IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 85,202

DAVID ALLEN SNYDER,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On February 7, 1991, Respondent was adjudicated guilty and sentenced as an adult for grand theft. He was placed on probation. On March 6, 1991, Respondent violated probation and was sentenced to 3 and 1/2 years incarceration. On March 26, 1991, Respondent appealed this sentence. (R. 51). While the appeal was pending, Respondent was arrested on April 8, 1992, for firing a Colt AR-15 rifle in his backyard. (R. 35-39). On April 17, 1992, the Second District Court of Appeal affirmed Respondent's 1991 conviction and treatment as an adult, and remanded his case for correction of certain sentencing problems. (R. 51-52).

On July 23, 1992, the State filed its Information charging Respondent with Possession of a Firearm by a Convicted Felon, a violation of Section 790.23, Fla. Stat. (1991). On October 16, 1992, Respondent filed a Motion to Dismiss. (R. 76). On October 21, 1992, the State filed its Traverse in response to Respondent's Motion to Dismiss and a hearing was held on Respondent's motion. (R. 4, 78). The trial court denied Respondent's motion. (R. 14).

On December 16, 1992, a bench trial was held and Respondent was adjudicated guilty. (R. 16, 64). On February 15, 1993, Respondent was sentenced to 3 and 1/2 years incarceration. (R. 69). On February 18, 1993, Respondent filed his notice of

appeal in the Second District. (R. 92). On January 27, 1995, the Second District reversed Respondent's conviction and remanded with instructions that Respondent be discharged. Snyder v. State, 20 Fla. L. Weekly D274 (Fla. 2d DCA January 27, 1995). The Second District certified conflict with Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988).

The State filed a Notice to Invoke Discretionary Jurisdiction. This Court postponed the decision on jurisdiction and set a briefing schedule.

SUMMARY OF THE ARGUMENT

It was not the intent of the legislature to allow convicted felons to possess firearms while their appeals were pending. Thus, the Second District's reliance on Wheeler v. State, infra, is misplaced. It appears that every court, both Florida and out-of-state, that has considered this issue has held that conviction means adjudication of guilt regardless of whether the conviction is pending on appeal.

ARGUMENT

ISSUE

WHETHER A PERSON CAN BE CHARGED AS A FELON IN POSSESSION OF A FIREARM WHILE THE PREDICATE FELONY IS ON APPEAL.

Petitioner asserts that the Second District Court of Appeal incorrectly reversed the trial court's finding that Respondent was a convicted felon for purposes of this offense from the moment of adjudication. The Second District relied on Wheeler v. State, 465 So. 2d 639 (Fla. 2d DCA 1985) in its opinion. However, Wheeler is inconsistent with legislative intent and the Second District concedes that the majority of courts, both Florida and out-of-state, support the holding in Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988). (A-1, p. 3). Based upon Burkett, the state asserts that the Second District's reliance on Wheeler is misplaced.

Pursuant to Section 790.23, Fla. Stat. (1991), a convicted felon is prohibited from possessing a firearm. In Burkett, the First District held that "a defendant is 'convicted', for purposes of that statute, when he is adjudicated guilty in the trial court, notwithstanding the fact that he has the right to contest the validity of the conviction by appeal or by other procedures." Id. at 1366. The First District reasoned, as follows:

> Our conclusion is based upon the presumptive correctness of a criminal conviction which allows it to be relied on for the essentially regulatory purpose of prohibiting convicted felons

> from possessing firearms, and the fact that a pending appeal of the predicate conviction is irrelevant to the legislative purpose of protecting the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities.

Burkett, 518 So. 2d at 1366.

It appears that every court that has considered this issue, both in-state and out-of-state, has held that a defendant may be convicted of possession of a firearm by a convicted felon, even where the underlying conviction was pending on appeal.[1] See Burkett, 518 So. 2d 1366-1368, fn. 10; Compare State v. Lobendahn, 784 P. 2d 872 (Haw. 1989)(Hawaii statute provides that no person under indictment for a felony may possess a firearm); See also Castillo v. State, 590 So. 2d 458 (Fla. 3d DCA 1991)(In regards to Section 790.23, Fla. Stat., the Third District construed "conviction" to mean adjudication of guilt); Weathers v. State, 56 So. 2d 536 (Fla. 1952)(provides a definition of "conviction", to wit: "one is convicted when the jury returns a verdict of guilty and the judge clinches the finding by adjudicating the guilt though the prisoner may never be punished...[t]he finding by jury and adjudication by court settle the fact of guilt...").

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[1] This Court should also note that in the instant case Respondent appealed his sentence, not his conviction, which further distinguishes this case from Wheeler. See Snyder v. State, 597 So. 2d 384 (Fla. 2d DCA 1992).

The Second District raises two erroneous reasons for its refusal to recede from Wheeler. The Second District reasoned that the trial court did not make adequate findings to treat Respondent as an adult. The court stated, as follows:

> If the appeal had been resolved at a later time, we would have been forced to vacate the adult treatment of this offense. See Sirmons v. State, 620 So. 2d 1249 (Fla. 1993). This is noteworthy because an adjudication in a juvenile delinquency proceeding cannot be used to support a charge of felon in possession of a firearm.

(A-1, pp. 2-3).

The State asserts that since the appeal was not resolved at a later time, the Sirmons case has no bearing in the instant case. Further, even if the Sirmons case did apply, the legislature has amended Section 790.23, Fla. Stat. in its 1994 Supplement to Florida Statutes 1993 to include delinquents. The pertinent portion is, as follows:

> (1) It is unlawful for any person to own or to have in his care, custody, possession, or control a firearm...if that person has been:
>
> (a) convicted of a felony or **found to have committed a delinquent act that would be a felony if committed by an adult in the courts of this state;**

Section 790.23, Fla. Stat. (1994 supp.)(emphasis added).

If the appeal had been raised at a later time, this supplement would also apply. Thus, based on this supplement, an

adjudication in a juvenile delinquency proceeding can be used to support a charge of felon in possession of a firearm.

The Second District further reasons that it is "troubled with the First District's reasoning because it could sometimes require a defendant to be incarcerated for a firearms offense before the successful conclusion of an appeal of the underlying offense." (A-1, p. 4). With all due respect to the Second District, this argument is without merit. Persons who are not even convicted of any offense and cannot post or make bail are frequently jailed until they receive a hearing or trial, and, once convicted, many defendants await the successful conclusion of an appeal while incarcerated.

Further, convictions for firearm possession have been held valid even though the predicate conviction was subsequently reversed on appeal. Lewis v. United States, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980); United States v. Bruscantini, 761 F. 2d 640 (11th Cir.), cert. den., Bruscantini v. United States, 474 U.S. 904, 106 S.Ct. 271, 88 L.Ed.2d 233 (1985); United States v. MacGregor, 617 F. 2d 348 (3d Cir. 1980); State v. Williams, 392 So. 2d 448 (La. 1980).

The reasoning set forth by the Second District in its opinion is inconsistent with what the legislature intended. As stated by the First District in Burkett:

> ...the holding in Wheeler is incorrect and may, if left unchallenged, mislead members of the bench and bar, as well as

> members of the general public, into thinking that the Florida Legislature intended to allow convicted felons to possess firearms during the pendency of their appeals or other petitions for post-conviction relief.

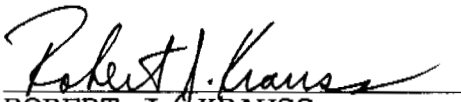
Burkett, 518 So. 2d at 1368.

CONCLUSION

Based on the foregoing reasons, arguments and citations of authority, the Petitioner respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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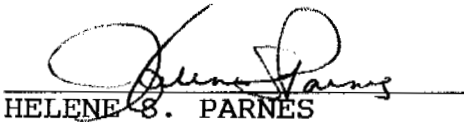

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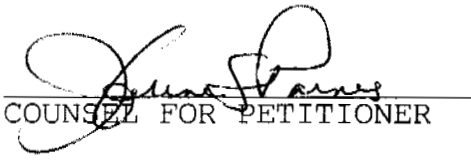
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. mail to Gary Gossett, Jr., Esquire, 1755 U.S. 27 South, Sebring, Florida 33870, this 21st day of March, 1995.



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APPENDIX

A-1.....Second District Court of Appeal Opinion, filed January 27, 1995, Case No. 93-00618

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DAVID ALLEN SNYDER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 93-00618

Opinion filed January 27, 1995.

Appeal from the Circuit Court for Highlands County; J. Dale Durrance, Judge.

Gary R. Gossett, Jr., Sebring, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Helene S. Parnes, Assistant Attorney General, Tampa, for Appellee.

ALTENBERND, Acting Chief Judge.

David Allen Snyder appeals his conviction for felon in possession of a firearm.[1] We reverse. This case is controlled

[1] § 790.23, Fla. Stat. (1991).

by our opinion in Wheeler v. State, 465 So. 2d 639 (Fla. 2d DCA 1985). We certify conflict with Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988).

In February 1991, Mr. Snyder was sentenced as an adult for grand theft. A few days after his initial sentencing hearing, he violated probation and was sentenced to 3½ years' imprisonment. This sentence was apparently stayed pending appeal.

While the appeal was pending, Mr. Snyder was arrested on April 8, 1992, for firing a Colt AR-15 rifle in his backyard. Nine days after the shooting incident, this court affirmed Mr. Snyder's 1991 conviction and treatment as an adult, and remanded his case for correction of certain sentencing problems. Snyder v. State, 597 So. 2d 384 (Fla. 2d DCA 1992).

In Wheeler, this court held that a person could not be charged as a felon in possession of a firearm while the predicate felony was pending on appeal. In Mr. Snyder's case, the trial court tried to distinguish Wheeler because Mr. Snyder had pleaded nolo contendere and had limited issues available for appeal. We conclude that this difference is not sufficient to distinguish this case from Wheeler.

The fact that Mr. Snyder pleaded nolo contendere did not assure that his conviction would be affirmed on appeal. Indeed, the trial court did not make adequate findings to treat Mr. Snyder as an adult. In our earlier opinion, we affirmed Mr. Snyder's conviction based on Davis v. State, 528 So. 2d 521 (Fla. 2d DCA), review denied, 536 So. 2d 243 (Fla. 1988). If the appeal had been resolved at a later time, we would have been forced

to vacate the adult treatment of this offense. See Sirmons v. State, 620 So. 2d 1249 (Fla. 1993). This is noteworthy because an adjudication in a juvenile delinquency proceeding cannot be used to support a charge of felon in possession of a firearm. J.B.M. v. State, 560 So. 2d 347 (Fla. 5th DCA 1990).

In Burkett, the First District's majority opinion expressed strong disagreement with Wheeler. That court acknowledged conflict with Wheeler, even though it recognized that Burkett was arguably distinguishable because the defendant's conviction in Burkett had been affirmed a few days prior to his offense. The rule announced in Burkett makes a person a "felon" for purposes of this offense from the moment of adjudication without regard to an appeal. Thus, our holding today directly conflicts with the holding in Burkett.[2]

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[2] Other courts have considered whether a person can be charged with felon in possession of a firearm while the predicate felony is on appeal. See Berg v. State, 711 P.2d 553 (Alaska Ct. App. 1985); State v. Bailey, 461 So. 2d 336 (La. Ct. App. 1984). See also Reynolds v. State, 18 Ark.App. 193, 712 S.W.2d 329 (Ark. Ct. App. 1986) (state law prohibits felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds). Recent federal cases in Florida have followed the reasoning of Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988), in the context of whether a withheld adjudication can serve as the underlying "conviction" for the federal counterpart to section 790.23. See United States v. Gispert, 8 Fla. L. Weekly Fed. D388 (S.D. Fla. Feb. 17, 1994); United States v. Lester, 785 F.Supp. 976 (S.D. Fla. 1991); United States v. Thompson, 756 F.Supp. 1492 (N.D. Fla. 1991). In Lewis v. United States, 445 U.S. 55 n.5, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), the Supreme Court noted in dicta that the federal counterpart would apply while the predicate felony was pending on appeal.

There is perhaps merit to both sides of this argument. We are not convinced, however, that we should encourage our colleagues to recede from Wheeler. We are troubled with the First District's reasoning because it could sometimes require a defendant to be incarcerated for a firearms offense before the successful conclusion of an appeal of the underlying offense.[3] See § 903.132, Fla. Stat. (1993) (no bail pending appeal for defendants with prior felony convictions). Moreover, in this case, if Mr. Snyder is presumed to know the law, he is presumed to have understood that, pursuant to Wheeler, he could lawfully possess a firearm pending review of his case in the Second District.

Reversed and remanded with instructions that the defendant be discharged.

BLUE and FULMER, JJ., Concur.

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[3] On the other hand, the analysis in Wheeler v. State, 465 So. 2d 639 (Fla. 2d DCA 1985), allows a sentenced felon to carry a firearm while his or her appeal is pending. For defendants who are on probation with a pending appeal, the Wheeler rule makes the firearms condition of probation a reasonable condition. Cf. Pagan v. State, 637 So.2d 959 (Fla. 2d DCA 1994) (defendant's special probation condition allowing him to possess firearm with probation officer's permission stricken).