ORIGINAL

IN THE SUPREME COURT OF FLORIDA

RICKEY PAUL MURRAY,

Petitioner,

versus

CASE NO. 92,143

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

RICKEY PAUL MURRAY,

Petitioner,

versus CASE NO. 92,143

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

A P P E N D I X

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by informations filed in the Circuit Court of Marion County, Florida, with "felony driving while license suspended or revoked." (R 1, 44) On February 14, 1997, he entered a plea of nolo contendere, reserving his right to appeal the trial court's denial of his motion to dismiss; adjudication of guilt was withheld and he was ordered to spend concurrent terms of one year in the county jail, pay fines of $500.00 per count, and serve concurrent terms of one year on probation. (R 20-21, 25, 44, 65-66, 67, 93, 26, 98-101, 105-107, 110-112)

The trial court's orders were affirmed, per curiam, on December 5, 1997. Murray v. State, 701 So. 2d 1251 (Fla. 5th DCA 1997). (APPENDIX A).

SUMMARY OF ARGUMENT

Section 322.34(1), the "felony driving while license suspended" statute, is unconstitutional because it improperly delegates to the judiciary the legislative function of determining whether a crime is a felony or a misdemeanor. The offense becomes a felony, not upon its third commission but upon a third "conviction," which leaves to trial judges the decision whether to adjudicate a defendant guilty of what would, upon such adjudication, then become a felony.

ARGUMENT

SECTION 322.34(1)(c) UNCONSTITUTIONALLY DELEGATES LEGISLATIVE AUTHORITY TO THE TRIAL COURTS.

Section 322.34(1) was amended in 1995, to become effective on October 1, 1995, to provide that:

> (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:
>
> * * *
>
> (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.

Ch. 95-278, s. 1, Laws of Florida.

Petitioner filed motions to dismiss informations charging him with "felony driving while license suspended," contending that by the language of the 1995 statute, he would not be guilty of a felony if the trial court exercised its discretion to withhold adjudication, and that it was an unconstitutional delegation of the Legislature's power, to the trial courts, to determine whether violation of Section 322.34(1) is to be punished as a felony or a misdemeanor. (R 20-21, 65-66) The Fifth District Court of Appeal affirmed the trial court's denial of his motions on the authority

of Raulerson v. State, 699 So. 2d 339 (Fla. 5th DCA 1997), currently pending this Honorable Court's review in Case Number 91,611.

In Raulerson, the District Court relied upon the holding in State v. Gazda, 257 So. 2d 242 (Fla. 1971), to decide whether a person has been "convicted" under the "felony DWLS" statute when a trial court withholds adjudication of guilt upon a finding that the statute has been violated. Gazda held:

> [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.

Id., 257 So. 2d at 243-244. In Wooten v. State, 332 So. 2d 15 (Fla. 1976), this Honorable Court held that a defendant convicted of driving under the influence under Section 316.193 *must* be adjudicated guilty, to achieve the legislative purpose of ensuring equal protection, so that one defendant from whom adjudication had previously been withheld would not be in a position to receive a lesser sanction than a defendant with one prior "conviction," i.e., adjudication of guilt. It is apparent from Wooten that an "adjudication withheld" disposition is not the equivalent of a "conviction."

Broward County Circuit Judge Stanton Kaplan explicated this

distinction when he compared the provisions of the "felony petit theft" statute to the lack of such provisions in the "felony DWLS" statute in State v. Santiago, 4 Fla. L. Weekly Supp. 220 (Fla. 17th Cir. Ct. August 2, 1996):

> If the statute was worded [similarly] to the petit theft statute, the problem would be eliminated. The petit theft statute provides, "(a) person who commits petit theft and who has previously been convicted two or more times of any theft commits a felony of the third degree..." It does not require a third "conviction" for felony sanctions to be imposed. It only requires two (2) prior convictions of theft. If the statute read, "(a) person who drives with a canceled, suspended, or revoked license and who has previously been convicted two or more times of driving with a canceled, suspended, or revoked license commits a felony of the third degree, punishable as provided in §775.082, §775.083, or §75.084," the legislative intent would be achieved, and the judge could still exercise his or her discretion regarding adjudication of guilt. This wording does not require a third "conviction" for the conduct to be felonious. With this wording, a judge is not obligated to adjudicate the offender guilty in order to impose felony sanctions; and a judge may exercise his or her discretion, per §948.01, Fla. Stat., and withhold adjudication of guilt. However, this Court is not empowered to cure an omission, or to add to a statute. [Citations omitted.]

The Fifth District Court of Appeal concluded in Raulerson that a "common sense reading" of the "felony DWLS" statute indicates that the Legislature intended for the term "conviction" to mean any determination of guilt via a plea or verdict. Id., 699 So. 2d at 340. As Judge Kaplan pointed out in Santiago, however, what the

Legislature intended it omitted to say.

A statute which allows one branch of government to exercise the powers of another branch violates Article II Section 3 of the Florida Constitution. See, e. g., Walker v. Bentley, 678 So. 2d 1265 (Fla. 1996). Section 322.34(1) is unconstitutional.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the Fifth District Court of Appeal's decision in this cause and declare Section 322.34(1) to be unconstitutional.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to the Petitioner, Mr. Rickey Paul Murray, c/o Ms. Ruth Murray, 1811 Third Avenue West, Palmetto, Florida 34221, this 14th day of April, 1998.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

RICKEY PAUL MURRAY,

Petitioner,

versus CASE NO. 92,143

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

A P P E N D I X

***1251** 701 So.2d 1251

22 Fla. L. Weekly D2722

Rickey Paul MURRAY, Appellant,
v.
STATE of Florida, Appellee.

No. 97-707.
District Court of Appeal of Florida,
Fifth District.
Dec. 5, 1997.

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

James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant.

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

PER CURIAM.

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

DAUKSCH, PETERSON and THOMPSON, JJ., concur.