IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. 86,532
(4TH DCA CASE NO. 94-2891)

STATE OF FLORIDA,

Petitioner,

vs.

ERIC ROY JOHNSON

Respondent.

****
ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S INITIAL BRIEF

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General
Chief, Criminal Law
West Palm Beach Bureau
Florida Bar # 339067

EDWARD L. GILES
Assistant Attorney General
Florida Bar No. 901954
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida
33401-2299
(407) 688-7759

Co-Counsel for Petitioner

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner, the State of Florida, certifies that the following persons and entities have or may have, an interest in the outcome of this case.

1. Eric Roy Johnson
   (Respondent/Appellant)

2. Bruce H. Colton, State Attorney, 19th Circuit
   by: Jeff Cosby, Assistant State Attorney, and
   Tom Bakkedahl, Assistant State Attorney

3. Robert A. Butterworth, Attorney General
   by: Edward Giles, Assistant Attorney General
   (Appellate Counsel)

4. The Honorable Dwight L. Geiger
   Circuit Judge, Martin County
   (Sentencing Judge)

5. E. Kent Mathews, Esquire
   (Attorney for Respondent/Defendant at sentencing)

6. Richard L. Jorandby, Public Defender, 15th Circuit
   by: Mallorye Cunningham, Assistant Public Defender
   (Appellate counsel for Respondent)

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Appellee below in the appended case of Eric Roy Johnson v. State, 20 Fla. L. Weekly D2158 (Fla. 4th DCA September 20, 1995), and will also be refered to as the "State". Respondent, Eric Roy Johnson, the defendant and appellant below, will also be referred to as "Respondent".

The symbol "A" will be used to refer to Exhibit A of Petitioner's Appendix, which is a conformed copy of the District Court's opinion. The symbol "B" will be used to refer to Exhibit B of Petitioner's Appendix, which is a conformed copy of Petitioner's Answer Brief filed in the Court below. All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was on probation as a result of a prior conviction in Circuit Court case number 92-752; wherein he was convicted in the Martin County Circuit Court of the charges of battery on a law enforcement officer. Respondent thereafter appealed to the Fourth District Court of Appeal, in and for the State of Florida, case number 93-1181. While this case was on appeal, Respondent was again arrested on June 10, 1993, in the instant case. An information was filed in the Martin County Circuit Court, case number 93-487. charging Respondent with Count I: possession of a firearm by a convicted felon; and Count II: possession of cocaine (R 31-32).

Respondent and his defense counsel were present at hearings on September 13, 1993 (R 45) and September 27, 1993 (R 46). At the latter date, Respondent and the State, Petitioner herein, entered into a plea agreement, by which Respondent would plead Nolo Contendere to Count I, the possession of a firearm by convicted felon charge, and Count II would be nolle prossed (R 47-53). Petitioner agreed to nolle prosse Count II, and Respondent was to receive on Count I a sentence of 8 months jail time, with credit for 134 days, followed by 3 years probation (R

54). Judgment was thereafter entered (R 55-56), and Respondent was sentenced on October 21, 1993 (R 57-65). The plea contained no reservation of a right to appeal.

On April 13, 1994, the Fourth District Court of Appeals reversed the underlying convictions for battery on a law enforcement officer in case no. 93-1181, Johnson v. State, 634 So. 2d 1144 (Fla. 4th DCA 1994). Respondent thereafter filed a motion to set aside the conviction for the possession of a firearm by a convicted felon on June 22, 1994 (R 72-73). After a hearing on Respondent's motion (R 2-14), the trial court entered its order denying Respondent's motion on July 21, 1994 (R 75-76). Respondent filed his notice of appeal to the Fourth District Court of Appeals on August 11, 1994 (R 77).

In his Initial Brief, Respondent alleged that the trial court erred in denying his motion to set aside his conviction for possession of a firearm by a convicted felon, because Respondent's underlying felony was not final until the appellate court issued its mandate. Respondent's Initial Brief to the Fourth District at page 3. In its Answer Brief, Petitioner alleged both a failure to reserve any right to appeal [waiver] in the plea agreement (B 9), and that § 790.23 Florida Statutes (1993), imposes a firearm disability until the felony conviction

is vacated or the felon is relieved of his disability by some affirmative action (B 7). Petitioner additionally argued that the statute does not contain the word "final" and that a defendant is a convicted felon for the purposes of that statute as soon as he is adjudicated guilty in the trial court, notwithstanding a right to appeal (B 7-8). The Fourth District thereafter reversed the conviction, but certified a conflict with the First District's opinion in Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988). Johnson v. State, 20 Fla. L. Weekly D2158 (Fla. 4th DCA September 20, 1995). This appeal follows.

SUMMARY OF ARGUMENT

The instant case, Johnson v. State, holds that a defendant is not "convicted" for purposes of § 790.23 Fla. Stat. (1993) [possession of a firearm by a convicted felon] where the convictions are on appeal at the time of sentencing for the subsequent offense. The State would contend, that the term "conviction" for purposes of possession of a firearm by a convicted felon means the adjudication of the trial court, notwithstanding the fact that a defendant has the right to contest the validity of the conviction by appeal or by other procedures

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT RESPONDENT WAS NOT A CONVICTED FELON UNDER § 790.23 FLORIDA STATUTES UNTIL SUCH TIME AS THE UNDERLYING FELONY WAS AFFIRMED ON APPEAL

The instant case, Johnson v. State, 20 Fla. L. Weekly D2158 (4th DCA September 20, 1995), holds that a defendant is not "convicted" for purposes of § 790.23 Fla. Stat. (1993) [possession of a firearm by a convicted felon] where the prior convictions are on appeal at the time of the instant offense.[1] While certifying a conflict with Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988), Johnson, 20 Fla. L. Weekly at D2159, the Fourth District went on to adopt the statutory interpretation of the Second District in Wheeler v. State, 465 So. 2d 639 (Fla. 2d DCA 1985). Petitioner's position is that Burkett is the correct statutory interpretation, and that the decision of the Fourth District should be reversed.

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[1] The plea agreement in the instant case contained no reservation of a right to appeal, and it was not until subsequent to the reversal on appeal of the underlying Battery charges that Respondent filed his Motion to Set Aside conviction.

In reaching its opinion in the instant case, the District Court applied the rule of lenity rejected by the majority in Lewis v. United States, 445 U.S. 55,100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), and in Burkett, supra, to argue that such statutes are ambiguous and therefore should be interpreted to require a "final", that is, mandate issued by the appellate court, conviction on the underlying charge, before the imposition of restrictions required by the subject statute. Johnson, supra at D2159. The court based its conclusion on both the dissent in Lewis, and a Washington case, State v. Gore, 681 P. 2d 227 (Wash. 1984), which so interpreted its own statute. However, this conflicts with Burkett, and other case law nationally that do not find such statutes ambiguous. See for instance Clark v. State, 739 P.2d 777 (Alaska App. 1987), and cases cited therein, specifically rejecting Gore, supra, as a minority position, at p. 780-781, State v. Lobendahn, 784 P.2d 872 (Hawaii 1989), and in general, Annotation, Sufficiency of prior conviction to support prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 39 A.L.R. 4th 983. In Harris v. State, 449 So. 2d 892, 896 (Fla. 1st DCA), rev. dism'd

453 So. 2d 1364 (Fla. 1984) that court set forth its position as follows:

> At issue is the defendant's status at the time of the alleged possession; [emphasis supplied] the fact that his "outstanding felony conviction ultimately might turn out to be invalid for any reason" provides no exception. [citation to Lewis and others omitted]

Id. at 896. In contrast, the probation cases cited by the Fourth District, (Johnson, 20 Fla. L. Weekly D 2159), of Brown v. State, 312 So. 2d 528 (Fla. 1st DCA 1975), and Judd v. State, 402 So. 2d 1279 (Fla. 4th DCA 1981), are not directly related to status at the time of revocation. In neither case was the felony **creating** the probation held invalid, only the charge **revoking** the probation. As such a valid condition of probation remains in effect until such time as the charge creating the probation is either overturned on appeal or removed through action of the court. See Stevens v. State, 409 So. 2d 1051 (Fla. 1982), Bush v. State, 369 So. 2d 674 (Fla. 3d DCA 1979). A violation of probation need not necessarily be a violation of a statute, but may be of a court order. See State v. Woodland, 602 So. 2d 554 (Fla. 4th DCA 1992).

As pointed out by the District Court, there is an apparent recognized conflict between the cases of Wheeler, and Burkett [2] within the State regarding the definition of "convicted". While going on to note a conflict with Wheeler, the court in Burkett defined the term as follows:

> we hold 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. 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 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.

Id. at 1366. While noting that it could have affirmed the appellant's conviction by rejecting his claim that knowledge of the court's mandate on his prior appeal was required in order for a violation of the statute to have occurred, it declined to do so because:

> 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

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[2] Petitioner would also argue that conflict exists with Harris, supra.

pendency of their appeals or other petitions for post conviction relief.

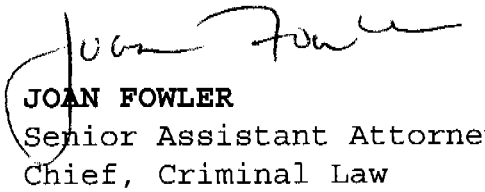
Id. at 1368. It should also be noted that the statute itself does not include the term "final", [although the court below suggests that it should be interpreted as such] as some other statutes do, see for instance § 732.802(5) Fla. Stat. (1993), and would indicate that the legislature intended to leave this term out. See Thayer v. State, 335 So. 2d 815 (Fla. 1976); see also Burkett, supra at 1365-1366 for its interpretation of the terms "convicted", "conviction" and "final judgment of conviction". Petitioner would therefore contend that the holding in Burkett provides the correct interpretation of § 790.23, and the decision of the Fourth District Court of Appeals should be reversed.

CONCLUSION

WHEREFORE, Petitioner, the State of Florida, respectfully submits that this Honorable Court should **REVERSE** the decision of the Fourth Distric Court of Appeal, filed September 20, 1995, Reversing and Vacating Respondent's conviction for possession of a firearm by a convicted felon .

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida



JOAN FOWLER
Senior Assistant Attorney General
Chief, Criminal Law
West Palm Beach Bureau
Florida Bar # 339067

EDWARD GILES
Assistant Attorney General
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida
33401-2299
Telephone (407) 688-7759
Florida Bar No. 901954

Counsel for Petitioner

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86,532
(4TH DCA CASE NO. 94-2891)

STATE OF FLORIDA,

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Respondent.

****

PETITIONER'S APPENDIX

****

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General
Chief, Criminal Law
West Palm Beach Bureau
Florida Bar # 339067

EDWARD L. GILES
Assistant Attorney General
Florida Bar No. 901954
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida
33401-2299
(407) 688-7759

Co-Counsel for Petitioner

EXHIBIT A

was intent to make timely payment, and it was attempted, or steps taken to accomplish it, but nevertheless the payment was not made due to a misunderstanding or excusable neglect, coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due or within the grace period.

David, 461 So. 2d at 96. *See also Pici v. First Union Nat'l Bank of Fla.*, 621 So. 2d 732 (Fla. 2d DCA), *rev. denied*, 629 So. 2d 132 (Fla. 1993); *Lunn Woods v. Lowery*, 577 So. 2d 705 (Fla. 2d DCA 1991).

However, these are not the only defenses that can preclude the entry of summary final judgment in a foreclosure action. A foreclosure action is an equitable proceeding which may be denied if the holder of the note comes to the court with unclean hands or the foreclosure would be unconscionable. *Federal Sav. & Loan Ins. Corp. v. Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1272 (11th Cir. 1989). Moreover, in *Stevens v. Len-Hal Realty, Inc.*, 403 So. 2d 507 (Fla. 4th DCA 1981), this court reversed a final summary judgment of foreclosure where substantial fact issues existed as to the mortgagor's affirmative defense of tortious interference.

In the instant case, therefore, the Knight Entities' affirmative defenses of unclean hands and tortious interference are legally sufficient to preclude a final summary judgment of foreclosure. These affirmative defenses directly relate to the issues raised in Amoco's foreclosure action, specifically the enforcement of the underlying loan transaction and settlement agreement. Moreover, Amoco failed to factually refute the allegations raised by the Knight Entities' affirmative defenses. The affidavits filed by Amoco in support of its motion for summary judgment merely refer to the settlement agreement, the Knight Entities' failure to make a timely payment, and the calculations of the principal and interest allegedly due. Nothing contained therein factually addresses the affirmative defense of unclean hands or tortious interference. Until Amoco successfully met its initial burden as the movant for summary judgment, the Knight Entities were under no obligation to demonstrate issues remaining to be tried. *Spradley v. Stick*, 622 So. 2d 610 (Fla. 1st DCA 1993).

Accordingly, the affirmative defenses of unclean hands and tortious interference raised by the Knight Entities are legally sufficient to preclude the entry of a summary final judgment of foreclosure. Furthermore, Amoco failed to factually refute these affirmative defenses. As such, a genuine issue of material fact existed precluding the entry of final summary judgment. Therefore, this case is reversed and remanded for further proceedings consistent herewith.

REVERSED AND REMANDED. (STONE and FARMER, JJ., concur.)

* * *

Criminal law—Nolo contendere plea—Although trial court may enhance attempted second degree murder charge to first degree felony due to use of deadly weapon, rule 3.172(c)(i) mandates that trial court advise defendant of the enhancement prior to accepting defendant's plea—Record did not reflect that defendant understood nature and consequences of plea that resulted in enhancement of offense—Conviction reversed for evidentiary hearing on issue of whether defendant understood his plea and enhancement due to use of deadly weapon

DAMON HARRIS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-1985. L.T. Case No. 91-1361-CF. Opinion filed September 20, 1995. Appeal from the Circuit Court for St. Lucie County; Cynthia G. Angelos, Judge. Counsel: Richard L. Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Edward L. Giles, Assistant Attorney General, West Palm Beach, for appellee.

(GUNTHER, C.J.) Appellant, Damon Harris, defendant below (Defendant), appeals a final judgment and sentence. Defendant had entered a plea of nolo contendere to attempted second degree murder, a second degree felony. Apparently, due to the involvement of a deadly weapon, the trial court enhanced Defendant's sentence to a first degree felony pursuant to section 775.087(1)(b), Florida Statutes (1991). We reverse because the record does not demonstrate that Defendant understood and agreed to the deadly weapon enhancement when entering his plea.[1]

Felonies of the first degree are punishable by up to thirty years while second degree felonies are punishable by no more than fifteen years. §§ 775.082(3)(b), (c), Fla. Stat. (1991). Moreover, this court has recently clarified that although second degree murder is a first degree felony, an attempted second degree murder is a second degree felony. *Harris v. State*, 650 So. 2d 639, 640 (Fla. 4th DCA 1995). The fact that a weapon is used in attempted second degree murder, however, is a proper reason to reclassify the second degree felony as a first degree felony. *Id.* at 641.

Although Defendant was indicted for attempted first degree murder, Defendant pled no contest to the lesser included offense of attempted second degree murder. Previously, we reversed and remanded this case on a separate issue involving the waiver of the right to be sentenced as a juvenile under section 39.111, Florida Statutes (1989). *Harris v. State*, 633 So. 2d 562 (Fla. 4th DCA 1994). Upon remand, the record reveals that the trial court resentenced Defendant to twenty years, exceeding the statutory maximum of fifteen years for a second degree felony. Apparently, the trial court had reclassified the attempted second degree murder to a first degree felony pursuant to section 775.087(1), Florida Statutes (1991). However, Defendant's counsel had stated that his intent was to make the plea to a second degree felony. Thus, it is unclear from the record whether Defendant entered his plea knowing of the enhancement.

Although case law and statutes allow the trial court to enhance the second degree murder charge to a first degree felony due to use of a deadly weapon, Rule 3.172(c)(i), Florida Rules of Criminal Procedure, governing the acceptance of pleas, mandates the trial court to advise the defendant of "the maximum possible penalty provided by law...." We deem the enhancement of Defendant's sentence under these circumstances to be a definite, immediate and largely automatic effect on the range of Defendant's punishment. *See Zambuto v. State*, 413 So. 2d 461, 462 (Fla. 4th DCA 1982). As such, the trial court, pursuant to Rule 3.172(c)(i), was required to advise Defendant of the enhancement.

Moreover, good cause to withdraw a plea has been found where a defendant proves that the plea was entered without a proper understanding of its nature and consequences. *Seizer v. State*, 575 So. 2d 747, 748 (Fla. 5th DCA 1991). Based upon the record before us, we are not convinced that Defendant understood the nature and consequences of his plea. We, therefore, remand for an evidentiary hearing in which the trial court may determine whether Defendant understood his plea and enhancement due to the use of a deadly weapon.

REVERSED AND REMANDED. (FARMER and KLEIN, JJ., concur.)

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[1]Defendant attempted to move to withdraw his plea at resentencing. *Cf. Kraviz v. State*, 638 So. 2d 636 (Fla. 5th DCA 1994). Further, Defendant's plea agreement specifically does not waive his right to appeal any sentence outside the guidelines unless specifically contained with the plea agreement. *Cf. Norman v. State*, 634 So. 2d 212 (Fla. 4th DCA 1994). Thus, we have jurisdiction. Fla. R. App. P. 9.140(b).

* * *

Criminal law—Possession of firearm by convicted felon—Conviction for possession of firearm by convicted felon cannot stand where predicate conviction was overturned on appeal—Conflict certified

ERIC ROY JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-2891. L.T. Case No. 93-0487 CFA. Opinion filed September 20, 1995. Appeal from the Circuit Court for Martin County; Dwight L.

Geiger, Judge. Counsel: Richard L. Jorandby, Public Defender, and Mallorye G. Cunningham, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Edward L. Giles, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) In *Burkett v. State*, 518 So. 2d 1363 (Fla. 1st DCA 1988), the first district held that a defendant is "convicted" for purposes of section 790.23, Florida Statutes (possession of a firearm by a convicted felon) when he is adjudicated guilty in the trial court, notwithstanding a pending appeal of that conviction. *Burkett* specifically declined to address the question of whether a conviction for possession of a firearm by a convicted felon could stand where the predicate conviction was overturned on appeal. This case presents that very question. We hold that the conviction cannot stand, and the trial court should have vacated the conviction upon the motion for post-conviction relief.

The appellant was tried and convicted of battery upon two police officers on March 25, 1992. He appealed the conviction to this court. During the pendency of the appeal, the appellant was arrested for possession of a firearm by a convicted felon and one count of possession of cocaine. On September 27, 1993, the appellant pled nolo contendere to the possession of the firearm, and the state nolle prossed the possession of cocaine charge. On October 21, 1993, the trial court withheld adjudication on the charge of possession of a firearm by a convicted felon and placed the appellant on probation for three years with a special condition of probation of eight months in the Martin County jail to run concurrently with the battery conviction. Subsequently, the battery conviction was reversed by this court in April of 1994 and remanded for a new trial. On June 22, 1994, the appellant moved to set aside the conviction for possession of a firearm by a convicted felon because the predicate felony had been reversed. Relying on *Lewis v. United States*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), the trial court denied the motion, resulting in this appeal.

In *Burkett*, the first district determined that "conviction" for the purposes of felony possession of a firearm did not mean a "final" conviction. Thus, the pendency of an appeal was "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. The *Burkett* court specifically disagreed with the second district's opinion in *Wheeler v. State*, 465 So. 2d 639 (Fla. 2d DCA 1985), which held that a judgment of conviction on appeal could not be relied upon to convict a defendant of possession of a firearm by a convicted felon until the appellate court affirms the predicate conviction on appeal. However, just as in *Burkett*, Wheeler's predicate conviction was affirmed on appeal. Therefore, neither case is controlling as to the result in the instant case. Nevertheless, the conflict between the district court opinions is instructive. *Burkett* concludes that the use of the word "conviction" in the statute means the jury verdict of conviction, i.e., the factual determination of the guilt of the defendant. On the other hand, *Wheeler* concludes that "conviction" referred to the legal use of the term, which would make a conviction await the conclusion of any matters affecting its finality. Thus, the conclusion of each court rests on two different interpretations of the statutory language.

Because the statute fails to define "conviction" and it is susceptible to two differing interpretations, the rule of lenity requires us to construe the statute in a manner most favorable to the accused. § 775.021(1), Fla. Stat. (1993); *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991). Therefore, we adopt the construction of the statute applied by *Wheeler* and certify conflict with Burkett.

In *Lewis*, on which the trial court relied in this case, the United States Supreme Court resolved conflicting federal decisions and concluded that even where the defendant's 1961 predicate felony conviction was subject to being set aside because defendant had been unconstitutionally denied counsel, that conviction was sufficient to make defendant's 1977 possession of a firearm a violation of 18 U.S.C. section 1202(a). *Lewis* was then followed by a case on all fours with the present case, *United States v. MacGregor*, 617 F.2d 348, 349 (3d Cir. 1980), in which the court affirmed the conviction, even though the predicate felony conviction had been reversed, because it saw no alternative under the "rigorous language" of *Lewis*.

In contrast to the Florida statute, however, the federal law, 18 U.S.C. section 1202(a)(1), as the Supreme Court noted in *Lewis*, is "sweeping." It includes not only people who have been convicted of a felony, but also people dishonorably discharged from the armed services, people adjudicated mentally incompetent, people who have renounced U.S. citizenship and illegal aliens. In addition, the legislative history reflected "an intent to impose a firearms disability on any felon based on the fact of conviction." *Lewis*, 445 U.S. at 62. Even under those circumstances, Justice Brennan in his dissent, with whom Justices Marshall and Powell agreed, argued that lenity still required the word "convicted" to be interpreted favorably to the accused.

In *State v. Gore*, 681 P.2d 227 (Wash. 1984), the Washington Supreme Court rejected *Lewis*, concluding that the word "convicted" in its statute, which is similar to ours, was ambiguous and, under lenity, had to be interpreted in favor of the accused.

Burkett relied in part on *Stevens v. State*, 409 So. 2d 1051 (Fla. 1982), which approved the decision of the Fifth District Court of Appeal that a probation revocation could be based on a conviction even though an appeal had been taken from the underlying conviction. The court reasoned that since a judgment of conviction was presumed correct until reversed, the better rule was to regard a revocation of probation for a subsequent conviction as proper even where the predicate conviction was subject to an appeal. Qualifying the stated rule, the supreme court quoted from the fifth district's opinion with approval which stated, "[o]f course, if a revocation is based solely on a conviction and that conviction is subsequently reversed, the revocation must also be reversed. *Plummer v. State*, 365 So.2d 1102 (Fla. 1st DCA 1979)." *Id.* at 1052. In *Brown v. State*, 312 So. 2d 528 (Fla. 1st DCA 1975), that very result occurred. When the court reversed a conviction because of an invalid plea, the conviction of probation violation which was based on the reversed predicate conviction was vacated. This court also reversed a probation revocation where the predicate conviction was reversed upon appeal. *See Judd v. State*, 402 So. 2d 1279 (Fla. 4th DCA 1981).

Similarly, in the instant case, the conviction for possession of a firearm by a convicted felon is based solely on the validity of the appellant's conviction for battery, which was reversed on appeal. Convictions which are reversed are considered a nullity. *Kaminski v. State*, 72 So. 2d 400 (Fla. 1954); *Ex parte Livingston*, 116 Fla. 640, 156 So. 612 (1934); *Griffith v. State*, 654 So. 2d 936, 943 n.14 (Fla. 4th DCA 1995). Therefore, since there is no predicate conviction upon which the charge of possession of a firearm by a convicted felon can be based, the conviction must necessarily be vacated. *Stevens*, 409 So. 2d at 1052.

Reversed with directions to vacate the appellant's conviction of possession of a firearm by a convicted felon. (GLICKSTEIN, WARNER and KLEIN, JJ., concur.)

* * *

Criminal law—Search and seizure—Officer's act of handcuffing defendant and telling him he was under arrest constituted an arrest triggering constitutional safeguards concerning unreasonable searches and seizures—Officer's observation that defendant was "nervous" and "fidgety" while officer was questioning defendant's companion, and that defendant stuffed a piece of folded plastic down front of his pants when officer approached him did not establish probable cause for arrest—Evidence seized from defendant pursuant to arrest should have been suppressed

MIKE MILLETS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District.

EXHIBIT B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NO. 94-02891

ERIC ROY JOHNSON,

Appellant,

vs.

STATE OF FLORIDA

Appellee.

****

ON APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA
CRIMINAL DIVISION

****

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

EDWARD L. GILES
Assistant Attorney General
Florida Bar No. 901954
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida
33401-2299
(407) 688-7759

Counsel for Appellee

CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellee, the State of Florida, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Eric Roy Johnson
   (Defendant/Appellant)

2. Jeff Cosby
   (Assistant State Attorney, Martin County)
   (Trial Counsel for State)

3. Edward Giles
   (Assistant Attorney General)
   (Appellate Counsel for State)

4. The Honorable Dwight Geiger
   (Circuit Judge, Martin County)
   (19th Judicial Circuit)

5. E. Kent Mathews, Esq.
   (trial counsel for Defendant)

6. Mallorye Cunningham
   (Assistant Public Defender)
   (Counsel for Appellant)

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TABLE OF CITATIONS

PRELIMINARY STATEMENT

Appellee was the prosecution and Appellant the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida.

In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellee may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"AB"	Appellant's Initial Brief

All emphasis has been added by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Subject to the exceptions, additions and clarifications set forth below, and in the argument portion of the State's brief, the State accepts Appellant's "Statement of the Case and Facts" as reasonably accurate portrayals of the legal events and the evidence adduced below.

Appellee would also add the following:

1. Appellant was on probation as a result of a prior conviction in Case no. 92-752, which was on appeal, at the time that he was arrested on June 10, 1993, in the instant case. An Information was filed on June 24, 1993, in the instant case, charging Appellant with Count I: Possession of a Firearm by a Convicted Felon and Count II: Possession of Cocaine (R 31-32). Appellant and defense counsel were present at hearings on September 13, 1993 (R 45) and September 27, 1993 (R 46). At the latter date, Appellant and the State entered into a plea agreement, by which Appellant would plead Nolo Contendere to Count I, Possession of a Firearm by a Convicted Felon (R 47-53). The State agreed to Nolle Prosse Count II, and Appellant was sentenced on Count I to 8 months jail time, credit for 134 days, followed by 3 years probation (R 54). Judgment was thereafter entered (R 55-56), and Appellant was sentenced on October 21, 1993 (R 57-65).

2. On April 13, 1994, the convictions for Battery on a Law Enforcement Officer were reversed by this court in Case No. 93-1181. Appellant subsequently filed a Motion to Set Aside the Conviction for the possession of a firearm by a convicted felon,

on June 22, 1994 (R 72-73). After a hearing on Appellant's Motion (R 2-14), the trial court denied the motion to set aside the conviction (R 75-76).

SUMMARY OF ARGUMENT

The trial court did not err in denying the appellant's motion to set aside his conviction for possession of a firearm by a convicted felon. Section 790.23 Florida Statutes imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action. Even assuming that Appellant is not retried, the disability would still be in effect during the time period between his conviction and the order of this Court on April 13, 1994.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SET ASIDE THE CONVICTION FOR POSSESSION OF A FIREARM BY A CONVICTED FELON

The trial court did not err in denying the appellant's motion to set aside his conviction for possession of a firearm by a convicted felon. Appellant's position would appear to be that during the time period in which he was placed on probation in case no. 92-752, and the time when the underlying convictions for Battery on Law Enforcement Officer was reversed by this Court on April 13, 1994, that Appellant was not a "convicted felon" for purposes of Section 790.23 Florda Statutes, which forbid possession of a firearm by a convicted felon (AB 3). The State's position to the contrary is that Section 790.23 imposes a firearm disability until the conviction is vacated, or the felon is relieved of his disability by some affirmative action.

During the relevant time frame, Appellant was on probation as a result of a prior conviction in Case no. 92-752, which was on appeal, at the time that he was arrested on June 10, 1993, in the instant case. An Information was filed on June 24, 1993, in the instant case, charging Appellant with Count I: Possession of a Firearm by a Convicted Felon and Count II: Possession of Cocaine (R 31-32). Appellant and defense counsel were present at hearings on September 13, 1993 (R 45) and September 27, 1993 (R 46). At the latter date, Appellant and the State entered into a plea agreement, by which Appellant would plead Nolo Contendere to Count I, Possession of a Firearm by a Convicted Felon (R 47-53). The State agreed to Nolle Prosse Count II, and Appellant was

sentenced on Count I to 8 months jail time, credit for 134 days, followed by 3 years probation (R 54). Judgment was thereafter entered (R 55-56), and Appellant was sentenced on October 21, 1993 (R 57-65). It was not until subsequent to the reversal on appeal of the underlying Battery on Law Enforcement Officers that Appellant filed his Motion to Set Aside his conviction was filed.[1]

The statute in question, § 790.23, reads in pertinent part as follows:

> (1) It is unlawful for any person who has been convicted of a felony in the courts of this state or of a crime against the United States which is designated as a felony or convicted of an offense in any other state, territory, or country punishable by imprisonment for a term exceeding 1 year to own or to have in his care, custody, possession, or control any firearm or electric weapon or device or to carry a concealed weapon, including all tear gas guns and chemical weapons or devices.

The federal equivalent, 18 U.S.C.A. Appx. § 1202, provides as follows:

> Any person who-
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony...

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[1] No express reservation of right to appeal this issue was made a part of the plea agreement, which would preclude a right to direct appeal under § 924.06(3) Fla. Stat. Appellant is therefore obligated to first file a motion under Fla. R. Crim. P. 3.850 to either withdraw the plea, or vacate the sentence. See Hall v. State, 397 So. 2d 1041 (Fla. 5th DCA 1981). Presumably the instant "Motion to Set Aside Conviction" fits this although no rule designation appears. The end result, if successful of such a motion to withdraw a plea bargain would place the parties back where they were before the plea, including the reinstatement of nolle prossed charges, regardless of the statute of limitation or speedy trial rule. See Geiger v. State, 532 So. 2d 1298 (Fla. 2d DCA 1988).

> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both. ...

The United States Supreme Court, in Lewis v. United States, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), has held that this statute "imposes a firearm disability until the [felony] conviction is vacated or the felon is relieved of his disability by some affirmative action". 445 U.S. at 60-61. Florida Courts have made a comparison between § 790.23 and its federal counterpart, to reach the same conclusion. See Harris v. State, 449 So. 2d 892, 896 (Fla. 1st DCA), rev. dism'd 453 So. 2d 1364 (Fla. 1984). The issue was clarified in Harris, as follows:

> At issue is the defendant's status at the time of the alleged possession; the fact that his "outstanding felony conviction ultimately might turn out to be invalid for any reason" provides no exception. [citation to Lewis and others omitted]

Id. at 896.

As pointed out by Appellant, (AB 4-6) there is an apparent recognized conflict between the cases of Wheeler v. State, 465 So. 2d 639 (Fla. 2d DCA 1985) and Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988), [and Harris although not cited by Burkett], regarding the definition of "convicted". While going on to note a conflict with Wheeler, the court in Burkett defined the term as follows:

> we hold 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. 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 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.

Id. at 1366. While noting that it could have affirmed the appellant's conviction by rejecting his claim that knowledge of the court's mandate on his prior appeal was required in order for a violation of the statute to have occurred, it declined to do so because:

> 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 convition relief.

Id. at 1368. It should also be noted that the statute itself does not include the term final, [although Wheeler would appear to imply this] as some other statutes do, see for instance § 732.802(5) Fla. Stat. (1993), and would indicate that the legislature intended to leave this term out. See Thayer v. State, 335 So. 2d 815 (Fla. 1976); see also Burkett, supra at 1365-1366 for its interpretation of the terms "convicted", "conviction" and "final judgment of conviction". Appellee would therefore contend that the holding in Burkett, and Harris, provide the correct interpretation of § 790.23, and the judgment of the trial court should be upheld for this reason.

Alternatively, Appellee would argue that Appellant should be estopped to argue that the sentence of the trial court may be vacated at this point, since Appellant entered into a plea

agreement without the reservation of any right of appeal. Even where a portion of a plea bargain suffers from some constitutional infirmities, the courts have been inclined to uphold the bargain. Novaton v. State, 634 So. 2d 607 (Fla. 1994). In the instant case, Appellant did contest any issue in the plea bargain itself, nor does he currently contest the validity or voluntariness. In Wheeler, contrary to the situation in the instant case, the appellant likewise entered into a nolo contendere plea, but specifically reserved the right to appeal the denial of his motion to dismiss based upon a pending appeal. While the State may reinstate the possession of cocaine charge in spite of the speedy trial rule, see Geiger v. State, 532 So. 2d 1298 (Fla. 2d DCA 1988), this is often not a realistic consideration. Appellee received the benefit of his plea bargain by a reduced sentence on Count I and a nolle pross on Count II, he should not be allowed to receive an additional benefit by waiting until the appellate court decides an earlier offense before contesting the agreement on Count I.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited herein, Appellee respectfully requests that the judgment and sentence of the trial court be **AFFIRMED.**

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

Edward Giles

EDWARD GILES
Assistant Attorney General
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida
33401-2299
Telephone (407) 688-7759
Florida Bar No. 901954

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: MALLORYE G. CUNNINGHAM, Assistant Public Defender, Counsel for the Appellant, Criminal Justice Building, 6th Floor, 421 3rd Street, West Palm Beach, Fl. 33401, this 13th day of December, 1994.

Edward Giles

Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: MALLORYE G. CUNNINGHAM, Assistant Public Defender, Counsel for the Appellant, Criminal Justice Building, 6th Floor, 421 3rd Street, West Palm Beach, Fl. 33401, this 20th day of October, 1995.

Edward Giles
Of Counsel