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IN THE SUPREME COURT OF FLORIDA

JAMES DONALD RAULERSON,	)	
	)	
Petitioner/Appellant,	)	
	)	
versus	)	S.CT. CASE NO. 91,611
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 97-710
	)	
Respondent/Appellee.	)	
	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

AMENDED

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Petitioner, James Raulerson, was charged by information with possession of drug paraphernalia and felony driving while license suspended in violation of Fla. Stat. §322.34(1) (1995). In the Circuit Court, Petitioner filed a motion to dismiss the DWLS charge on the grounds that §322.34(1) is unconstitutional as a violation of separation of powers (R23-24). Petitioner argued that §322.34(1) delegates legislative powers to the judiciary by making a third DWLS conviction a felony. Petitioner argued that this gave the circuit court the power to make a third offense DWLS either a felony or a misdemeanor by adjudicating the defendant guilty or withholding adjudication.

At a hearing involving Petitioner and several other defendants, the Honorable Carven D. Angel denied the motion to dismiss (R28, 51-62). Petitioner entered a nolo contendere plea, reserving the right to appeal (R29, 66-68). Petitioner was sentenced to 180 days in jail followed by two years probation on the felony conviction (R35).

Petitioner appealed the denial of the motion to dismiss to the Fifth District Court of Appeal. The Court of Appeal decided that a withhold of adjudication equals a conviction, and affirmed the Circuit Court. This Court granted discretionary review.

SUMMARY OF THE ARGUMENT

Petitioner argued unsuccessfully, in the trial court and the District Court of Appeal that Florida Statute 322.34(1)(c), the felony DWLS statute was unconstitutional because it delegated legislative powers to the judiciary by allowing trial judges to withhold adjudication and turn a felony into a misdemeanor. The Court of Appeal found that a withheld adjudication is a conviction. There are many lines of case law distinguishing between withheld adjudication and conviction. The case that the District Court relied on does not apply to this issue, and is based on law that has been off the books for 28 years. The Statute is unconstitutional.

POINT

FLORIDA STATUTES SECTION 322.34(1)(c) (1995) IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY TO TRIAL COURTS, AND THE INFORMATION FAILED TO VEST THE CIRCUIT COURT WITH JURISDICTION.

Florida Statutes §322.34(1) reads as follows:

> (1) Any person whose driver's license or driving privilege has been canceled, suspended or revoked as provided by law, except persons defined in §322.264, and who drives any motor vehicle upon the highways of this state while such license or privilege is canceled, suspended or revoked, upon:
>
> (a) A first conviction is guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083.
>
> (b) A second conviction is guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083.
>
> (c) A third or subsequent conviction is guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

The basis of the defense argument in the Circuit Court, and here, is that §322.34(1) gives the Circuit Court the discretion to determine whether a third or subsequent conviction of DWLS is a felony or a misdemeanor by either withholding adjudication or adjudicating a defendant guilty.

A statute which allows one branch of government to apply the

inherent powers of another branch is unconstitutional as a violation of Article 2, Section 3 of the Florida Constitution, Walker v. Bentley, 678 So.2d 1265 (Fla. 1996). Determining whether a criminal act is a misdemeanor or a felony is a power of the legislative, not the judicial branch. Section 322.34(1) is thus unconstitutional. When a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused, Scates v. State, 603 So.2d 504 (Fla. 1992), Florida Statutes §775.021 (1995).

The State's primary argument in the Circuit Court, and the basis of the decision of the Fifth District Court of Appeal, was that a withhold of adjudication equals a conviction. There are numerous situations where this is not the case, and the Fifth District Court's reliance on State v. Gazda, 257 So.2d 242 (Fla. 1971) is misplaced.

Florida's DUI statute, Florida Statutes §316.193, is similar to the DWLS statute in that the degree of crime increases when a defendant drives while intoxicated more than once. In Wooten v. State, 332 So.2d 15 (Fla. 1976), this Court held that a defendant convicted of DUI under §316.193 must be adjudicated guilty. This Court held that mandatory adjudication ensures equal protection by preventing a defendant who avoids adjudication of guilt on

three prior DUI prosecutions from receiving a less severe sanction than a defendant with one prior conviction. Clearly, this Court's conclusion in Wooten was that a withheld adjudication does not serve the same function as a conviction. Wooten and the more recent case of State v. Whitaker, 590 So.2d 1029 (Fla. 1st DCA 1991), make it clear that withholding adjudication in a DUI case could result in a defendant's fourth prosecution not resulting in a felony conviction. There exists no mandatory adjudication rule with regard to DWLS prosecutions.

In a case dealing with sentencing options, Thomas v. State, 356 So.2d 846 (Fla. 4th DCA 1978), the court equated a conviction with an adjudication of guilt. The court wrote that "[w]ithholding and suspension of adjudication and sentence means the court declines to convict (adjudicate guilty) the defendant or fine or imprison him until probation is tried" Id. at 847).

Castillo v. State, 590 So.2d 458 (Fla. 3d DCA 1991) was a case dealing with possession of a firearm by a convicted felon. The court in Castillo reversed the Appellant's conviction for possession of a firearm by a convicted felon because the defendant's prior adjudication had been withheld, and the defendant was therefore not a convicted felon.

The question of what "conviction" means has also come up in

the context of impeaching a witness with prior convictions. Florida Statutes §90.610 (1995) allows a witness to be impeached by prior felony convictions or convictions involving dishonesty if the witness has been "convicted of a crime". In Barber v. State, 413 So.2d 482 (Fla. 2d DCA 1982) and Johnson v. State, 449 So.2d 921 (Fla. 1st DCA 1984), a witness was allowed to be impeached when the trial court's decision to convict or withhold adjudication had not been made at the time of trial. In both of these cases the courts held that if the trial court ultimately withheld adjudication impeachment would not be permitted. In situations where witnesses testified after a finding of guilt but prior to sentencing, appellate courts in Roberts v. State, 450 So.2d 1126 (Fla. 4th DCA 1984) and Parker v. State, 563 So.2d 1130 (Fla. 5th DCA 1990) would not allow impeachment.

The decision the Fifth District Court found most persuasive was this Court's decision in State v. Gazda, 257 So.2d 242 (Fla. 1971). The fact is, however, that this Court's decision in Gazda provides no guidance in deciding the question at issue here.

Gazda dealt with Florida Statutes §775.14, which provided that any person receiving a withheld sentence which was not altered for five years shall not be sentenced for a conviction of the same crime for which sentence was imposed. The Court ruled

that a conviction does not require an adjudication by the court. This Court was very clear in holding that this determination was "for the purposes of construing s.775.14", Gazda at 243. Using Gazda as a general rule to determine what constitutes a conviction is wrong.

Another problem with Gazda is that the holding was based on law which no longer exists. This Court relied on Florida Statutes §§921.01 and 921.02 to distinguish between a "judgement of conviction" which this Court believed required an adjudication and a "conviction" which the Court believed was a determination of guilt. The Court noted in a footnote that these statutes had been repealed and replaced by Fla. R. Crim. P. 1.650 and 1.670 while Gazda was on appeal, Gazda at 244.

These statutes read:

> Section 921.01, Judgement Defined-The term judgement as used in the criminal procedure law means the adjudication by the court that the defendant is guilty or not guilty.
>
> Section 921.02, Rendition of Judgement-If a defendant has been convicted, a judgement of guilty, and if he has been acquitted, a judgement of not guilty, shall be rendered in open court and entered on the minutes of the court.

As these statutes evolved into Rules 1.650 and 1.670, and

finally into Fla. R. Crim P. 3.650 and 3.670, the distinction between a conviction and an adjudication of guilt was refined. The new rules read, in relevant part, as follows:

> Rule 1.650 Judgement Defined
> The term "judgement" means the adjudication by the court that the defendant is guilty or not guilty.
>
> Rule 1.670 Rendition of Judgement
> If the defendant is found guilty, a judgement of guilty, and, if he has been acquitted, a judgement of not guilty shall be rendered in open court and in writing, signed by the judge and filed; and, if in a court of record, recorded, otherwise, entered on the court's docket. However, the judge may withhold such adjudication of guilt if he places the defendant on probation.
> When a judge renders a final judgement of conviction, imposes a sentence, grants probation or revokes probation, he shall forwith inform the defendant concerning his right of appeal therefrom including the time allowed by law for taking an appeal.

In re Florida Rules of Criminal Procedure, 196 So.2d 124, 167 (Fla. 1967).

When 1.650 became 3.650 it did not change. The second paragraph of 1.670, which is now 3.670 was amended. It now reads:

> When a judge renders a final judgement of conviction, withholds adjudication of guilt after a verdict of guilty, imposes a sentence, grants probation, or revokes

> probation, the judge shall forwith inform the defendant concerning the rights of appeal therefrom, including the time allowed by law for taking an appeal.

These changes show an increasingly clear distinction between a conviction and a withheld adjudication. These changes began even before Gazda was written. A conviction does not equal a withheld adjudication, and the statute does delegate legislative powers to the trial court.

Another problem with §322.34(1) is that it does not give circuit courts jurisdiction over third offense DWLS charges. The crime becomes a felony upon conviction. This means that when charged, the crime is a misdemeanor. A circuit court's jurisdiction is invoked by filing an information charging a crime cognizable in that court, and jurisdiction is determined from the face of the information, Pope v. State, 268 So. 2d 173 (Fla. 2d DCA 1972). The theft statute, Florida Statutes §812.014 was similar to the statute at issue here. In 1992 it was changed to make it a felony to commit petit theft after two prior convictions. This gives the circuit court jurisdiction. The statute here charges a misdemeanor until conviction. The statute is unconstitutional.

CONCLUSION

BASED UPON the argument and authorities contained herein, Petitioner respectfully requests that this Honorable Court declare Section 322.34(1) unconstitutional, and vacate Petitioner's conviction.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to James Donald Raulerson, 4295 N.E. 166th Place, Citra, Florida 32113, on this 3rd day of April, 1998.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JAMES DONALD RAULERSON,	)	
	)	
Petitioner/Appellant,	)	
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Respondent/Appellee.	)	
	)	

A P P E N D I X

97-302 KW

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

JAMES RAULERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

CASE NO. 97-710

Opinion filed September 26, 1997

Appeal from the Circuit
Court for Marion County,
Carven D. Angel, Judge.

James B. Gibson, Public Defender, and
Kenneth Witts, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Mary G. Jolley,
Assistant Attorney General,
Daytona Beach, for Appellee.

ANTOON, J.

James Raulerson (defendant) appeals his judgment and sentence for felony driving while license suspended, claiming that section 322.34(1) of the Florida Statutes (1995) unconstitutionally permits the trial court to determine whether the offense is a misdemeanor or a felony. We affirm.

The defendant was charged with the offense of driving while his license was suspended in violation of section 322.34 of the Florida Statutes (1995). The state prosecuted the offense as a felony, relying upon the fact that the defendant had three prior

convictions for the same offense. The defendant filed a motion to dismiss the charge, asserting that section 322.34(1) was unconstitutional. The trial court denied the motion, and the defendant thereafter entered a plea of *nolo contendere* after specifically reserving his right to appeal the denial of his dismissal motion. The trial court then adjudicated the defendant guilty of the felony offense of driving while license suspended and imposed sentence.

Section 322.34(1) of the Florida Statutes (1995) provides that a driver, upon a third or subsequent conviction for driving with a suspended license, is guilty of committing a third-degree felony:

> **322.34 Driving while license suspended, revoked, canceled, or disqualified.-**
>
> (1) Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, except persons defined in s. 322.264, and who drives any motor vehicle upon the highways of this state while such license or privilege is canceled, suspended, or revoked, upon:
>
> (a) A first conviction is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (b) A second conviction is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (c) A third or subsequent conviction is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The defendant argues that whether an accused has been "convicted" under the statute depends upon whether or not the trial court exercised its discretion to withhold an adjudication of guilt. In this regard, the defendant maintains that if the trial court withholds a defendant's adjudication of guilt following either a guilty verdict or plea on the charge of violating section 322.34(1), then that charge would not constitute a prior "conviction" for

purposes of enhancement under the statute. He further asserts that since the trial court is vested with discretion pertaining to the decision whether to withhold an adjudication of guilt, the statute must be struck down as unconstitutional because the delegation of such legislative power to the trial court violates Article 2, section 3 of the Florida Constitution. We disagree.

In determining whether a statute is constitutional we must resolve all doubts in favor of the statute's constitutionality. State v. Stadler, 630 So. 2d 1072 (Fla. 1994). In doing so, we must give the statute a fair construction that is consistent with the constitution and legislative intent. Id. at 1076. Applying these rules of construction to the instant case, the defendant's argument fails.

The dispositive issue here is whether a defendant's violation of section 322.34(1) constitutes a conviction when the sentencing court decides to withhold an adjudication of guilt instead of entering a judgment against the defendant. If the answer is yes, then the defendant's argument fails because all prior violations of the statute would count in determining whether the violation is a felony.

By embracing the concept of withholding adjudication, Florida courts have created some confusion because there is uncertainty as to the meaning and ramifications of such a disposition. However, our supreme court has made it clear that one may be "convicted" without being adjudicated guilty:

> [T]he term "conviction" means a determination of guilt by verdict of the jury or by plea of guilty, and does not require adjudication by the court. It is important to distinguish a "judgment of conviction" which is defective unless it contains an adjudication of guilt.

State v. Gazda, 257 So. 2d 242, 243-244 (Fla. 1971).

The above definition is consistent with rule 3.701(d)(2) of the Florida Rules of

Criminal Procedure, which provides:

> "Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

In Smith v. Bartlett, 570 So. 2d 360 (Fla. 5th DCA 1990), rev. denied, 581 So. 2d 1310 (Fla. 1991), Judge Harris aptly noted that, after Gazda, the term "conviction" was similarly defined and applied in other contexts. See Jones v. State, 502 So. 2d 1375 (Fla. 4th DCA 1987)(adjudication withheld is a conviction for double jeopardy purposes); Johnson v. State, 449 So. 2d 921 (Fla. 1st DCA), rev. denied, 458 So. 2d 274 (Fla. 1984) (an adjudication withheld constitutes valid impeachment evidence).

A common sense reading of the instant statute indicates that the legislature intended the term "conviction" to mean a determination of a defendant's guilt by way of plea or verdict. There appears to be no requirement that there be an adjudication. The obvious legislative intent of section 322.34 is to increase the penalty for repeat violations of the statute. The legislative goal is accomplished by application of the Gazda definition of conviction. Accordingly, we conclude that the statute is constitutional.

AFFIRMED.

GRIFFIN, C.J., concurs.
HARRIS, J., concurs and concurs specially, with opinion.

HARRIS, J., concurring and concurring specially: **Case No. 97-710**

I concur in the opinion of Judge Antoon. I write to more directly address the contention of the appellant. This seems appropriate since this has become a "hot issue" of the day.

Raulerson relies on *Wooten v. State,* 332 So. 2d 15 (Fla. 1976), another case involving a criminal offense which provides for progressively more severe sentences for subsequent like offenses. *Wooten* requires that formal adjudications are essential in order to authorize the imposition of the progressive sentences. The *Wooten* court held:

> The requirement that offenders who have been proven guilty be so adjudged is part and parcel of the legislative scheme to discourage drunken driving by authorizing progressively harsher sentences for multiple offenders. In order for a repeat offender to be subject to enhanced punishment for subsequent offenses under Fla. Stat. §316.028(4) (1974 Supp.), there must have been at least one previous conviction under Fla. Stat. §316.028(3) (1974 Supp.) Section 316.028 does not authorize stiffer punishment in the absence of a prior adjudication of guilt; previous entry of a judgment of conviction is the necessary precondition.

Id. at 17.

Although the requirement for a formal adjudication was contained in the DWI statute then under review (and is not a requirement of the statute involved in our case), the supreme court indicated in *Wooten* that classifying drunken driving offenders differently by not permitting withholding of adjudication was justified in order to ensure equal protection of the law. The court held:

> In light of the legislative history, the requirement of mandatory adjudication manifests, if anything, a legislative intent to ensure equal protection of the laws. If Fla. Stat. §316.028 (1974 Supp.) stood alone, the multiple offender who succeeded in avoiding formal adjudication, in three previous prosecutions, could not be punished as severely as the drunken driver whose single previous offense resulted in conviction. For this reason, the

> legislature might have concluded that failure to require adjudication would have permitted unjust disparities in the punishment authorized for subsequent offenders. When by court rule the Court also adopted the mandatory adjudication requirement for drunken driving offenses, the Court aligned itself with the legislature and approved the view that classifying drunken driving offenders in this manner served a rational state purpose. We are not persuaded otherwise today.

Id.

Although the supreme court ruled in *Wooten* that because the DWI statute provided for progressively more severe sentences for repeat offenders and thus justified the mandatory adjudication requirement in order to ensure equal protection of the laws, it did not specifically hold that mandatory adjudication should be required in all cases in which a progressive sentencing scheme is employed. But because the suspension of licenses often results from convictions for drunken driving, the policy reason mentioned in *Wooten* seems every bit as relevant in driving with license suspended cases. Should not, therefore, the court also require, even though the statute is silent, mandatory adjudications in driving with license suspended cases in order to ensure equal protection of the laws? This issue is not before us because it is not the basis of Raulerson's appeal. Instead, Raulerson urges that because the trial court has discretion to withhold adjudication in this case, thus permitting the trial judge to determine whether a misdemeanor or felony has been committed, the legislature has violated the separation of powers doctrine by permitting the court to "legislate" what is and what is not a felony. The statute before us provides that a third or subsequent "conviction" for driving with license suspended will constitute a felony of the third degree. Raulerson urges that, consistent with *Wooten,* this "conviction" must be a formal adjudication of guilt and that the decision to adjudicate rests solely with the trial judge.

Raulerson's position on appeal, therefore, depends entirely on whether there must be an adjudication of guilt for this third offense of driving with license suspended in order to enhance the offense from a misdemeanor to a felony. Even though consistency with *Wooten* might require a formal adjudication for the qualifying offenses (the first two offenses), would it necessarily follow that there must also be an adjudication for the sentence which is based on those qualifying offenses? I think not. In the case of the third offense, the defendant is not being tried for the misdemeanor of driving with license suspended. He is now being tried for a felony which consists of two elements: (1) driving with license suspended and (2) having twice been convicted of the same offense (it is these convictions that might require the formal adjudications).[1] The lesser included offense to the felony charge (merely driving with license suspended), whether the defendant pleads to or is found guilty by the fact finder of felony driving with license suspended, will never be before the court for sentencing. There is no equal protection problem created by not requiring formal adjudication of the third offense because everyone who is held accountable for the charged felony, whether adjudicated or not, is sentenced as a felon. Formal adjudication for the third offense is, in my view, also irrelevant in determining whether the offense is a felony or misdemeanor. I believe it was the clear intent of the legislature that a felony is committed if the defendant thrice violates the driving with license suspended statute. Therefore, the mere sentencing for the felony, even if adjudication of guilt of the felony is withheld, should be ample "conviction" of the

[1] It is not argued that there were not formal adjudications of the qualifying offenses in our case.

included third offense of driving with license suspended to fulfill the requirements of section 322.34(1)(c). This is an appropriate case, as indicated by the majority opinion, in which to apply the supreme court's distinction between a conviction and an adjudication of guilt.