

[Cite as *State v. Stewart*, 2017-Ohio-2993.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 105154

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**SHERMAN STEWART**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-15-599213-B

**BEFORE:** Stewart, J., E.A. Gallagher, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** May 25, 2017

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Sherman Stewart pleaded guilty to one count of having a weapon while under disability in violation of R.C. 2923.13(A)(2) as charged. In a separate case, Stewart pleaded guilty to an amended count of robbery in violation of R.C. 2911.02(A)(1), a second-degree felony, with a one-year firearm specification. The convictions in both cases arose from a single incident wherein Stewart and two others, armed with handguns, robbed a deli. Stewart’s weapon disability conviction, the only subject of this appeal, was predicated on a prior delinquency adjudication where he had committed acts that, if committed by an adult, would constitute the offense of robbery, an offense of violence. In this appeal, Stewart argues that the weapon disability statute, R.C. 2923.13(A)(2), violates his due process rights because it permits a juvenile adjudication to “create the basis for an adult offense.” We affirm Stewart’s conviction.

{¶2} We first note that Stewart did not object to, or otherwise challenge, the application of the statute at the trial court. Because of this, the state argues that Stewart waived the constitutional challenge he now presents by having pleaded guilty to the offense.

{¶3} Stewart claims that he could not challenge the application of R.C. 2923.13 in the trial court because the Ohio Supreme Court case he relies on for reversal here, *State v. Hand*, Slip Opinion No. 2016-Ohio-5504, had not been decided when he was convicted. This argument is unpersuasive for several reasons.

{¶4} Waiver is “[t]he voluntary relinquishment — express or implied — of a legal right or advantage.” *Black’s Law Dictionary* 1813 (10th Ed.2014). Fundamentally, “waiver is the intentional relinquishment or abandonment of a known right.” *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). When represented by competent counsel, a defendant “waives all nonjurisdictional defects in prior stages of the proceedings.” *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 19, quoting *Ross v. Common Pleas Court*, 30 Ohio St.2d 323, 285 N.E.2d 25 (1972). See also *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 92, ¶ 78.

{¶5} Although *Hand* had not yet been decided when Stewart was convicted, there is nothing that prevented Stewart from challenging the constitutionality of the statute at the trial court (similar to what the defendant did in *Hand* by pleading no contest and making a constitutional challenge). An issue similar to the one in this case is the mandatory bindover statute and whether an accused waives the right to challenge the constitutionality of the statute by pleading guilty. Although courts are divided on the issue, see *State v. Legg*, 2016-Ohio-801, 63 N.E.3d 424 (4th Dist.), our district has consistently held that a guilty plea to a felony conviction waives the right to challenge the mandatory bindover statute on appeal. *State v. Carter*, 8th Dist. Cuyahoga No. 101810, 2015-Ohio-1834, ¶ 53 (concluding that defendant's guilty plea waived constitutional challenge to mandatory bindover statutes); *State v. Mays*, 2014-Ohio-3815, 18 N.E.3d 850, ¶ 43 (8th Dist.). There is no practical difference between the mandatory bindover cases and this case challenging the use of a juvenile adjudication to create a weapon disability. Stewart has, therefore, waived his right to challenge the constitutionality of R.C. 2923.13.

{¶6} Even if Stewart had not waived his right to challenge the statute, *Hand* does not apply to the statute at issue here: it did not hold that a juvenile delinquency adjudication may not constitute an element of an offense. *Hand* addressed the narrow issue of whether a juvenile adjudication could be deemed a criminal conviction for the purpose of sentencing enhancements. *Hand*, Slip Opinion No. 2016-Ohio-5504, at ¶ 36-37.

{¶7} Stewart was convicted for having a weapon while under disability, in violation of R.C. 2923.13(A)(2), which makes it a crime for a person to knowingly have or carry a firearm if that person “has been convicted of any felony offense of violence or adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony of violence.” He argues for an extension of *Hand* — invalidating a statute that equated a prior juvenile adjudication with a prior criminal conviction for the purpose of enhancing the degree of, or punishment for, a subsequent adult offense — to also invalidate a statute that makes a prior delinquency adjudication an element of a crime. We note that other appellate districts that have addressed this issue have declined to do so. *See State v. Hudson*, 7th Dist. Mahoning No. 15MA0134, 2017-Ohio-645, ¶ 51 (no indication Supreme Court would extend *Hand* to R.C. 2923.13(A)(2)); *State v. Carnes*, 1st Dist. Hamilton No. C-150752, 2016-Ohio-8019, ¶ 14 (*Hand* limited to banning use of adjudication to enhance punishment).

{¶8} Judgment affirmed.

It is ordered that appellee recover of appellant 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.

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MELODY J. STEWART, JUDGE

EILEEN A. GALLAGHER, P.J., and  
LARRY A. JONES, SR., J., CONCUR