**ORIGINAL**



IN THE SUPREME COURT OF FLORIDA

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| HECTOR Z. LUCIO, | ) | |
| | ) | |
| Petitioner/Appellant, | ) | |
| | ) | |
| versus | ) | S.CT. CASE NO. 92,066 |
| | ) | |
| STATE OF FLORIDA, | ) | DCA CASE NO. 97-168 |
| | ) | |
| Respondent/Appellee. | ) | |
| | ) | |

**ON DISCRETIONARY REVIEW FROM**
**THE FIFTH DISTRICT COURT OF APPEAL**

# MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE AND FACTS

Petitioner, Hector Lucio, was charged by information with felony driving while license suspended or revoked, in violation of Florida Statute §322.34(1) (1995) and not having a registration (R26-27). Petitioner filed a motion to dismiss the DWLS charge, arguing that §322.34(1) is unconstitutional because it gives legislative powers to the trial court (R44-47). Petitioner argued that, by withholding adjudication, the court could determine whether the crime was a felony or a misdemeanor. The trial court denied the motion to dismiss (R14, 60).

Petitioner entered pleas of nolo contendere to both charges, reserving the right to appeal the denial of the motion to dismiss (R14-15, 18). Petitioner was sentenced to three years probation for the felony DWLS (R19-23, 61-62, 69-71).

A notice of appeal was timely filed (R64). The Fifth District Court of Appeal affirmed the lower court based on Raulerson v. State, 699 So.2d 339 (Fla. 5th DCA 1997). This Court accepted jurisdiction over this case on March 20, 1998.

## 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), in Raulerson, 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 distinguished between and 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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COUNSEL FOR PETITIONER

## 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 Hector Z. Lucio, P.O. Box 3411, Belleview, Florida 34421, on this 14th day of April, 1998.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

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A P P E N D I X

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



HECTOR Z. LUCIO,

Appellant,

v.

CASE NO. 97-168

STATE OF FLORIDA,

Appellee.



Opinion Filed November 14, 1997.

Appeal from the Circuit Court
for Marion County,
Thomas Sawaya, Judge.

James B. Gibson, Public Defender, and
Dan D. Hallenberg, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Kristen L. Davenport,
Assistant Attorney General, Daytona Beach,
for Appellee.

PER CURIAM.

AFFIRMED. See Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997).

GRIFFIN, C.J., THOMPSON and ANTOON, JJ., concur.