

[Cite as *State v. Johnson*, 2009-Ohio-3101.]

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:
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

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.:

{¶ 1} Defendant-appellant Steven Johnson appeals from his conviction after a jury found him guilty of having a weapon while under disability (“HWD”).

{¶ 2} 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.

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} 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 a gun”¹ at an address on Cedar Avenue.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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.

{¶ 9} Johnson subsequently provided a written statement to the detective

¹Quotes indicate testimony presented at Johnson’s trial.

who 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.

{¶ 10} 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.

{¶ 11} 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

{¶ 12} 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.

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

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

{¶ 14} "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 ***."

{¶ 15} 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.

{¶ 16} 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.

{¶ 17} 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.

{¶ 18} Johnson's fourth assignment of error states:

{¶ 19} **"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."**

{¶ 20} 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.

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

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

{¶ 23} '(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:

{¶ 24} " * * *

{¶ 25} '(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 ***.

{¶ 26} "**** 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').

{¶ 27} "**** 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. ***

{¶ 28} "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. ***

{¶ 29} “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.’”

{¶ 30} “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.)

{¶ 31} 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.

{¶ 32} 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.

{¶ 33} 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.

{¶ 34} 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*.

{¶ 35} Consequently, Johnson’s fourth assignment of error is sustained.

{¶ 36} 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