The Supreme Court of Florida

CASE NO. 86,493

THE STATE OF FLORIDA,

Petitioner,

v.

JOSEPH J. HALL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION
OF THE DISTRICT COURT OF APPEAL
OF THE FIRST DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The Supreme Court of Florida

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_____/

PRELIMINARY STATEMENT

Respondent, JOSEPH J. HALL, was the defendant in the trial court and appellant before the District Court of Appeal, First District, 1st DCA Case No. 94-4140. He will be referred to in this brief as "respondent," "defendant," or by his proper name. The State of Florida was the plaintiff in the trial court and the appellee before the District Court of Appeal, First District, and is the petitioner in the present proceedings. It will be referred to here as "petitioner," or the "state."

Citations in this brief to designate record references are as follows:

Petitioner's jurisdictional brief will be cited as "JB ". Filed with this brief is an appendix containing a copy of the decision on which discretionary review is sought, ***Hall v. State***, 20 Fla. L. Weekly D2152 (Fla. 1st DCA September 18, 1995). Reference to the appendix will be "A." All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained.

STATEMENT OF THE CASE AND THE FACTS

Respondent will accept, for the purpose of briefing of the jurisdictional issue, the statement of the case and facts presented by the petitioner.

SUMMARY OF ARGUMENT

Respondent acknowledges that this Court would appear to have discretionary jurisdiction to exercise under article V, section 3(b)(3), Fla. Const., in view of its decision in *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), and its progeny.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IN *HALL v. STATE*, 20 FLA. L. WEEKLY D2152 (FLA. 1st DCA SEPTEMBER 18, 1995), DOES NOT EXPRESSLY AND DIRECTLY CONFLICT ON THE SAME QUESTION OF LAW WITH *BARBER v. STATE*, 413 SO. 2d 482 (FLA. 2d DCA 1982). HOWEVER, THIS COURT MAY HAVE DISCRETIONARY JURISIDICTION TO EXERCISE UNDER *JOLLIE v. STATE*, 405 SO. 2d 418 (FLA. 1981).

Petitioner asserted in its Notice to Invoke Discretionary Jurisdiction that the decision in the instant case, *Hall v. State*, 20 Fla. L. Weekly D2152 (Fla. 1st DCA September 18, 1995), expressly and directly "conflicts" on the same question of law with *Barber v. State*, 413 So. 2d 482 (Fla. 2d DCA 1982), thereby conferring jurisdiction in this Court pursuant to Article V, section 3(b)(3), Fla. Const. *See also* Fla. R. App. P. 9.030(a)(2)(A)(iii) and (iv). Petitioner neither raises nor argues this contention in its Brief on Jurisdiction. Given that, respondent will offer no argument on whether *Hall* and *Barber* expressly and directly conflict on the same question of law except to say briefly that *Barber* and *Hall* do not conflict as each addressed different questions of law.

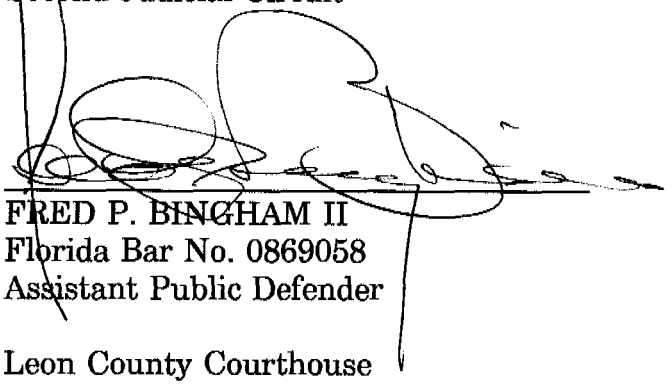
The First District opinion expressly relied upon *Peterson v. State*, 651 So. 2d 781 (Fla. 4th DCA), *review granted*, Case No. 85,583 (Fla. June 29, 1995). [*See* A. 1]. Under these circumstances, this Court would appear to have discretionary jurisdiction to exercise under article V, section 3(b)(3), Fla. Const., in view of its decision in *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), and its progeny. *See*, e.g., *A.A. v. State*, 646 So. 2d 194 (Fla. 1994); *H.H. v. State*, 646 So. 2d 194 (Fla. 1994); *Reed v. State*, 649 So. 227 (Fla. 1995).

CONCLUSION

Respondent, JOSEPH J. HALL, based on the foregoing, respectfully acknowledges that the Court has discretionary jurisdiction to exercise and may accept this case for review should it choose to do so.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit



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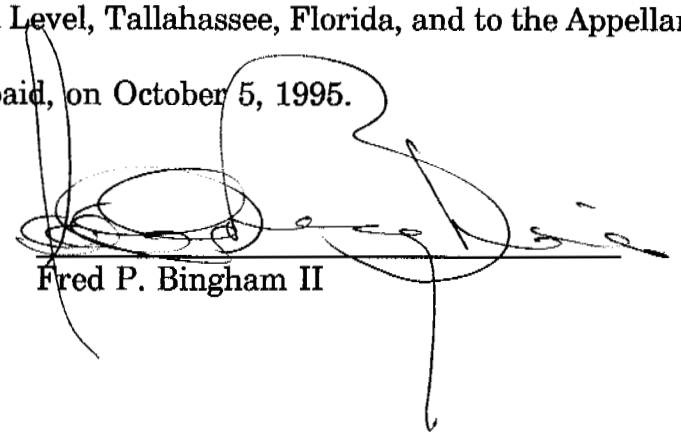
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to counsel for petitioner: Sonya Roebuck Horbelt, Esq., Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on October 5, 1995.



Fred P. Bingham II

The Supreme Court of Florida

NO. 86,493

THE STATE OF FLORIDA,

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v.

JOSEPH J. HALL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION
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APPENDIX

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INDEX

Criminal law—Sentencing—Guidelines—Where three convictions scored under "prior record" for purposes of computing scoresheet were pending on direct appeal at time of sentencing, sentences are vacated and remanded for resentencing using recalculated scoresheet which omits those three convictions

JOSEPH J. HALL, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-4140. Opinion filed September 18, 1995. An appeal from the Circuit Court for Holmes County. Russell A. Cole, Judge. Counsel: Nancy A. Daniels, Public Defender; Fred Parker Bingham II, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Sonya Roebuck Horbelt, Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) In this direct criminal appeal, appellant challenges both his convictions and his sentences. We conclude that the challenge to the convictions lacks merit. Accordingly, we affirm the convictions without further discussion. However, because it appears from the face of the record that three convictions scored under "prior record" for purposes of computing the guidelines scoresheet were pending before this court on direct appeal at the time of sentencing, we vacate appellant's sentences and remand to the trial court for resentencing using a recalculated scoresheet which omits those three convictions. *See Peterson v. State*, 651 So. 2d 781 (Fla. 4th DCA), *review granted*, Case No. 85,583 (Fla. June 29, 1995).

CONVICTIONS AFFIRMED; SENTENCES VACATED; and CASE REMANDED, with directions. (WOLF, WEBSTER and VAN NORTWICK, JJ., CONCUR.)

* * *

Criminal law—Sentencing—Fifteen-year sentence for burglary of occupied dwelling with intent to commit assault exceeded statutory maximum for third-degree felony

JAMES R. PEARSON, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 95-104. Opinion filed September 18, 1995. An appeal from the Circuit Court for Bradford County. Maurice Giunta, Judge. Counsel: Appellant pro se. Robert A. Butterworth, Attorney General; Thomas Crapps, Assistant Attorney General, Tallahassee

(PER CURIAM.) In *Pearson v. State*, 410 So. 2d 598 (Fla. 1st DCA 1982), this court held that Pearson's thirty-year sentence for attempted burglary of an occupied dwelling with intent to commit assault exceeded the statutory maximum for that crime. Pearson now alleges, by way of a motion to correct illegal sentence, that the fifteen-year sentence for that crime which the trial court imposed on resentencing still exceeds the statutory maximum. We agree.

Attempted burglary of an occupied dwelling with intent to commit assault is a third-degree felony. § 810.02(3), § 777.04(4)(c), Fla. Stat. (1979). The maximum sentence for a third-degree felony is five years. Accordingly, we reverse the trial court's denial of Pearson's Rule 3.800 motion, vacate his illegal sentence, and direct the trial court to impose a legal sentence. (MICKLE, BENTON, and VAN NORTWICK, JJ., CONCUR.)

* * *

Criminal law—Costs—Error to impose costs and fees on per count basis instead of imposing costs as to entire case—Assessment of $1 a month to First Step was not statutorily authorized

JACQUES H. RENAUD, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 94-2115. Opinion filed September 18, 1995. An appeal from the Circuit Court for Bay County. Clinton Foster, Judge. Counsel: Nancy A. Daniels, Public Defender; Terry Carley, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General; Patrick Martin, Assistant Attorney General, Tallahassee, for appellee.

(PER CURIAM.) Appellant raises a number of issues on appeal, only two of which demonstrate reversible error. The first is that the trial court erred by imposing costs and fees on a per count basis instead of imposing costs as to the entire case. *Hunter v. State*, 651 So. 2d 1258 (Fla. 1st DCA 1995). The trial court also erred by ordering appellant to pay $1.00 a month to First Step, Inc. where said fee was not statutorily authorized. *See Metz v. State*, 650 So. 2d 248 (Fla. 1st DCA 1995).

We, therefore, remand with directions to strike the duplicative costs as well as the unauthorized fee. (WOLF, WEBSTER and VAN NORTWICK, JJ., concur.)

* * *

Civil procedure—Plaintiffs' claims did not constitute compulsory counterclaims that should have been asserted in earlier mortgage foreclosure action by defendant—Summary judgment for defendant reversed and remanded

JOSEPH T. SMITH and BIG CHIEF MOTORS, INC., Appellants, v. CAPITAL CITY SECOND NATIONAL BANK, Member of Capital City Bank Group, Appellee. 1st District. Case No. 94-3817. Opinion filed September 18, 1995. An appeal from the Circuit Court for Leon County. F. E. Steinmeyer, III, Judge. Counsel: Robert A. Rand of Rand and Walker, Tallahassee, for Appellants. William M. Smith of Macfarlane Ausley Ferguson & McMullen, Tallahassee, for Appellee.

(PER CURIAM.) Appellants seek review of a summary final judgment entered in a civil damage action. The summary judgment was based upon the ground that appellants' claims should have been presented as compulsory counterclaims to an earlier mortgage foreclosure action brought by appellee. We conclude that the claims asserted by appellants were not compulsory counterclaims to the earlier mortgage foreclosure action under the test adopted in *Londono v. Turkey Creek, Inc.*, 609 So. 2d 14 (Fla. 1992). Accordingly, we reverse, and remand for further proceedings.

REVERSED and REMANDED, with directions. (WOLF, WEBSTER and VAN NORTWICK, JJ., CONCUR.)

* * *

Workers' compensation—Resolution of conflict between opinions of examining and treating doctors is within fact-finding authority of judge of compensation claims

JOSIE WILSON, Appellant, v. SCHOOL BOARD OF PALM BEACH COUNTY and SEDGWICK JAMES OF FLORIDA, Appellees. 1st District. Case No. 94-2463. Opinion filed September 18, 1995. An appeal from Order of the Judge of Compensation Claims. Steven Cullen, Judge. Counsel: Jane-Robin Wender and Laurence F. Leavy of Laurence F. Leavy, P.A., Ft. Lauderdale, for Appellant. Kennie L. Edwards of Danielson, Clarke, Pumpian & Ford, P.A., West Palm Beach, for Appellees.

(PER CURIAM.) The claimant appeals a workers' compensation order by which the judge denied certain claims, relying on the opinions of two examining doctors. While two treating doctors rendered contrary opinions, and all of these doctors testified by deposition, the resolution of such conflict is within the fact-finding authority of the judge of compensation claims. *Johnson v. Martin Paving*, 20 Fla. L. Weekly D953 (Fla. 1st DCA April 11, 1995); *Florida Mining & Materials v. Mobley*, 649 So. 2d 934 (Fla. 1st DCA 1995). This court will not retry the case on appeal, and will defer to permissible interpretations of the deposition testimony and inferences derived therefrom. *Johnson*. Because such review reveals competent substantial evidence to support the challenged ruling, the appealed order is affirmed. (ALLEN and DAVIS, JJ., and SHIVERS, SENIOR JUDGE, CONCUR.)

* * *

has jurisdiction in the guardianship proceeding as well.[1] It is not too late to bring the guardians before the court and determine whether the division of the Texaco stock met the requirements of the guardianship statutes and can be confirmed as proper.

Accordingly, we reverse with directions that the trial judge examine the matter of confirming the transaction giving rise to the dispute before us. We suggest that the guardianship proceeding pertaining to Mrs. Bentley simply be consolidated with the present action for purposes of expediency. Summary judgment was improper on the state of the record before us.

REVERSED AND REMANDED for further proceedings consistent with this opinion.

HOBSON, A. C. J., and CAMPBELL, J., concur.

Anthony BARBER, Appellant,

v.

STATE of Florida, Appellee.

No. 81-1215.

District Court of Appeal of Florida, Second District.

May 7, 1982.

Defendant was convicted in the Circuit Court, Pinellas County, Robert E. Beach, J., of second-degree robbery, and he appealed. The District Court of Appeal, Grimes, Acting C. J., held that jury verdict of guilty without adjudication of guilt constituted conviction for purposes of impeachment.

Affirmed.

1. Witnesses ⇐345(4)

A jury verdict of guilty without adjudication of guilt constituted a conviction for purposes of impeachment. West's F.S.A. § 90.610; F.S.1977, § 90.08.

2. Witnesses ⇐360

If a witness has been impeached by evidence that he has previously suffered an adverse verdict of guilt, evidence will be admissible to show that no adjudication has been made.

Jerry Hill, Public Defender, Bartow, and Eula Tuttle Mason, Asst. Public Defender, St. Petersburg, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

GRIMES, Acting Chief Judge.

[1] In this case we must decide whether a jury verdict of guilty without an adjudication of guilt constitutes a conviction for purposes of impeachment.

During his trial for second degree robbery, appellant, under advice of counsel, testified on direct examination that he had no prior convictions. However, one week earlier another jury had returned a guilty verdict against him in a felony case although the court had not yet adjudicated him guilty. Knowing this, the state attorney informed the court that he intended to use the jury verdict for impeachment purposes. Appellant's counsel objected, arguing that a jury verdict, absent adjudication by the court, could not be so used, but the lower court allowed the inquiry. Appellant then admitted the prior conviction. He was subsequently convicted as charged.

It has long been the rule in Florida that a witness may be impeached by evidence of his prior convictions. *E.g., Roberson v. State*, 40 Fla. 509, 24 So. 474 (1899); § 90.08, Fla.Stat. (1977), *repealed by* Ch.

1. Art. V, § 5, Fla.Const.; § 26.012, Fla.Stat. (1981). See the discussion of circuit court jurisdiction in *In Re Guardianship of Bentley*, 342 So.2d 1045 (Fla. 4th DCA 1977).

2

76–237, § 2, Laws of Fla. This has been codified in the Florida Evidence Code as section 90.610, Florida Statutes (1981), which reads:

> (1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment . . . .

Florida courts have dealt with the meaning of conviction in a variety of contexts,[1] but only one case even tangentially deals with the precise question posed by this appeal. In *Smith v. State*, 75 Fla. 468, 78 So. 530 (1918), the state had charged the defendant under a statute precluding the sale of intoxicating liquor in a dry county by a person "having been before convicted of the same offense." The court construed the word "convicted" to be equivalent to "adjudicated" and reversed the judgment of guilt because the information had only alleged that the defendant had previously pled guilty to a like offense. In support of its decision, the court quoted from 2 Words and Phrases, Convictions, which stated that a conviction as used to effect the credibility of a witness meant the judgment of a court. 75 Fla. at 474, 78 So. at 532.

Courts in other state jurisdictions have also interpreted the word conviction, with differing results.[2] However, certain decisions of the federal courts are more significant because they deal directly with what constitutes a prior conviction for purposes of impeachment.

In *United States v. Klein*, 560 F.2d 1236 (5th Cir. 1977), *cert. denied*, 434 U.S. 1073, 98 S.Ct. 1259, 55 L.Ed.2d 777 (1978), the court considered whether it was proper to impeach the defendant with evidence of a jury verdict of guilt which had been returned against him in another case earlier on the same day though no adjudication had yet taken place. The court observed that until the adoption of the Federal Rules of Evidence, the federal circuits were split on the issue with respect to the propriety of using prior convictions which were on appeal for purposes of impeachment. The court noted, however, that Federal Rule of Evidence 609 now specifically provided that the pendency of an appeal would not render evidence of a conviction inadmissible for impeachment, though evidence of the pendency of the appeal would also be admissible. The court then said:

> It follows that if a jury can comprehend that a prior conviction on appeal may be reversed, it can also comprehend that a jury verdict of guilty may be set

1. *State v. Gazda*, 257 So.2d 242 (Fla.1971) (conviction does not require adjudication by the court in context of a statute relating to limitation on withheld sentences); *Delta Truck Brokers v. King*, 142 So.2d 273 (Fla.1962) (conviction in the context of a statute preventing one from engaging in a brokerage business without a license means determination of guilt and judgment of court); *Weathers v. State*, 56 So.2d 536 (Fla.1952) (conviction of a principal means adjudication of guilty); *Ellis v. State*, 100 Fla. 27, 129 So. 106 (1930) (judgment of conviction in a misdemeanor case must contain an adjudication of guilty by the court); *Timmons v. State*, 97 Fla. 23, 119 So. 393 (1929) (when alleging prior convictions in an indictment, conviction must include adjudication by the court); *State ex rel. Owens v. Barnes*, 24 Fla. 153, 4 So. 560 (1888) (conviction may on occasion have different meanings depending upon the context in which it is used); *Accredited Sur. & Cas. Co. v. State*, 318 So.2d 554 (Fla. 1st DCA 1975) (conviction for purposes of the bail bond statute means adjudication of guilt and not a guilty plea).

2. *State v. Superior Court*, 51 Del. 178, 141 A.2d 468 (1958) (conviction construed in its technical legal sense); *State v. Ege*, 274 N.W.2d 350 (Iowa 1979) (conviction for purposes of impeachment does not include a deferred sentence and a successfully completed period of probation); *Forcier v. Hopkins*, 329 Mass. 668, 110 N.E.2d 126 (1953) (conviction means judgment that conclusively establishes guilt after a finding, verdict, or plea, but a suspended sentence does not affect the finality of the judgment); *Bubar v. Dizdar*, 240 Minn. 26, 60 N.W.2d 77 (1953) (conviction means either ascertainment of guilt prior to judgment and sentence or in its technical legal sense, judgment or sentence rendered pursuant to a verdict, confession or plea); *Jones v. Kelly*, 9 A.D.2d 395, 194 N.Y.S.2d 585 (1959) (no fixed significance attached to conviction; therefore courts may look for legislative intent).

3

aside upon a motion for judgment of acquittal, pursuant to Fed.R.Crim.P. 29(c), a motion for a new trial, pursuant to Fed. R.Crim.P. 33, or a motion in arrest of judgment, pursuant to Fed.R.Crim.P. 34. Thus, we can perceive no logical distinction, for purposes of impeachment, between a conviction on appeal and a jury verdict of guilty where judgment and sentence have not yet been entered, so long as the defendant has the opportunity to explain to the jury the legal status of the "conviction."

We hold only that a verdict of guilty where judgment and sentence have not been entered is admissible for impeachment purposes where it otherwise meets the requirements of Fed.R.Evid. 609. In so holding, we do not suggest that a guilty verdict is for all purposes the equivalent of a conviction or that a mere plea of guilty may in all cases be used for impeachment purposes.[3]

560 F.2d at 1240.

Other federal circuits have followed this interpretation of rule 609. *United States v. Smith*, 623 F.2d 627 (9th Cir. 1980); *United States v. Vanderbosch*, 610 F.2d 95 (2d Cir. 1979); *United States v. Duncan*, 598 F.2d 839 (4th Cir.), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979); *United States v. Rose*, 526 F.2d 745 (8th Cir. 1975), *cert. denied*, 425 U.S. 905, 96 S.Ct. 1497, 47 L.Ed.2d 755 (1976). While section 90.610 of the Florida Evidence Code is not the same as rule 609 in all particulars, that portion of the section now under consideration is identical with its federal counterpart. Because the federal interpretation is founded in logic, we choose to follow it. We believe that for purposes of impeachment, there is no significant difference in probative value between a jury's finding of guilt and the entry of a judgment thereon.

[2] One may reasonably suggest that an anomaly will occur if the court ultimately chooses to withhold adjudication and place appellant on probation for the crime of which the jury had previously found him guilty. Should this happen, appellant cannot thereafter be impeached by evidence concerning that crime. *United States v. Georgalis*, 631 F.2d 1199 (5th Cir. 1980). However, the result under those circumstances would be no different than if a witness's judgment of guilt was ultimately reversed on appeal. Until such time as the reversal occurs, evidence of his judgment of guilt may be admitted for impeachment, and the fact that an appeal is pending may also be shown. Likewise, if a witness has been impeached by evidence that he has previously suffered an adverse verdict of guilt, evidence will also be admissible to show that no adjudication has yet been made. *See United States v. Smith.*

The court did not err in permitting appellant to be impeached by his prior guilty verdict despite the absence of adjudication. Appellant's other point has no merit.

AFFIRMED.

RYDER and SCHOONOVER, JJ., concur.

AMERICAN AGRONOMICS CORPORATION, a Florida corporation, Appellant,

v.

Edward Otto VARNER, Appellee.

No. 82-1.

District Court of Appeal of Florida, Second District.

May 7, 1982.

Defendant corporation appealed from an order of the Circuit Court, Charlotte

3. The court noted in a footnote by way of contrast that often, as in *Smith v. State*, where a prior conviction is an essential element of the offense, there must be proof of a judgment and sentence in order to demonstrate a conviction.

4