

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-11-034

Appellee

Trial Court No. 2009CR0227

v.

Gregory Arent

DECISION AND JUDGMENT

Appellant

Decided: November 9, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David E. Romaker, Jr., Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the April 19, 2011 judgment of the Wood County Court of Common Pleas, which sentenced appellant, Gregory Arent, after he was convicted by a jury of violating R.C. 3599.12(A)(2), illegal voting. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

THE TRIAL COURT ERRED IN GRANTING THE STATE'S
MOTION IN LIMINE TO EXCLUDE EVIDENCE OF APPELLANT'S
MEDICAL CONDITION AND CONTINUING TO PROHIBIT
TESTIMONY FROM BEING INTRODUCED AT TRIAL.

{¶ 2} On May 7, 2009, appellant was indicted in a single-count indictment alleging that he voted twice in an election. Appellee moved to exclude all evidence of the defense related to appellant's mental state, including his mental history, on the ground that R.C. 3599.12(A)(2) is a strict liability statute. The court granted the motion in limine. Following a trial to the court, appellant was convicted of the offense and sentenced to a two-year period of community control. Appellant sought an appeal from the judgment.

{¶ 3} In his sole assignment of error, appellant contends that the trial court erred by holding that R.C. 3599.12(A)(2) is a strict liability statute. Appellant argues that the Ohio Supreme Court altered its analysis of the application of strict liability to criminal statutes in *State v. Collins*, 89 Ohio St.3d 524, 529, 2000-Ohio-231, 733 N.E.2d 1118, and *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, 942 N.E.2d 347.

{¶ 4} It is clear under Ohio law that a defendant cannot be found guilty of an offense unless he has committed a prohibited act or failed to do a required act with "the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense." R.C. 2901.21(A)(2). Furthermore, since 1974, R.C. 2901.21(B) provides that strict criminal liability should be imposed when the

statutory section defining the offense fails to set forth a culpable mental state and the statute “plainly indicates a purpose to impose strict criminal liability for the conduct described * * *.” This statute further provides that: “[w]hen the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.”

{¶ 5} Most recently, the Ohio Supreme Court has held that R.C. 2901.21(B) is applicable only when the section of a statute which defines an offense does not as a whole contain any culpable mental state element. *Johnson* at paragraph two of the syllabus. The *Johnson* case involved a violation of R.C. 2923.13(A)(3), knowingly having a weapon while under indictment or prior conviction of a felony offense. The court held that R.C. 2901.21(B) was not applicable in that case because a culpable mental state (knowingly) was included for one element of the offense but not another. *Id.* R.C. 2923.13 sets forth the elements of several offenses, but each offense has the common element of “knowingly” having a gun in addition to another factual element for which no mens rea element is stated. The court found that this analysis was consistent with its holdings in two prior decisions, *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, and *State v. Wac*, 68 Ohio St.2d 84, 428 N.E.2d 428 (1981). *Johnson* at ¶ 49. In these two cases, the court, applying R.C. 2901.21(B), held that a stated mens rea element in one discrete clause was not applicable to another clause and that the exclusion of the mens rea element plainly indicated the legislative intent to impose strict liability for that element of the offense. *Maxwell* at ¶ 29 and *Wac* at 86. Under the *Johnson*

holding, the analysis of *Maxwell, supra*, and *Wac, supra*, was unnecessary because the same result is derived from an analysis that begins with determining whether R.C. 2109.21(B) is applicable. When a mens rea element is stated within a clause or section of a statute defining a criminal offense, the court must find that strict liability applies to the clause(s) or section(s) without a stated mens rea element because the court cannot insert recklessness into a statute through R.C. 2901.21(B) when any mens rea element has been stated. *Johnson* at paragraph two of the syllabus.

{¶ 6} In the case before us, R.C. 3599.12(A), which criminalizes several types of illegal voting, only one of the offenses specified requires a specific mens rea. The statute reads as follows:

(A) No person shall do any of the following:

(1) Vote or attempt to vote in any primary, special, or general election in a precinct in which that person is not a legally qualified elector;

(2) Vote or attempt to vote more than once at the same election by any means, including voting or attempting to vote both by absent voter's ballots under division (G) of section 3503.16 of the Revised Code and by regular ballot at the polls at the same election, or voting or attempting to vote both by absent voter's ballots under division (G) of section 3503.16 of the Revised Code and by absent voter's ballots under Chapter 3509. or armed service absent voter's ballots under Chapter 3511. of the Revised Code at the same election;

(3) Impersonate or sign the name of another person, real or fictitious, living or dead, and vote or attempt to vote as that other person in any such election;

(4) Cast a ballot at any such election after objection has been made and sustained to that person's vote;

(5) Knowingly vote or attempt to vote a ballot other than the official ballot.

{¶ 7} R.C. 3599.12(A)(2) defines one type of illegal voting as follows: “No person shall * * * [v]ote * * * more than once at the same election by any means * * *.”

The subsection of the statute which defines the offense does not contain a culpable mental state. Therefore, following *Johnson*, 128 Ohio St.3d 107, 2010-Ohio-231, 733 N.E.2d 1118, at paragraph two of the syllabus, we find R.C. 2901.21(B) is applicable.

{¶ 8} Because the Ohio Supreme Court found that R.C. 2901.21(B) was not applicable in the *Johnson* case, that case does not give us any guidance as to how we are to determine the second part of the R.C. 2901.21(B) test: Whether there was a plain indication of purpose to impose strict liability.

{¶ 9} The Ohio Supreme Court has held that we must first consider the words of the statute to determine the legislative intent. *Wac*, 68 Ohio St.2d at 87, 428 N.E.2d 428; *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 22; and *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). A court must be careful to “give effect to the words used, not to delete words used or to insert words

not used.” *Horner*, citing *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969).

{¶ 10} In both the *Horner* and *Wac* cases, the court held that where the General Assembly stated a culpable mental state element for only one of two subsections of a statute (where each subsection delineates the elements for a separate criminal offense), the court could find a plain indication of a legislative intent to make one of the offenses a strict liability offense. *Horner* at ¶ 33-34, and *Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, at ¶ 30. The Ohio Supreme Court has also considered whether the legislative history and whether the General Assembly has altered a statute to differentiate between different types of violations. *State v. Schlosser*, 79 Ohio St.3d 329, 331-332, 681 N.E.2d 911 (1997), and *State v. Collins*, 89 Ohio St.3d 524, 533, 733 N.E.2d 1118 (2000) (Lanzinger, J., dissenting).

{¶ 11} This analysis also applies in the case before us. Here, one offense of illegal voting defined under the statute has a culpable mental state, while the one at issue does not. Furthermore, the General Assembly made a distinction between the false registration statute, R.C. 3599.11(A), which includes a “knowingly” mens rea element, and the illegal voting statute, R.C. 3599.12(A)(2), which does not contain a culpable mental state. Clearly, the absence of a culpable mental state is a plain indication the General Assembly wanted to make a distinction between the two offenses and intended for R.C. 3599.12(A)(2) to be a strict liability offense.

{¶ 12} In *State v. Workman*, 126 Ohio App.3d 422, 426, 710 N.E.2d 744 (5th Dist.1998), the Fifth District held that R.C. 3599.12(A) was a strict liability statute because it begins with the phrase “no person shall.” However, we find this case conflicts with the holding of the Ohio Supreme Court in case of *State v. Moody*, 104 Ohio St.3d 244, 2004-Ohio-6395, 819 N.E.2d 268, in which the Ohio Supreme Court held that hold that the “no person shall” language does not indicate the legislative intent to make the statute a strict liability offense. *Id.* at ¶ 16.

{¶ 13} Finally, whether the court can consider whether there are any indications outside of the statute that “plainly indicate a purpose to impose strict liability” is unclear. In *Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, the court considered the strong stance the General Assembly had taken against sexual offenses involving minors, evidenced by the number of statutes criminalizing such behaviors, and the fact that the General Assembly added a knowledge requirement for some acts and not for the act at issue before concluding that the General Assembly had plainly indicated an intent to impose strict criminal liability for the offense at issue. *Id.* at ¶ 30. However, in *State v. Collins*, 89 Ohio St.3d 524, 733 N.E.2d 1118, the Ohio Supreme Court held that: “It is not enough that the General Assembly in fact intended imposition of liability without proof of mental culpability. Rather the General Assembly must plainly indicate that intention in the language of the statute.” *Id.* at 530. However, we believe that there may be indications outside the specific statute at issue which support a finding that the statutory language reflects an intention to impose strict liability.

{¶ 14} Both the Twelfth District in *State v. Hull*, 133 Ohio App.3d 401, 728 N.E.2d 414 (12th Dist.1999) and the Ninth District in *State v. Worrell*, 9th Dist. Nos. 23378 and 23409, 2007-Ohio-7058, reviewed this illegal voting statute. Both courts found that strict liability can be imposed for criminal conduct that protects the general welfare. Therefore, both courts held the General Assembly intended to impose strict liability for illegal voting because it protects the general welfare by punishing people who vote improperly. *Hull* at 408, and *Worrell* at ¶ 13. While the *Worrell* court cited to *Workman*, 126 Ohio App.3d 422, 710 N.E.2d 744, the ultimate holding in the *Worrell* case was not based upon the holding in the *Workman* case.

{¶ 15} Therefore, we find that the trial court did not err in finding that R.C. 3599.12(A)(2) is a strict liability offense. Consequently, evidence of why appellant voted twice in an election is irrelevant (pursuant to Evid.R. 401), and the court properly granted the motion in limine (Evid.R. 402). Appellant's sole assignment of error is not well-taken.

{¶ 16} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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