clearly worded statute that criminalized his possession of a firearm because of two prior convictions involving drug abuse offenses.

Johnson first argues that the State is asking to revisit *State v. Clay*. The State does not request that *Clay* be overruled or changed. But Johnson attempts to make *Clay* broader than the text of the opinion. *Clay* only requires the state prove a mental element in relation to an indictment to prove a violation of R.C. 2923.13. Johnson, like the Eighth District’s opinion, expands *Clay* to require the State prove a defendant’s awareness that the indictment or conviction *creates a disability*. That proposition needlessly expands *Clay* to create a mistake of law defense.

Johnson next argues that a strict liability construction denies him due process. Johnson and the amicus do not complain that the statute is unclear to a person of average intelligence. Instead, they argue that an average person would not consider the marijuana conviction to create an

¹ *Morrisette v. U.S.* (1972), 342 U.S. 246, 256.

additional penalty for possession of a hand grenade—a dangerous ordnance.² The statute is not a strict liability statute. The state must prove *knowing* possession and must prove *an awareness* that the item is a dangerous ordnance. It is only the subsection dealing with a prior conviction that should not require an additional mental element. Because there is an intent element, there are no due process concerns.

Johnson also argues that there was structural error in this case. He is incorrect. Johnson stipulated to his prior convictions and the jury was instructed that they must accept these facts as proven. Thus, the only question for the jury was whether Johnson acted in self-defense. This case does not present the concerns raised in *State v. Colon* and Johnson’s conviction withstands review regardless of an additional mental element.

The Eighth District’s extends *Clay* to create a mistake of law defense. The State’s proposition provides sound law.

² Johnson argues that his conviction for trafficking in a controlled counterfeit substance is not a valid disability. This Court holds that “any offense involving * * * any drug of abuse” found in (A)(3) means any “drug abuse offense.” *State v. Moaning* (1996), 76 Ohio St.3d 126, 128. And trafficking in a counterfeit controlled substance is defined as a drug abuse offense. 2925.01(G)(1). Johnson has two valid disabilities. The question only centers on whether there is a mental element in relation to these stipulated convictions.

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.

Johnson's answer concerns four reasons as to why the State's proposition is wrong.

A. What is a Court permitted to review in determining legislative intent of a particular statute?

Johnson first argues that as a matter of statutory interpretation, the State's proposition is inappropriate. Specifically, he argues that 1) a court cannot look beyond the four corners of a section defining an offense to determine if the legislature intends to impose strict liability and 2) strict liability can only be inferred when a person's conduct is criminal in nature.

1. Can a Court look beyond the four corners of a statute to determine whether an element has a mens rea?

In determining legislative intent courts have looked to considerations outside the statute. If Johnson's argument is accepted, many statutes that have been held to impose strict liability would require the mental element of recklessness. The problem with Johnson's argument is that it is often

unclear whether the legislature intended to impose strict liability. Analysis of other considerations outside the statute then becomes necessary. In fact, “this court looked to the statutory language, the legislative intent, and public policy to determine whether [a] statute was intended to impose strict liability for the conduct described.”³

Courts routinely go beyond the four corners of a statute to determine legislative intent. It is not always clear whether the Legislature intended to impose strict liability or have the State prove an additional mental element. If this Court did not go beyond of the four corners of the statute at issue, there would be a good argument that strict liability is intended because inclusion of a mental element in one part of a statute and exclusion of a mental element in another part of the same statute is evidence that the legislature intends to impose strict liability.⁴

Because courts must sometimes go beyond the four corners of a statute to determine legislative intent, the considerations provided in the State’s brief are evidence that the legislature intended to impose strict liability when a disability is based on a prior conviction.

³ *State v. Collins*, 89 Ohio St.3d 524, 533, 2000-Ohio-231 (J. Lundberg Stratton dissenting) (citing *State v. Schlosser*, 79 Ohio St.3d 329, 331-332, 1998-Ohio-716).

⁴ *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121.

2. In determining legislative intent, is the Court limited to the facts of a particular case or should a Court look at what the statute prohibits?

Johnson argues that the State compares a firearm to a dangerous ordnance. He further argues that strict liability should not be imposed on a regulatory offense such as the weapon under disability offense. Johnson is wrong on both arguments.

The State does not argue that a firearm and a dangerous ordnance are the same thing. But Johnson's approach is for this Court to only consider the facts of this case and not consider the entire statute in determining legislative intent.⁵ The facts of a case are irrelevant in determining statutory intent. To determine whether the statute penalizes innocent conduct, this Court must examine the entire statute.

When a person has certain criminal convictions, the legislature determined that possession of a hand grenade is the same as a possession of a firearm. The statute does not solely look to criminalize possession of a firearm—potentially innocent conduct. The statute also addresses dangerous ordnances. The inclusion of a dangerous ordnance in the statute can help in the determination of whether the legislature intended the State prove a mental element when a disability is based on a prior conviction.

⁵ Johnson's Brief at pg. 9 "Simply put, there is no dangerous ordnance *in the instant case* and the State's argument is inapposite."

Because possession of a dangerous ordnance is not innocent conduct, it is not clear that the legislature intended the State prove an additional mental element. This makes it necessary to go beyond the words of the statute to help determine legislative intent.

And if this Court were to follow Johnson's argument and limit its considerations to the facts of the case, then Johnson is still guilty. While an individual that engages in responsible firearm ownership should not suffer criminal responsibility, Johnson was not engaged in responsible firearm ownership. Johnson concealed a stolen firearm in a bag. If Johnson wanted to be a responsible gun owner, he would have attempted to obtain a concealed carry license. He would have properly registered his firearm. But Johnson cannot obtain a concealed carry license or properly register his firearm because he has two convictions involving drug abuse offenses. Johnson is not a responsible firearm owner and should not be treated as such.

The State does not want to punish individuals that are engaging in responsible firearm ownership. But Johnson is not that person. He has two prior convictions involving drug abuse offenses. The State is not required to prove that Johnson was recklessly aware that his conviction disabled him from carrying a firearm.

Johnson also argues that as a matter of statutory interpretation, strict liability should only be imposed for criminal conduct that is inherently immoral. This Courts has taken a different approach and concluded that regulatory offenses passed for general welfare are presumed to be strict liability:

Offenses under RICO, R.C. 2923.32, are *mala prohibita*, i.e., the acts are made unlawful for the good of the public welfare regardless of the state of mind. Thus, we agree with the Twelfth District's reasoning in *State v. Haddix* (1994), 93 Ohio App.3d 470, 638 N.E.2d 1096, which stated, "Whether a defendant knowingly, recklessly or otherwise engages in a pattern of corrupt activity, the effect of his activities on the local and national economy is the same. Requiring the finding of a specific culpable mental state for a RICO violation obstructs the purpose of the statute * * *." *Id.* at 477, 638 N.E.2d at 1101. Given these goals, we believe that the General Assembly intended to enhance the government's ability to quell organized crime by imposing strict liability for such acts.⁶

The weapon under disability statute is meant to broaden criminal liability.⁷ It is an attempt to protect society from individuals involved with drug abuse offenses by imposing strict liability in relation to a prior conviction. Based on this Court's own precedent concerning the scope of this statute, when a disability is based on a prior conviction, the State need not prove an additional element of recklessness.

⁶ *State v. Schlosser*, 79 Ohio St.3d 329, 333, 1998-Ohio-716.

⁷ *State v. Maoning* (1996), 76 Ohio St.3d 126, 128.

3. The pre-*Clay* cases that address tangential issues hold that the conviction places a defendant on notice and no knowledge need be proven by the State.

In *State v. Lofties*, the Court held that “[a] defendant’s actual knowledge of the disability is not an essential element of the offense charged under R.C. 2923.13(A)(3) when the disability is based on a prior conviction.”⁸ Another portion of this decision was later found persuasive and followed by this Court in *State v. Moaning*.

The *Lofties* decision was followed in the past and should continue to be followed by this Court.

B. Does imposition of strict liability in a portion of the weapon under disability statute create a due process problem?

Johnson argues that to impose strict liability offends due process. But this statute does not impose complete strict liability. The State must prove knowing possession and an awareness that the item possessed is a firearm or dangerous ordnance. Because only one element of the statute has no mens rea there is no due process concern.

“[T]he failure to require mens rea, standing alone, does not violate due process.”⁹ To prove a substantive due process violation Johnson must

⁸ *State v. Lofties* (1991), 74 Ohio App.3d 824.

⁹ *Schlosser*, 79 Ohio St.3d 329, 333.

establish that the statute is not narrowly tailored to serve a compelling government interest.¹⁰ “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the “evil” it seeks to remedy.”¹¹

The purpose of the weapons under disability statute is to keep weapons out of the hands of certain bad risks.¹² The legislature has decided that there are five different types of people that must not possess firearms. Each type of person creates an increased risk of danger to the police and society when they are in possession of a firearm. Due process does not require inclusion of a mental element in a statute’s subdivisions to narrowly tailor the offense to the compelling government interest.

The statute is narrowly tailored to serve a compelling government interest. Failure to require a mental element in relation to a prior conviction does not offend or implicate substantive due process. Johnson’s claim lacks support.

¹⁰ With respect to the specific facts of this case, the State does not dispute that the weapons under disability statute restricts a fundamental right. If Johnson possessed a hand grenade, the State would dispute the use of a strict scrutiny analysis.

¹¹ *State v. Burnett*, 93 Ohio St.3d 419, 429 (quoting *Frisby v. Schultz* (1988), 487 U.S. 474, 485).

¹² *State v. Maoning* (1996), 76 Ohio St.3d 126, 128.

- C. **Johnson wants to expand the decision in *State v. Clay* and require the State prove that he was aware that his convictions are “offenses involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.” By making the State prove Johnson’s knowledge of the law, is he asking this Court to insert a mental element to create a mistake of law defense?**

Johnson argues that the state must not only prove that was recklessly aware that he had been convicted of possession of marijuana but the State must also prove that he was aware that his marijuana conviction is an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse under R.C. 2923.13. Johnson argues that this is not a mistake of law defense under *U.S. v. Liparota*.

Assuming the State must prove recklessness, should Johnson be permitted to extend *Clay* beyond the syllabus and now have the State prove that he was aware that his conviction created a legal disability? Johnson claims the disability—possession of a drug of abuse prevents firearm possession—is a fact to be found by the jury. This is incorrect. The disability is legal collateral consequence of his prior convictions. This is best exemplified by two examples.

Whether a prior conviction is a disabling offense is a determination that is made on the face of Johnson’s indictment. In this case, Johnson has

a conviction for two prior drug abuse convictions. Whether the convictions create a disability is known from the face of the indictment in this case. No facts beyond the face of the indictment are necessary to determine if these offenses are drug abuse offenses. The convictions are legal disabilities as a matter of law. Because this issue can be determined from the face of the indictment, this is a legal issue and not one of fact.

Another way to show that Johnson argues mistake of law is to examine what the jury would consider had Johnson not stipulated to his prior convictions. The jury, legally, would not be permitted to find that Johnson has a conviction for marijuana possession and trafficking in a counterfeit controlled substance but then find that these convictions are not drug abuse offenses. Because the issue of whether these offenses are drug abuse offenses is the law, Johnson's proposed proposition creates a mistake of law defense. Juries do not consider the law. If the State proves that Johnson has a conviction and he is aware of the conviction, there is no need to have the jury make a determination that Johnson was aware that he had a disability preventing firearm ownership.

Additionally, Johnson's reliance on *U.S. v. Liparota* is misplaced. The Supreme Court's concern in *Liparota* was that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent

conduct.”¹³ If the State in only required to prove that Johnson was aware of his prior conviction, a broad range of apparently innocent conduct is not made criminal.

If the State is required to prove the Johnson was recklessly aware that he had a conviction for marijuana possession, then the concern in *Liparota* is avoided without also requiring the State prove that Johnson was recklessly aware that the conviction was an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse under R.C. 2923.13. If Johnson knows he has a conviction, then there is no criminalization of a broad range of apparently innocent activity. The conviction creates a legal disability and Johnson knows he has a conviction. Johnson, with knowledge of the conviction “is in a position to prevent [criminal conduct] with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities” for responsible firearm ownership. Johnson could read a clearly worded statute. Johnson in filling out a form to purchase a handgun or receive a concealed carry permit would list prior convictions. Either one of these actions, which would be pursued by someone attempting to engage in responsible firearm

¹³ *U.S. v. Liparota* (1985), 471 U.S. 419, 426.

ownership, would prevent a violation of the weapon under disability statute.

Assuming there is an additional mental element when a disability is based on a prior conviction, Johnson and the Eighth District go to far in making the State prove Johnson was aware that the conviction created a disability. If this Court believes that *Clay* controls the decision in this case, then the State is only required to prove that Johnson was recklessly aware that he was convicted of marijuana possession and trafficking in a counterfeit controlled substance. No extension of *Clay* is necessary to prevent the concern of the United States Supreme Court in *Liparota*.

D. Johnson stipulated to his convictions. The Jury is required to accept the stipulations. If a defendant stipulates to certain facts and removes those facts from the jury's consideration, can there be structural error as described in *Colon II*.

Johnson makes two arguments in an attempt to show structural error as contemplated by *Colon II*. First, he argues that the jury did not consider the appropriate mens rea. Second, he argues that he may have been convicted of a crime that did not even create a legal disability. Johnson argument is incorrect on both facets.

- 1. When a defendant stipulates to prior convictions, there is no error in the jury instructions or any concern that a defendant is convicted without the state proving all the elements.**

To prove a structural error when an indictment omits a judicially interpreted *mens rea* there must be proof “that the error in the indictment led to errors that ‘permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.’”¹⁴ That was not proven in this case.

In a pretrial motion to dismiss, Johnson argued that his convictions were not legal disabilities. The court denied that motion. Johnson then stipulated to his prior convictions. Johnson also admitted to knowing possession of a firearm. Johnson’s defense was self-defense. There was no argument to the jury about Johnson’s prior convictions. The jury was told that they were required to find the offenses disabling. Assuming the indictment omitted an essential element, that omission did not affect the determination of guilt or innocence. The issue was whether Johnson acted in self-defense. Because this was a case of self-defense Johnson admitted to the charges but claimed a justification. No errors resulted from a

¹⁴ *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, at ¶ 8 (quoting *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, at ¶ 23).

potentially flawed indictment. Because of the stipulation and the self-defense argument, there is no structural error as contemplated by *Colon II*.

2. Is a conviction for trafficking in a counterfeit controlled substance a disabling conviction?

Johnson argues that his prior conviction for trafficking in a counterfeit controlled substance does not create a bar to possession of a firearm. This Court disagrees.

In *State v. Moaning*, this Court held that the phrase “any offense involving a drug of abuse” found in R.C. 2923.13(A)(3) refers to “drug abuse offenses as defined in R.C. 2925.01(H)(1)-(4).”¹⁵ A drug abuse offense includes a violation of trafficking in a counterfeit controlled substance.¹⁶

Johnson trafficked in a counterfeit controlled substance and was convicted of violating R.C. 2935.27. This is a drug abuse offense and a proper disabling condition under *Moaning*.

E. Reply to the amicus brief

The amicus raises a concern that many people that are convicted of misdemeanor marijuana charges do not know that they are prevented from possessing a firearm. But the State does not believe that the main concern

¹⁵ *Moaning*, 76 Ohio St.3d 126, 128-129. R.C. 2925.01(H)(1)-(4) is now R.C. 2925.01(G)(1)-(4).

¹⁶ R.C. 2925.01(G)(1).

raised by the amicus creates a disability in most cases. Most misdemeanor marijuana cases arise in municipal court and are not charged with violating the revised code but a municipal code section.

If a defendant is ultimately convicted *solely* of a violation of a municipal ordinance, there is no disabling condition. It is only when a person is convicted of violating a section of the Revised Code, or a similar *state* or Federal Law is there a disability.

Under *Moaning*, any offense involving a drug of abuse means a drug abuse offense. A drug abuse offense is defined as:

“a violation of an existing or former law *of this or any other state* or of the United States that is substantially equivalent to any section listed in Division (G)(1) of this section.”¹⁷

A violation of a municipal ordinance does not equate to a drug abuse offense under *Moaning*. This is put into context because before a conviction an “indictment” is the only thing that creates a disability under R.C. 2923.13(A)(3). Most cases in municipal court do not proceed by indictment. Thus, a charge does not create a disability. The interpretation of the weapons under disability statute does not create a disability for a misdemeanor conviction based on municipal law alone. Therefore, the issues raised by amicus are largely unfounded.

¹⁷ R.C. 2925.01(G)(2).

CONCLUSION

There is a fundamental difference between being indicted and coming into open court and admitting guilt beyond a reasonable doubt for a drug abuse offense. It is this difference that should provide a different analysis and a different result than *Clay*. There is no evidence, with R.C. 2923.13(A)(3), that the State must prove a mental element in relation to a prior conviction. This Court should reject the Eighth District opinion that created a mistake of law defense and remand this case for consideration of the remaining assigned errors.

Respectfully submitted,

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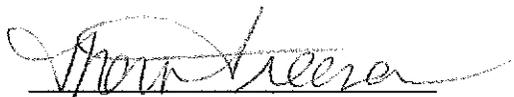
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CERTIFICATE OF SERVICE

A copy of the foregoing reply brief was sent by regular U.S. mail this 16TH day of April 2010 to John Martin and Cullen Sweeney at 310 Lakeside Ave. Suite 200 Cleveland Ohio 44113 and Thomas Huey 3240 West Henderson Road Columbus Ohio 43220.



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