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

STATE OF FLORIDA,

Petitioner

v.

ERIC ROY JOHNSON,

Respondent.

****

ON CERTIORARI FROM THE FOURTH DISTRICT COURT OF APPEAL

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REPLY BRIEF OF PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner would adopt the previous Certificate of Interested Persons as set fort in the State's Initial Brief on the Merits:

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PRELIMINARY STATEMENT

Petitioner will use the symbols, and designations as previously set forth in its Initial Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner would rely upon the Statement of the Case and Facts as previously set forth in its Initial Brief on the Merits.

SUMMARY ARGUMENT

The State would contend, that the Statute, § 790.023 Fla. Stat. (1993) uses the term "conviction" not "final conviction" and that this term should be interpreted to mean 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. The instant case should not be compared to a conviction for a nonexistant crime, since the crime does exist, and the purpose of the appeal in the underlying offense was to challenge the validity of the conviction, not the existence of the offense itself. Petitioner would respectfully suggest that this Court look to the issue of whether or not a prior conviction which is on appeal imposes a disability upon the individual defendant during the time period between the adjudication of the trial court and the decision of the appellate courts.

ARGUMENT

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

The State would contend, that the Statute, § 790.023 Fla. Stat. (1993) uses the term "conviction" not "final conviction" and that this term should be interpreted to mean 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. The instant case should not be compared to a conviction for a nonexistant crime, since the crime does exist, and the purpose of the appeal in the underlying offense was to challenge the validity of the conviction, not the existence of the offense itself. Petitioner would respectfully suggest that this Court look to the issue of whether or not a prior conviction which is on appeal imposes a disability upon the individual defendant during the time period between the adjudication of the trial court and the determination of the Appellate court.

Respondent's argument, that without the predicate conviction for Fla. Stat. § 790.23 Fla. Stat. "the Respondent would be convicted on a nonexistent crime" (Respondent's brief at p. 6), is inapplicable to the instant case. The cases cited by Respondent refer specifically to convictions for crimes that do not exist, no matter what the eventual outcome of the case. In Achin v. State, 436 So. 2d 30 (Fla. 1982), it was attempted extortion, and in Adams v. Murphy, 394 So. 2d 411 (Fla. 1981), it was attempted perjury.. In the instant case, the crime does exist, the question is whether or not it applies to a defendant during the pendancy of an appeal. Petitioner argues that it does, and serves the purpose of protecting society until such time as a final determination, whether through winning

an appeal, or through a restoration of civil rights subsequent to a pardon.

What ever the eventual outcome of a trial, or appeal, the law places restrictions upon those who are awaiting the decision of a court. The term "final" is not written into the instant statute as it is in other statutes, see for instance § 732.802(5) Fla. Stat. (1993), and could lead to absurd results if applied as suggested by Respondent. As a decision of a District Court of Appeal may reverse the trial court, so too does this Court have the authority to reverse the decision of the District Court and reinstate the judgment of the trial court, even where the trial court has discharged a defendant based upon the mandate of the District Court. See State v. Henderson, 521 So. 2d 1113 (Fla. 1988). When does the conviction reach "finality" since a variety of avenues are open to a defendant, from the trial court through the United States Supreme Court, presumably, the discovery of new evidence years later, see Fla. R. Crim. P. 3.850(b)(1), could potentially alter all of the convictions inbetween. Further, an exception to the Statute, must be asserted as a matter of defense, see Hernandez v. State, 289 So. 2d 16 (Fla. 1974), something that was not done in the instant case. It was not until subsequent to the reversal on appeal of the underlying battery charges that Repondent filed his motion to set aside the conviction in the instant case. Assuming that a decision may be considered res judicata for subsequent appeal, see Kaminsky v. State, 72 So. 2d 400 (Fla. 1954) [cited by Respondent at p.7 of his brief], the issue should at least have been presented at some prior point in the underlying felony during plea negotiations.

The Respondent (at p. 6 of the brief) and the District Court, additionally cite the case of State v. Gore, 681 P.2d 227 (Wash. 1984) as authority; however, as pointed out in the Initial Brief (at p. 7), this has been rejected by other States as a minority opinion. See Clark v. State, 739 P.2d 777 (Alaska App. 1987), at pp. 780-781. The majority does not accept this position, finding instead, that

substantially similar statutes are not ambiguous Id., see also State v. Lobendahn, 784 P.2d 872 (Hawaii 1989). Petitioner would suggest that the District Court was incorrect in attempting to graft words into a statute where such is not necessary.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the **Petitioner**, respectfully requests this honorable Court **REVERSE** the decision of the Fourth District Court of Appeal, and **REINSTATE** the decision of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished to MALLORYE G. CUNNINGHAM, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on November 29, 1995.

Edward Giles

EDWARD GILES
Counsel for Appellee