ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 91,578

ROBERT SCHULTZ,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

PRELIMINARY STATEMENT

Petitioner, STATE OF FLORIDA, was the plaintiff in the trial court and the respondent in the district court and will be referred to herein as "Petitioner" or "State." Respondent, Robert Schultz, was the defendant in the trial court and the petitioner in the district court and will be referred to herein as "Respondent" or "Defendant."

The following symbols will be used:

R = Record on appeal

T = Transcripts

A = Appendix

STATEMENT OF THE CASE AND FACTS

Respondent, Robert Schultz, was found guilty in county court of driving while his license was suspended or revoked. The trial judge withheld adjudication and imposed court costs in the amount of $75.00. (R. 71). Schultz appealed to the circuit court, and the prosecutor moved to dismiss the appeal arguing that the circuit court did not have jurisdiction based on Florida Rule of Appellate Procedure 9.140. (R. 71). After reviewing Schultz's response to the motion to dismiss, the circuit court dismissed the appeal, finding that the basis for the appeal was not one of the enumerated circumstances under which a criminal defendant may appeal as set forth in Rule 9.140 and section 924.06 of the Florida Statutes. (R. 82-83).

On January 18, 1997, Schultz filed a Notice of Appeal (R. 84), and the Fourth District Court of Appeal treated the notice as a petition for writ of certiorari (App. 1). The court ordered the State to show cause why the petition should not be granted (App. 2), and the State responded that at the time the trial court entered its order dismissing Respondent's appeal it did not have the benefit of the Fourth District's opinion in Waite v. City of Fort Lauderdale, 681 So. 2d 901 (Fla. 4th DCA 1996). Therefore, the only decision that was applicable was Martin v. State, 600 So. 2d 20 (Fla. 2d DCA 1992), which held that a court order withholding adjudication of guilt and imposing court costs is not appealable

because it is not a final order. The State argued that, as a result, there was no departure from the essential requirements from law, and the petition for certiorari should be denied. The State did acknowledge that the Fourth District's opinion in Waite was controlling and requested that the court certify conflict (App. 3).

In rendering its decision, the Fourth District framed the issue as "whether a defendant found guilty in a criminal case may appeal from an order withholding adjudication of guilt, without having been placed on probation." (App. 4). The court found such an order to be appealable, Acknowledging that Waite was decided after the circuit court dismissed Respondent's appeal, the court granted the petition for certiorari and certified conflict with Martin.

Upon the State's Notice to Invoke Discretionary Review, this Court issued its order postponing decision on jurisdiction and setting a briefing schedule. The State's brief on the merits follows.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal erred in granting Respondent's petition for certiorari as there was no departure from the essential requirements of law at the time the circuit court judge dismissed Respondent's appeal. The only applicable decision was Martin v. State, 600 So. 2d 20 (Fla. 2d DCA 1992), as Waite v. Citv of Fort Lauderdale, 681 So. 2d 901 (Fla. 4th DCA 1996) had not yet been decided.

Furthermore, the Fourth District Court of Appeal erroneously concluded, in Waite and in the case at bar, that orders withholding adjudication and imposing costs, but not placing defendants on probation, are appealable orders. The opinion rendered by the Second District in Martin is correct.

This Court should accept jurisdiction to review the conflict created by the Fourth District as it erroneously analyzed which orders are appealable orders.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN GRANTING RESPONDENT'S PETITION FOR CERTIORARI BECAUSE THE CIRCUIT COURT'S DISMISSAL OF RESPONDENT'S APPEAL FROM COUNTY COURT WAS NOT A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW.

Certiorari is the proper remedy to test a lower court order that departs from the essential requirements of law. Martin-Johnson v. Savaue, 509 So. 2d 1097 (Fla. 1987); Enalish v. McCrary, 348 So. 2d 293 (Fla. 1977). The Fourth District Court of Appeal erred in granting Respondent's petition for writ of certiorari, as he failed to demonstrate any departure from the essential requirements of law on the part of the circuit court when it dismissed his appeal from county court. District courts should only exercise discretion in granting a petition for certiorari when there has been a violation of a "clearly established principle of law resulting in a miscarriage of justice." See Haines City Communitv Development v. Higgs, 658 So. 2d 523 (Fla. 1995); Combs v. State, 436 So. 2d 93 (Fla. 1983). No such miscarriage of justice occurred in the case at bar.

In Martin v. State, 600 So. 2d 20 (Fla. 2d DCA 1992), the Second District held that an order withholding adjudication, but not placing a defendant on probation, is not an appealable order pursuant to Florida Rule of Appellate Procedure 9.140. When the circuit court in the instant case dismissed Respondent's appeal from county court, Martin was the applicable law at the time. The

Fourth District's opinion in Waite v. City of Fort Lauderdale, 681 so. 2d 901 (Fla. 4th DCA 1996), which held that such orders were appealable, had not yet been decided. Consequently, when the circuit court dismissed the appeal, there was no departure from the essential requirements of law. The Fourth District Court of Appeal erred in granting Respondent's petition for certiorari.

The Fourth District erroneously applied its decision in Waite retroactively. This Court in Witt v. State, 387 So. 2d 922 (Fla. 1980), set forth the test for determining if a new rule of law may be applied retroactively. In order to be applied retroactively, a new law must (1) originate in either the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. Id. at 931. In the case at bar, the Waite decision did not originate in either the United States Supreme Court or this Court; thus, prong one was not satisfied.[1] Consequently, the Fourth District's opinion could not be applied retroactively.

Moreover, the Fourth District erroneously concluded that orders withholding adjudication, but not placing a defendant on probation, are appealable orders. While section 924.06(1)(a) and Rule 9.140 delineate the scope of the circuit court's appellate jurisdiction, neither provides that orders withholding

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[1] As all three components must be present, there is no need to explore whether prongs two and three are met.

adjudication, without placing a defendant on probation, are appealable. Consequently, the Fourth District's reliance, in Waite and in the case at bar, on section 924.06(1)(a), Florida Statutes (1995), and Rule 9.140(b)(1)(C), is misplaced. The court's analysis is improper and the decision must be reversed.

Section 924.06(1)(a) provides that a criminal defendant may appeal from "a final **judgment of conviction** when probation has not been granted." (Emphasis added). This Court in State v. Gazda, 257 So. 2d 242 (Fla. 1971), distinguished between the terms "conviction" and "judgment of conviction."* This Court found that "conviction" means determination of guilty by verdict of the jury or plea of guilty, and does not require adjudication by the court Id. at 243-244. "Judgment of conviction," on the other hand, necessarily includes an adjudication. Id. at 244.

The legislature has not amended the statute, even with the knowledge of this Court's distinction between the words "conviction" and "judgment of conviction." It is evident that by using the term "judgment of conviction," the legislature intended to require an adjudication of guilt before a defendant, who has not been placed on probation, can appeal pursuant to section 924.06(1). In the case at bar, adjudication was withheld, and thus the statute is not applicable. Consequently, the analysis made by Judge Gross

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[2] See also Raulerson v. State, 22 Fla. L. Weekly D2267(a) (Fla. 5th DCA Sept. 26, 1997).

in Waite regarding the definition of "conviction" is unsound. Waite at 902. Moreover, utilizing the definition of "conviction" set forth in the sentencing statute, as the court did in Waite, is improper because the case at bar did not involve sentencing. Chapter 921 is titled "Sentencing" and section 921.011 reads, "As used in this chapter . . ."

As section 924.06 is not applicable to the case at bar, one must then look to Rule 9.140 to determine if Respondent had a right to appeal the county court's order withholding adjudication and imposing costs. Under that rule, a defendant in a criminal case may appeal only the following types of orders:

> (A) a final judgment adjudicating guilt;
>
> (B) an order granting probation or community control, or both, whether or not guilt has been adjudicated;
>
> (C) orders entered after final judgment or finding of guilt, including orders revoking or modifying probation or community control, or both;
>
> (D) an unlawful or illegal sentence;
>
> (E) a sentence, if the appeal is required or permitted by general law; or
>
> (F) as otherwise provided by general law.

The county court specifically withheld adjudication, so this is not a final order adjudicating guilt, and thus subsection (A) is not applicable. Likewise, the order does not place Respondent on probation without an adjudication of guilt so subsection (B) does

not apply. Subsection (D) does not apply because the order is not a "sentence" as defined in Florida Rule of Criminal Procedure 3.700(a).[3] And, subsection (E) does not apply.

Subsection (C), contrary to the Fourth District's assertions, is not applicable. The order is not one entered **after** final judgment or finding of guilt. The term "after" is synonymous with "later" or "subsequent to" or "subsequent in time to." Black's Law Dictionary **61** (6th Ed. 1990), and refers to orders entered post-conviction, such as to revoke or modify probation. The Rule does not read "orders imposing probation."

As a result of the foregoing analysis, the county court order from which Respondent sought an appeal in the circuit court is not appealable and the circuit court properly dismissed the appeal. The Fourth District erroneously found the order appealable, and this court must quash the decision of the court granting certiorari. Likewise, this Court must overrule the Fourth District's opinion in Waite, as the analysis and holding therein are wrong. It should approve, however, the Second District's opinion in Martin. See also Garrewv v. State, 679 So. 2d 353 (Fla. 5th DCA 1996)(holding that defendant only entitled to review of imposition of costs and not circuit court's dismissal of appeal

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[3] Rule 3.700(a) defines sentences as "the pronouncement by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty." As Respondent was not "adjudged guilty," his appeal is not of a sentence under subsections (D) & (E).

from order withholding adjudication).'

If this Court finds that orders withholding adjudication and imposing costs, but not placing defendants on probation, are appealable, the State submits that any decision rendered should not be applied retroactively. As previously stated, this Court in Witt v. State, 387 So. 2d 922 (Fla. 1980), set forth the test for determining if a new rule of law may be applied retroactively. In order to be applied retroactively a new law must (1) originate in either the United States Supreme Court or the Florida Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. Id. at 931." A finding that orders withholding adjudication but not placing defendants on probation are appealable would be nothing more than an "evolutionary refinement in the law." Furthermore, such a decision is not of constitutional import, and thus is not a candidate for retroactive application.

The right of appeal is not natural, unqualified or absolute, but is one that is created by law. Booker v. State, 514 So. 2d 1079 (Fla. 1987). It is the legislature that has the task of

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[4] The courts in Martin and Garrepy discussed the issue of the imposition of costs when an order withholding adjudication is entered, In the case at bar, the issue at this juncture is not the impropriety of the imposition of costs; rather, it is whether an order withholding adjudication is directly appealable.

[5] Cf. Voorhees v. State, 22 Fla. L. Weekly S357 (Fla. 1997)(holding Coney decision not applicable to cases tried before Coney decision issued); State v. Hampton, 22 Fla. L. Weekly S383a (Fla. 1997)(holding Gray not applicable to cases in which conviction became final before Grav decision issued).

prescribing, by statute, the means and methods by which appellate review may be acquired. The legislature may do so by placing reasonable restrictions on the right to appeal. And of course, this Court has jurisdiction over the practice and procedure relating to appeals. See Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773 (Fla. 1996). The legislature and this Court have exercised these powers by establishing rules and statutes that prescribe when a defendant may appeal. These limitations are few and intentional, and thus there would be no constitutional ramifications if this Court were to hold that orders withholding adjudication, but not placing defendants on probation, are appealable. Furthermore, there would not be any fundamental significance involved, as there would not be a "change in the law," but rather, a clarification, or refinement. Finally, any retroactive application would open the floodgates of litigation, as all defendants who have previously had appeals dismissed under the same circumstances would seek to have their appeals reinstated.

This Court should accept jurisdiction to review the conflict created by the Fourth District, as it erroneously granted Respondent's petition for certiorari. There was no essential departure by the trial court from the essential requirements of law and, the district court's conclusion that orders withholding adjudication but not placing defendants on probation, are appealable orders, is incorrect and is not supported by the law of

this state.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, the State respectfully requests that this Honorable Court reverse the Fourth District's holdings in Waite v. Citv of Fort Lauderdale, 681 So. 2d 901 (Fla. 4th DCA 1996) and Schultz v. State, 22 Fla. L. Weekly D2136(b) (Fla. 4th DCA Sept. 10, 1997), and reinstate the circuit court order denying Respondent's appeal from county court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

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(561) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" has been furnished to: ROBERT SCHULTZ, pro se, 11294 Taft Street, Pembroke Pines, Florida 33026, this 12th day of December 1997.

Barbara A Wersberg
Of Counsel

,

APPENDIX 1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

ROBERT SCHULTZ

Petitioner(s),

vs.

STATE OF FLORIDA, et al.

Respondent(s).

CASE NO. 96-00325

L.T. CASE NO. 95-101 AC10A
BROWARD

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL
APR 30 1997
CRIMINAL OFFICE
WEST PALM BEACH

April 29, 1997

BY ORDER OF THE COURT:

ORDERED that petitioner's April 22, 1997, motion for order to accept appellant's appeal as a petition for writ of certiorari is granted, and the appeal is redesignated as a petition for writ of certiorari. The initial brief shall be treated as the petition and petitioner shall file an appendix in lieu of the record.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Robert Schultz
Attorney General-W. Palm Beach
Robert E. Lockwood, Clerk
Public Defender 15
State Attorney 17

/PB

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

R

ROBERT SCHULTZ

Petitioner(s),

vs.

STATE OF FLORIDA, et al.

Respondent(s),

CASE NO, 96-00325

L.T. CASE NO. 95-101 AC10A
BROWARD

June 12, 1997

BY ORDER OF THE COURT:

ORDERED that the first paragraph of this court's order of May 15, 1997 is vacated, and this court's April 29, 1997 order treating petitioner's initial brief as his petition is reinstated. Petitioner is directed to serve the State of Florida with a copy of his initial brief immediately, if he has not already done so; further,

ORDERED that ~~respondent~~ in the above-styled case is hereby commanded to file with this Court and show cause, if any there be, within twenty (20) days, why the above-styled petition should not be granted as prayed; further,

ORDERED that petitioner may file a reply in writing with this Court within ten (10) days of the date of service of the response(s).

State's pleading
(Response) due
July 2. 1997

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Robert Schultz
Attorney General-W. Palm Beach
Public Defender 15
State Attorney 17

/DM

APPENDIX 3

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

ROBERT SCHULTZ,

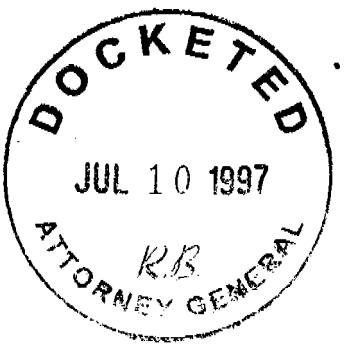
96-140408

Appellant,

vs. CASE NO. 96-00325

STATE OF FLORIDA,

Appellee.



RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW Appellee, the State of Florida, by and through undersigned counsel, pursuant to this Court's Order, and hereby files its Response to Order to Show Cause, and states:

1. Petitioner has filed a Petition for Writ of Certiorari[1] seeking review of a circuit court Order dismissing his appeal, from county court, for lack of jurisdiction.

2. Petitioner was found guilty, in county court, of driving while license suspended or revoked. The trial judge withheld adjudication and imposed court costs in the amount of $75.00 (App.

[1] Petitioner filed an Initial Brief, which this Court, by Order dated June 12, 1997, is treating as a petition for writ of certiorari.

71).

3. Petitioner appealed to the circuit court and the prosecutor moved to dismiss the appeal arguing that the circuit court did not have jurisdiction based on Rule 9.140 of the Florida Rules of Appellate Procedure (App. 71).

4. After reviewing Petitioner's response to the motion, the circuit court dismissed the appeal finding that the basis for Petitioner's appeal is not one of the enumerated circumstances under which a criminal defendant may appeal as set forth in Rule 9.140, Fla. R. App. Pro. and 5924.06, Fla. Stat. (1995) (App. 82 - 83).

5. On January 18, 1996, Petitioner filed the instant action (App. 84).

6. The State points out to this Court that at the time the circuit court entered its Order dismissing Petitioner's appeal, it did not have the benefit of this Court's decision in Waite v. City of Fort Lauderdale, 681 So. 2d 901 (Fla. 4th DCA 1996). The only decision which was applicable was Martin v. State, 600 So. 2d 20 (Fla. 2d DCA 1992), which held that a court order withholding adjudication of guilt and imposing court costs is not appealable because it is not a final order. See, Voorhees v. State, 22 Fla. L. Weekly S357 (Fla. June 19, 1997) (Coney decision not applicable to

cases tried before Coney decision issued); State v. Hampton, 22 Fla. L. Weekly S383a (Fla. June 26, 1997) (Grey not applicable to cases in which conviction became final before Grey decision issued). Thus, at the time the Order was entered, there was no departure from the essential requirements of law.

7. But, the State acknowledges that this Court's decision in Waite is now controlling. In Waite, this Court held that orders withholding adjudication of guilt, without placing a defendant on probation, are properly appealable from county court to circuit court, sitting in its appellate capacity.

8. As acknowledged by this Court in Waite, that decision conflicts with the Second District's decision in Martin. As Waite did not go to the Florida Supreme Court, the conflict has not been resolved. As the issue is obviously capable of repetition, the State requests that this Court recertify conflict with the Second District's decision of Martin.

WHEREFORE, in light of the foregoing, the undersigned respectfully acknowledges that this Court's decision in Waite is controlling.

Respectfully submitted,
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

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Assistant Attorney General
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West Palm Beach, FL 33401-2299
(407) 688-7759

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Response to Order to Show Cause" has been furnished by U.S. Mail to: ROBERT SCHULTZ, 11294 Taft Street, Pembroke Pines, FL 33026 this 10th day of July 1997.

Of Counsel

APPENDIX 4

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1997

ROBERT SCHULTZ,

Petitioner,

v.

STATE OF FLORIDA, THE OFFICE: OF THE STATE ATTORNEY, SEVENTEENTH JUDICIAL, CIRCUIT OF FLORIDA, SOUTH SATELLITE COURTHOUSE,

Respondents.

CASE NO. 96-0325

Opinion filed September 10, 1997

Petition for writ of certiorari to the Circuit Court of the Seventeenth Judicial Circuit, Broward County; Barry E. Goldstein, Judge; L.T. Case No. 95-101AC10A.

Robert Schultz, Pembroke Pines, pro se.

Robert A. Butterworth, Attorney General, Tallahassee, and Barbra Amron Weisberg, Assistant Attorney General, West Palm Beach, for respondents.

PER CURIAM.

This is a petition for writ of certiorari addressed to an order entered by the circuit court in its appellate capacity. The circuit court dismissed petitioner's appeal based on lack of jurisdiction. However, Waite v. City of Fort Lauderdale 681 So. 2d 901 (Fla. 4th DCA 1996), decided 'after the circuit court's dismissal, controls the -outcome here and requires that we grant the petition.

In this case, petitioner was convicted in the Broward County Court of driving with a suspended or revoked license. The county court withheld adjudication and assessed petitioner $75.00 in court costs.

The issue here, as in Waite, is whether a defendant found guilty in a criminal case may appeal from an order withholding adjudication of guilt, without having been placed on probation In Waite we concluded, based on an analysis of the applicable statutes and procedural rules, that an order withholding adjudication is appealable at the time of its rendition

In Waite we noted the second district's contrary ruling in Martin v. State, 600 So. 2d 20 (Fla. 2d DCA 1992), and certified conflict with it. The state concedes that Waite is controlling but requests that we recertify conflict.

Accordingly, we grant the petition for writ of certiorari and quash the order dismissing petitioner's circuit court appeal on the authority of Waite. s we did in Waite, we again certify conflict with Martin

STONE, C.J., WARNER and PARIENTE, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.