

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 2017-0087
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
ANTHONY CARNES	:	Court of Appeals Case Number C-150752
Defendant-Appellant	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE

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Introduction

This Court has held that juvenile adjudications cannot be used to elevate the degree of an offense or to enhance the sentence of an offense. Defendants have sought to have that ruling stretched to cover the use of juvenile adjudications as elements of an offense. Carnes is one such defendant who sought to have the ruling extended to prohibit the state from using his juvenile adjudication as an element of R.C. 2923.13, having weapons while under disability.

The First District disagreed, as has every appellate district to consider the issue. This Court has accepted jurisdiction over this matter to determine whether the lower courts are right. And because it is proper to use a juvenile adjudication as an element of an offense, this Court should uphold the appellate districts and rule that juvenile adjudications may be used as elements of an offense under both the Ohio and Federal Constitutions.

Statement of the Case

In early 1994, in Hamilton County Juvenile Case No. 94-1910X, Anthony Carnes was adjudicated delinquent of felonious assault. At that hearing, both he and his mother signed off on him waiving his right to counsel. (T.d. 52.) This waiver was recognized on the judge's sheet that Carnes filed along with the waiver he signed. (Id.)

In 2014, Carnes was charged with having weapons while under disability. (T.d. 1.) The disability was a result of his 1994 adjudication. (Id.)

Carnes moved to dismiss the indictment against him based upon his belief that his waiver of counsel in the juvenile court was improper. (T.d. 50.) Since he felt it was improper, he argued that it could not be used against him as an adult. After considering the arguments of the parties, the trial court denied his motion. (T.p. 24-26.)

On appeal, Carnes argued that his juvenile adjudication could not be used “to create a crime,” here having weapons while under disability. (Appellant’s Assignment of Error, Case No. C-150752.) After Carnes filed his brief, this Court decided *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, which was considered by the First District Court of Appeals when it rejected Carnes’ arguments.

Statement of the Facts

Carnes was adjudicated delinquent in 1994, which caused him to be under a disability that prevented him from having, possessing, or using firearms. (State’s Exhibit 26.) Before he was adjudicated, Carnes signed a waiver of his right to counsel. (T.d. 52.) His mother also signed it. (Id.)

On the night of his arrest in this matter, Carnes told officers that, based upon his 1994 juvenile adjudication, he could not possess a gun. (T.p. 180.) In spite of this disability, Carnes was in possession of firearm. (T.p. 191-193.)

In addition to this evidence, the state put on evidence of his juvenile adjudication. (T.p. 290-297 & State’s Exhibit 26.) Through his cross-examination, Carnes brought forth the facts underlying that adjudication showing that he engaged in a fist fight with another person and that Carnes knocked some of that person’s teeth out. (T.p. 297-303.)

Based upon that evidence, Carnes was convicted of having weapons while under disability.

Argument in Support of State’s Proposition of Law

Proposition of Law: While a juvenile adjudication may not be used to enhance a sentence or the degree of an offense, it may be used as an element of an offense.

Certain juvenile adjudications cause a person to be under a firearm disability. Carnes and other defendants have been arguing that this Court’s decision in *State v. Hand*, which prevents juvenile adjudications from being used to enhance sentences, means that they cannot be used as elements of offenses either. Every Ohio court to consider this issue has rejected that argument. Because it is proper to use juvenile adjudications as elements of an offense, this Court should reject Carnes’ arguments and hold that juvenile adjudications may be used as an element of an offense.

I. Under *State v. Hand*, a juvenile adjudication may not be used to enhance a sentence, but may be used for other purposes.

In *State v. Hand*, this Court held that juvenile adjudications cannot be used “as a previous conviction that *enhances* either the degree of or the sentence for a subsequent offense committed as an adult” and “[b]ecause a juvenile adjudication is not established through a procedure that provides the right to a jury trial, it cannot be used *to increase a sentence* beyond a statutory maximum or mandatory minimum.” *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, paragraph one and two of the syllabus (emphasis added).

Hand involved the application of a statute, not at issue here, that allowed juvenile adjudications to be treated as though they were adult convictions in certain circumstances. Because that statute was treating a juvenile adjudication as an adult conviction, it caused a second-degree felony to operate as a first-degree felony, thus enhancing his sentence. *Id.* at ¶ 3. In finding that this was not permissible, this Court relied on *Apprendi v. New Jersey*.

In *Apprendi*, the United States Supreme Court ruled that “[o]ther than the fact of a prior conviction, any fact that *increases the penalty* for a crime beyond the statutory prescribed maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (emphasis added). Since juvenile adjudications generally do not come with a right to a jury trial, this court ruled that they could not be used to enhance a sentence. *Hand, supra*, 2016-Ohio-5504, paragraphs one and two of the syllabus.

This Court reached a similar conclusion in *State v. Bode*: “[A]n adjudication of delinquency may not be used to *enhance the penalty* for a later [OVI] offense under R.C. 4511.19(G)(1)(d) when the adjudication carried the possibility of confinement, the adjudication was uncounseled, and there was no effective waiver of the right to counsel.” *State v. Bode*, 144 Ohio St. 3d 155, 2015-Ohio-1519, 41 N.E.3d 1159, ¶ 1 (emphasis added).

This court applied the same rule to adults in *State v. Brooke*: “For purposes of *penalty enhancement* in later [OVI] convictions under R.C. 4511.19, when the defendant presents a *prima facie* showing that prior convictions were unconstitutional because they were uncounseled and resulted in confinement, the burden shifts to the state to prove that the right to counsel was properly waived.” *State v. Brooke*, 133 Ohio St. 3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, paragraph one of the syllabus (emphasis added).

There is a bright line that runs through all of those cases: sentence enhancement. A sentence for a violation of R.C. 2923.13 cannot be enhanced. It is always a third-degree felony. That is true whether the disability sprang forth from an adult conviction, a juvenile adjudication, or any of the other ways a person may be placed under a disability.

II. Under R.C. 2923.13, a juvenile adjudication is an element of the offense.

Under R.C. 2923.13, certain people are prohibited from having firearms. In total, there are five categories, two of which involve juvenile adjudications, that result in a disability:

(A) Unless relieved from disability under operation of law or legal process, 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 felony 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 a felony 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, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to court order" and "patient" have the same meanings as in section 5122.01 of the Revised Code.

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

“It is basic hornbook law that the state under its police powers may impose restrictions on who may possess firearms.” *State v. Taniguchi*, 74 Ohio St.3d 154, 157, 1995-Ohio-163, 656 N.E.2d 1286. The Ohio Legislature felt it was wise to create a disability that prohibits a person who has been adjudicated delinquent from possessing firearms. As such, the Legislature made being adjudicated delinquent of certain offenses an element of the crime of having weapons while under disability.

But those adjudications are a possible element of the offense that is always a third-degree felony. There is no way to either elevate the degree of or to enhance the sentence for a violation of R.C. 2923.13. Since *Hand* only prohibits using juvenile adjudications to enhance a sentence, R.C. 2929.13's use of a juvenile adjudication as an element is in accord with *Hand*.

III. It is constitutional to use juvenile adjudications as elements of offenses.

Carnes, however, wants this Court to extend *Hand* by saying that juvenile adjudications cannot be used to create a firearm disability. He reasons that if his adjudication cannot be used to enhance a sentence, then it should not be used to create a disability. His argument fails.

In *Lewis v. United States*, the United States Supreme Court ruled that it is constitutional to allow even constitutionally infirm convictions to create firearm disabilities. 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). Lewis had been convicted in Florida of an offense without the benefit of counsel. *Id.* at 57-58. The failure to provide him with counsel meant that he could have easily collaterally attacked that conviction and had it vacated. *Id.* Despite the fact that his Florida conviction was unconstitutional under both the Sixth and Fourteenth Amendments, it was being used as the basis of his knowingly receiving and possessing a firearm while under a disability. *Id.* Lewis argued that his unquestionably unconstitutional conviction could not be used as the basis for his firearm disability.

The Court disagreed: "The federal gun laws . . . focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational. Enforcement of that essentially civil disability through a criminal sanction does not 'support guilt or enhance punishment' on the

basis of conviction that is unreliable when one considers Congress' broad purpose." *Id.* at 67 quoting *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).

Before reaching that conclusion, the Court reviewed its previous jurisprudence related to what uncounseled convictions, such as Lewis', could not be used for. Perhaps foreshadowing its future *Apprendi* decision, it noted that such a conviction could not be used to enhance punishment under a recidivist statute. *Burgett, supra*. Nor could it be considered by a court in sentencing a defendant in a subsequent conviction. *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). And it could not be used to impeach the general credibility of a defendant. *Loper v. Beto*, 405 U.S.473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972). Those prohibitions are in place because, to quote the Court, the conviction "lacked reliability." *Lewis, supra*, 445 U.S. at 60, quoting *Loper, supra*, 405 U.S. at 484, quoting *Linkletter v. Walker*, 381 U.S. 618, 84 S.Ct. 1731, 14 L.E.d 2d 601, at fn.20 (1965).

Lewis all but answers the question of whether a juvenile adjudication may be used to create a firearms disability. While the Court did not directly address juvenile adjudications (the federal firearms disability statute, 18 U.S.C. 922(g), mirrors many of the elements of R.C. 2923.13, but does not include juvenile adjudications), it is logical to conclude that if it felt an unconstitutional conviction could be used to create a valid firearm disability that it would likewise feel that a juvenile adjudication could also be used to create one.

Carnes, of course, argues that this Court can find that the Ohio Constitution provides greater protection than the Federal Constitution. And that's obviously true. He suggests that is what this Court did in *Hand* and that it should follow suit here.

That, however, is not what this Court did in *Hand*. In *Hand*, this Court did side with the minority of state and federal courts that had considered whether a juvenile adjudication could be

used to enhance a sentence following a conviction. But it did so because it felt that “[g]iven the United States Supreme Court’s emphatic pronouncements on the importance of the right to a jury trial, it is logical to conclude that the court meant to limit the prior-conviction exception to prior proceedings that satisfied the jury-trial guarantee.” *Hand, supra*, at ¶ 34.

This Court did not offer greater protection under the Ohio Constitution; it offered the protection it logically concluded the United States Supreme Court would find under the United States Constitution. Ohio’s “due course of law” provision is the equivalent of the “due process of law” protections in the United States Constitution. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 48, citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941). So issuing a ruling that is in accord with what this Court feels the United States Supreme Court would do makes sense. Given that *Lewis* found it permissible to allow a conviction so unreliable that it could be easily vacated as unconstitutional to form a firearm disability, it is logical to conclude that the Court would allow juvenile adjudications to also form the basis of a firearm disability.

Returning to Ohio, every Ohio court to consider this issue has found it proper to allow juvenile adjudications to be used to create a firearms disability. *State v. Carnes*, 1st Dist. Hamilton No. C-150752, 2016-Ohio-8019; *State v. St. Jules*, 2nd Dist. Montgomery No. 27405, 2017-Ohio-794; *State v. Jones*, 5th Dist. Stark No. 2017CA00064, 2017-Ohio-9119; *State v. Hudson*, 7th Dist. Mahoning No. 15MA0134, 2017-Ohio-645; *State v. Stewart*, 8th Dist. Cuyahoga No. 105154, 2017-Ohio-2993; and *State v. Brown*, 10th Dist. Franklin No. 16AP-753, 2017-Ohio-7134. But since this Court only precluded using juvenile adjudications to enhance sentences (*Hand*, for example, noted that it was still proper for trial courts to consider juvenile adjudications when imposing a sentence, *Hand, supra*, 2016-Ohio-5504, at ¶ 20), each appellate

court to consider the answer has logically concluded that this Court would rule that juvenile adjudications can be used as an element of an offense.

It is also notable that, unlike the statute at issue in *Hand*, R.C. 2923.13 is not treating juvenile adjudications as adult convictions. Instead, as noted by the Tenth District in *Brown*, R.C. 2923.13 “presents alternative elements to establish the offense: either a prior juvenile adjudication *or* a prior conviction. Thus, from the plain language of the statute, it cannot be said that R.C. 2923.13(A)(2) treats a prior juvenile adjudication as an adult conviction because it separately considers both juvenile adjudications and adult convictions.” *Brown, supra*, 2017-Ohio-7134 at ¶ 21 (emphasis sic. and footnote omitted).

It is, therefore, permissible to use juvenile adjudications as elements of offenses. This Court should, therefore, adopt the State’s proposition of law and hold that juvenile adjudications may be used as elements of offenses.

IV. If this Court were to adopt Carnes’ argument, it would gut almost the entirety of R.C. 2923.13, thus removing the firearm disability the Ohio Legislature has placed upon many of those it felt were too dangerous to have firearms.

Hand and the cases it relied upon dealt with the lack of a jury causing an unreliability in the adjudication that prohibited it from being used to enhance a sentence or to elevate the degree of an offense. Because most of the things in R.C. 2923.13 that can create a firearms disability lack a jury trial, extending *Hand* as Carnes suggests would gut the majority of the statute.

Under R.C. 2923.13, there are multiple means of being placed under a disability that do not include the right to a jury trial: being a fugitive from justice, being under indictment for a felony offense of violence, being under indictment for a felony drug offense, being drug dependent or in danger of drug dependence, being a chronic alcoholic, and being adjudicated

mentally incompetent. Just as is the case with a juvenile adjudication, none of those situations carries a right to a jury trial.

Not only do those things not come with the right to a jury, this Court has previously ruled that they do not even come with a culpable mental state. In *State v. Johnson*, this Court ruled that a “conviction for violation of the offense of having weapons while under disability as defined by R.C. 2923.13(A)(3) does not require proof of a culpable mental state of the element that the offender 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.” 128 Ohio St.3d 107, 2010-Ohio-6301, 942 N.E.2d 347, paragraph one of the syllabus.

In addition to there being no culpable mental state regarding the disability, this Court has further ruled that a conviction for having a weapon while under a disability still stands “when there is an acquittal on, or dismissal of, the indictment which had formed the basis for the charge of having a weapon while under disability.” *Taniguchi, supra*, 74 Ohio St. 3d 154, syllabus. So a disability survives even an acquittal.

In *Hand* and the cases it followed, the ultimate issue was that juvenile adjudications were not reliable enough to be used to either elevate the degree of an offense or to enhance a sentence. But when it comes to firearm disability statutes, the cases that have preceded this one have found that everything from unconstitutional convictions to outright acquittals may be used to create the disability. Both of those fall well below juvenile adjudications on the spectrum of reliability.

If this Court were to rule that a juvenile adjudication cannot be used to create a disability under R.C. 2923.13 because juveniles do not have the right to a jury trial, then it would be opening the door to allow fugitives from justice, drug addicts, and those deemed mentally incompetent to possess and use firearms because all those things may come about without the

benefit of a jury trial. The legislature, however, felt people who fall into those categories present a greater risk to society, so it placed them under a firearm disability.

V. Ohio statutes, including R.C. 2923.13, enjoy a strong presumption of constitutionality and Carnes has not overcome that presumption.

Normally, all statutes enjoy a strong presumption of constitutionality, and, to overcome that presumption, the challenging party must prove beyond a reasonable doubt that the statute is unconstitutional. *State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶ 20. Carnes has never suggested that the having weapons while under disability statute impacts any of his fundamental rights, so in deciding whether the statute is constitutional involves a rational basis inquiry. *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 26. Under that test, the statute will be upheld if it is rationally related to a legitimate governmental purpose. *Id.* This Court has applied a rational-basis test to due process and due course of law arguments as applied to juvenile matters. *See State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883. (Had Carnes suggested that one of his fundamental rights had been impacted, then it may have caused the burden to shift to the state to justify the intrusion of that right. Having not raised that below, the state never had an opportunity to present such proof, thus rendering it unfair to apply anything other than a rational-basis test at the appellate level. *See State v. Alexander*, 4th Dist. Adams No. 12CA945, 2013-Ohio-1913, ¶ 15-17.)

In *Lewis*, the Court found that “Congress’ judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational.” *Lewis, supra*, 445 U.S. at 67. There is nothing less rational about the Ohio Legislature’s

judgement that those who have juvenile adjudications for certain offenses are among the class of persons who should be disabled from having firearms in Ohio.

Ohio's weapons under disability statute, therefore, is constitutional and should be fully upheld.

VI. The relief from disability statute, if anything, supports the State's position in this matter.

For the first time, Carnes is arguing to this Court that R.C. 2923.14, a statute that provides a means to receive relief from a firearms disability, somehow plays a role in this case. This argument has not been raised below and is not properly before this Court.

Regardless, whether there is a possibility of relief from a disability does not have any impact on whether a juvenile adjudication may be used as an element of an offense. If anything, the relief from disability statute shows that *Lewis* is even more on point with the State's arguments in this matter.

In *Lewis*, the Court noted that "a convicted felon is not without relief" and that federal law "states that the disability may be removed by a qualifying pardon or the Secretary's consent." *Lewis, supra*, 445 U.S. at 64. Ohio's relief from disability statute is more liberal than its federal counterpart. It does not require the extraordinary relief of a pardon and, instead, gives the court of common pleas where the applicant resides (not the jurisdiction that the conviction was from) discretion to grant the relief to those applicants it deems fit. *See, for example, In re Chrosniak*, 8th Dist. Cuyahoga No. 105459, 2017-Ohio-7408, ___ N.E.3d ___, ¶ 14 and cases cited therein.

Further supporting the State's position is this Court's recognition that "[i]nasmuch as the General Assembly has clearly provided a method for an individual who is under indictment to

have a weapon legally, the intent is obvious that if relief is not obtained, R.C. 2923.13 is violated.” *Taniguchi, supra*, 74 Ohio St. 3d at 157.

So under prior jurisprudence from both this Court and the United States Supreme Court, the availability of a means for obtaining relief from disability only strengthens the conclusion that juvenile adjudications may be used as an element of having weapons while under disability.

VII. Brief Response to Buckeye Firearms Association’s Amicus arguments

The Second Amendment issues raised by Amicus Curiae, Buckeye Firearms Association, were not raised at any stage below, so they are not properly before this court. Even if they had been raised below, the right to bear arms is not absolute and it is constitutional to limit that right in the manner that R.C. 2923.13 does. *See, for example, Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993) (there is a fundamental right to bear arms, but that right is not absolute); *Lewis v. United States, supra*, 445 U.S. 55 (upholding similar federal disability statute). “It is basic hornbook law that the state under its police powers may impose restrictions on who may possess firearms.” *Taniguchi, supra*, 74 Ohio St.3d at 157. So even if Amicus’ Second Amendment arguments had been raised below, they would remain meritless.

Conclusion

While juvenile adjudications may not be used to enhance a sentence, they may be used as an element of an offense. That is what R.C. 2923.13 does. It uses juvenile adjudications as an element of the offense. As such, this Court should rule that juvenile adjudications may be used as an element of an offense.

Respectfully,

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Proof of Service

I hereby certify that I have sent a copy of the foregoing Merit Brief, by email, addressed to Peter Galyardt, Ohio Public Defender's Office, *Peter.Galyardt@opd.ohio.gov*, counsel of record, this 16th day of January, 2018. Copies were further emailed to amicus counsel: Marsha L. Levick, *mlevick@jlc.org*, Samuel Park, *spark@winston.com*, John Drosick, *jdrosick@winston.com*, and Ronald Lemieux, *ronlemieuxesq@gmail.com*.

Lacking an email address, a copy was sent via regular U.S. mail to Nadia Seeratan, National Juvenile Defender Center, 1350 Connecticut Ave. NW, Suite 304, Washington, D.C. 20036.

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Appendix

18 U.S.C. 922(g)

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

All other cited statutes are found in the Appellant's Appendix.