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IN THE SUPREME COURT OF FLORIDA

ALBERT J. HLAD, JR.,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 76,623

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The state for the first time in the case argues that the defendant did not preserve the issue of an uncounseled conviction for appellate review. This objection from the state comes to late and, if it had any merit, would be waived. Further, the issue was properly presented to the trial court at the first available opportunity, and, hence, was preserved. The correct constitutional analysis, which was utilized by the dissenting opinion below, precludes the use of any prior uncounseled convictions for enhancement of a subsequent offense, which enhancement would result in jail time.

ARGUMENT

A PRIOR UNCOUNSELED MISDEMEANOR CONVICTION MAY NOT CONSTITUTIONALLY BE USED TO ENHANCE A SUBSEQUENT OFFENSE AND PUNISHMENT.

The State claims for the first time in its answer brief on the merits that the defendant has failed to preserve this issue for appeal. It must be noted that the state failed to make this claim in the district court of appeal, and presents it for the first time in this Court in its answer brief. As a result, even if the waiver claim had any merit, it is now too late for the state to complain. Its waiver claim has been waived. Smith v. Estelle, 602 F.2d 709, 708 n.19 (5th Cir. 1979), approved in Estelle v. Smith, 451 U.S. 454, 468 n. 12 (1981).

Secondly, the record shows that the defendant entered his plea during a jury trial in which the trial court indicated that it believed the defendant's testimony to be perjurious. (R 297, 350) When the defendant entered his plea to the charge, he was asked by the court if he was aware that he had three prior convictions and that the offense was therefore a felony. (R 352-353) The defendant admitted that he did have three prior DUI convictions, but wished to speak to his attorney concerning the matter:

> THE COURT: Are you entering this plea because you did, in fact, commit this offense?
> THE DEFENDANT: I was driving under the influence, but I don't feel --
> THE COURT: (Interposing) That's what you are charged with.

THE DEFENDANT: Not to the point where I was impaired.
THE COURT: Well, then why are you entering a plea of guilty?
THE DEFENDANT: I was on Antabuse.
MR. BURKE [defense counsel]: He believes it's in his best interests, in light of the evidence presented.
THE COURT: Do you feel it's in your best interests?
THE DEFENDANT: Yes, sir.

* * *

MS. HELLER [prosecutor]: Can we make one thing clear? That he is pleading to the D.U.I. with three prior D.U.I.'s.
THE COURT: Your having had three prior convictions, do you understand that, and that's what you are pleading guilty to?
MR. BURKE: He realizes it is a felony, yes.
THE COURT: Let me ask him the question. Do you understand that you are pleading guilty to driving while under the influence, after having had three prior convictions? Do you understand that, and is that what you are pleading to?
THE DEFENDANT: Well, I had prior convictions. Yes, sir.
THE COURT: That was a simple question, sir. Are you pleading having had three prior convictions?
THE DEFENDANT: Yes, sir.
THE COURT: And that's what you intend to do?
THE DEFENDANT: Could I talk to my attorney for just one second?
THE COURT: We can go ahead and resume the trial, if you would like.
MR. BURKE: Make it quick. What's the question?
THE DEFENDANT: Never mind. Go ahead.

(R 351-354) After the plea, private counsel was substituted for the Public Defender and the defendant sought to withdraw the plea and strike one of the prior convictions. (R 303-317) Thus, it is

clear that the defendant admitted only that he had three convictions, not that they were valid. He sought at the plea hearing to discuss the matter with his counsel, but met with hostility and resistance. Upon having an opportunity to discuss this matter with an attorney, the defendant did object to the prior conviction. The matter was presented to the trial court, which ruled on the merits of the claim. The district court of appeal also ruled on the merits of the claim.

At the hearing on the motion to strike a prior conviction, the defendant testified that he did not have counsel when he went to court and entered a plea and was not advised that an attorney could be appointed for him. (R 253-254) After the defendant disputed the legality of the conviction, it was then incumbent upon the state to produce evidence refuting the defendant's claim. See Eutsey v. State, 383 So.2d 219, 225 (Fla. 1980); Beach v. State, 564 So.2d 614 (Fla. 1st DCA 1990); State v. Troehler, 546 So.2d 109 (Fla. 4th DCA 1989). Furthermore, as noted by Judge Cowart's dissenting opinion, the trial court did not reject the defendant's testimony as being unworthy of credit. Hlad v. State, 565 So.2d 762, 778 (Fla. 5th DCA 1990) (Cowart, J., dissenting). Contrary to the state's claim, the defendant has met his burden here; the state, however, has failed to meet its burden in light of the defendant's assertion.

The state next argues that the Doctrine of Laches precludes the defendant from making the claim herein. The majority opinion did not rely on this doctrine in reaching the

issue herein. Moreover, Judge Cowart's dissenting opinion ably demonstrates that such doctrine in inapplicable here where it is the state, and not the defendant asserting the claim, where the constitutional violation of the denial of right to counsel is a current one (where the uncounseled conviction is being denied anew), and where the state was responsible for the destruction of the records. Hlad v. State, supra at 778-783 (Cowart, J., dissenting). Counsel for the petitioner cannot improve on Judge Cowart's well-reasoned opinion and hence adopts it as his argument herein.

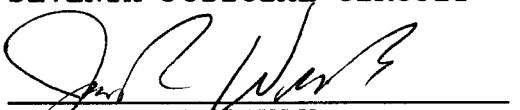
An uncounseled misdemeanor conviction, even if it, itself, did not result in jail time, cannot be used to enhance a subsequent offense and thus directly contribute to increased incarceration. A state rule of judicial administration allowing for the destruction of misdemeanor records after five years cannot be used by the state as a sword to eviscerate the defendant's constitutional rights. This Court must preserve the vitality of the right to counsel as guaranteed by the Florida and federal constitutions by vacating the majority opinion of the fifth district in the instant case and striking the prior uncounseled conviction for enhancement purposes.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the petitioner requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, adopt the dissenting opinion therein, and remand with instructions to vacate the felony DUI conviction and reduce it to a misdemeanor.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal, and mailed to Albert J. Hlad, Jr., #V-07959, Orange County Jail, P.O. Box 4970, Orlando, Florida 32802, this 4th day of March, 1991.

JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER