IN THE SUPREME COURT OF FLORIDA

ALBERT GLOSTER, :

Petitioner, :

v. :

STATE OF FLORIDA, :

Respondent. :

_____/

CASE NO. 92,235
1st DCA No. 96-4559

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case involves a constitutional challenge to § 322.34(1)(c), Florida Statutes (1995). The statute provides:

> (1) Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, ... 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 first 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 facts as found by the district court are as follows:

> The state filed an information in which it

charged (1) that appellee drove a motor vehicle upon the highways of this state on April 3, 1996, while his license or privilege to drive was canceled, suspended or revoked; (2) that, on that date, appellee had two previous convictions for driving while his license or privilege to drive was canceled, suspended or revoked; and (3) that, therefore, appellee was guilty of a violation of section 322.34(1)(c), Florida Statutes (1995). Appellee responded by filing a motion to dismiss, claiming that section 322.34(1)(c) is unconstitutional because it delegates to the judiciary the legislative power to determine whether conduct such as appellee's will be treated as a misdemeanor or a felony.

Both in his motion, and at the hearing on the motion, appellee relied exclusively upon the rationale set forth in State v. Santiago, 4 Fla. L. Weekly Supp. 220 (Fla. 17th Cir. Ct. Aug. 2, 1996). In Santiago, the circuit judge dismissed an information charging a violation of section 322.34(1)(c), concluding that the statute unconstitutionally delegated a legislative power to the judiciary. The gist of the judge's rationale is contained in the following paragraph:

> Because [section 322.34(1)(c)] requires an adjudication of guilt for the conduct to be punishable as a felony, and because § 948.01, Fla. Stat., allows this Court to withhold adjudication of guilt, this Court has the unbridled discretion to make the Defendant's conduct a felony or a misdemeanor by simply exercising its discretion regarding the withholding of adjudication of guilt. The Legislature has the sole authority and responsibility to make the criminal laws, including classifying transgressions of the criminal law as either a felony or a misdemeanor. It is an unconstitutional delegation of the legislative power to

> grant to this Court the power to make the Defendant's conduct punishable as a felony or a misdemeanor by this Court exercising its discretion to withhold adjudication of guilt.
>
> Id. at 221. In granting appellee's motion to dismiss, the trial court announced that it was adopting the rationale in Santiago. This appeal follows.

State v. Gloster, 23 Fla. L. Weekly D32a (1st DCA December 18, 1997).

Following supplemental briefing oral argument, which it ordered *sua sponte*, the district court reversed, finding that a trial judge has no option to treat a violation of § 322.34(1)(c) as a misdemeanor. The court stated:

> [T]here are two possible alternatives when one charged with a violation of section 322.34(1)(c) has adjudication of guilt withheld and is placed on probation--either the term of probation will be successfully completed, in which event the defendant will not have been convicted at all; or probation will be revoked, in which case the defendant must be adjudicated guilty of a violation of section 322.34(1)(c), and sentenced accordingly. Treating the charge as a misdemeanor (as Santiago suggests) is simply not an available alternative. Thus, it is clear that section 322.34(1)(c) does not have the effect ascribed to it in Santiago, and by the trial court below; and, therefore, does not involve an unconstitutional delegation of legislative power to the judiciary.

23 Fla. L. Weekly at D33.

The district court denied Gloster's motion for rehearing and rehearing en banc. Gloster now seeks discretionary review in this court, pursuant to Article V, Section 3(b)(3) of the Florida Constitution, to review a decision in which the district court declared valid a state statute.

SUMMARY OF THE ARGUMENT

Section 322.34(1)(c), Florida Statutes, which makes driving with a suspended license a felony upon a third conviction, is a recidivist enhancement mechanism unlike others in the criminal code. It differs from the felony petit theft statute in that its operation hinges on conviction, and from the felony DUI statute in that adjudication of guilt, which creates the "conviction," remains discretionary with the trial judge. Petitioner argued below that, in attaching felony status to the trial judge's optional decision to impose adjudication of guilt, the Legislature unconstitutionally delegated the determination of the permissible punishment to the judiciary, a violation of Article III, Section 1 of the Florida Constitution.

Three district courts have rejected this claim, though for two different reasons. The First DCA concluded that the option to treat the offense as a misdemeanor simply does not arise, because an offender for whom adjudication is withheld will either complete probation successfully or violate probation, compelling the trial judge to impose (felony) adjudication of guilt. The Fifth DCA, joined by the Third DCA, concluded that one who commits the offense has been convicted of a felony, regardless of adjudication of guilt.

Petitioner believes that each perspective is flawed, for reasons he will expand upon if directed to submit a brief on the merits. He will argue that the First DCA's perspective creates unacceptable uncertainty in the lack of sufficient notice of the potential penalty for a criminal offense, including the permissible duration of probation upon withholding of adjudication -- one year for a misdemeanor or five years for a felony. He will argue that the Fifth DCA's perspective on what constitutes a conviction is out of step with a clear line of precedent. In short, he will argue that neither perspective creates a workable solution to the separation of powers problem created by the provision. For these reasons, petitioner prays that this court will exercise its discretion to review the DCA decision and order briefing on the merits to determine the constitutional validity of § 322.34(1)(c).

ARGUMENT

THIS COURT SHOULD ACCEPT THIS CASE TO DETERMINE WHETHER THE STATUTE MAKING DRIVING WHILE LICENSE SUSPENDED A FELONY UPON A THIRD CONVICTION CAN BE CONSTRUED SO THAT IT DOES NOT UNCONSTITUTIONALLY DELEGATE TO THE JUDICIARY THE POWER TO PRESCRIBE AUTHORIZED CRIMINAL PENALTIES.

The Legislature amended § 322.34, Florida Statutes, to provide that a third or subsequent conviction of driving while license suspended IS hird-degree felony. Ch. 95-278, § 1, Laws of Florida. Unlike the recidivist scheme for driving while intoxicated, §§ 316.193 and 316.656(1), Florida Statutes, the trial judge retains discretion to impose or withhold adjudication of guilt. Unlike the felony petit theft statute, § 812.014(3)(c), which makes repeated commission of the offense a felony regardless of conviction, the offense becomes a felony only upon conviction. Accordingly, those prosecuted for the offense argued for dismissal on grounds that the provision unconstitutionally grants the judiciary the power to determine whether the offense is a felony or misdemeanor via imposition or withholding of guilt. The trial court agreed and dismissed the prosecution in Santiago v. State, 4 Fla. L. Weekly Supp. 220 (17th Cir. Aug. 2, 1996), review pending, 4th DCA No. 96-2818. The trial court in this case adopted the ruling in Santiago and

ruled the statute unconstitutional.

To date, three district courts have ruled to the contrary, though for different reasons. In Raulerson v. State, 22 Fla. L. Weekly D2267 (5th DCA Sept. 26, 1997), the court concluded that the statute does not violate the constitutionally required separation of powers because an offender is convicted upon a finding of guilt, with or without adjudication of guilt. In Pirtle v. State, 22 Fla. L. Weekly D2533 (3d DCA Nov. 5, 1997), the court adopted the "well-reasoned decision" in Raulerson. In this case, the district court also found the provision constitutional, reasoning that the opportunity to treat the offense as a misdemeanor never arises, so no encroachment on legislative powers can occur. State v. Gloster, 23 Fla. L. Weekly D32 (1st DCA Dec. 18, 1997). The Gloster court noted that Raulerson was decided "on somewhat different grounds." Id. at D33.

If given the opportunity, petitioner will argue to this court that the perspectives of the district courts in these cases are untenable. He will argue that the rationale employed in Gloster creates more problems than it solves, for it results in constitutionally invalid uncertainty as to the potential penalty for a criminal offense, including the permissible duration of probation upon withholding of adjudication -- one year for a

misdemeanor or five years for a felony. He will also argue that the Fifth DCA's perspective on what constitutes a conviction is out of step with a clear line of precedent. He will conclude that the violation of Article III, Section 1 identified in Santiago cannot be resolved by statutory construction, requiring that this court rule it unconstitutional.

This court may accept this case for review under Article V, Section 3(b)(3) of the Florida Constitution because the district court expressly declared valid a state statute in finding that "section 322.34(1)(c) ... does not involve an unconstitutional delegation of power to the judiciary." State v. Gloster, 23 Fla. L. Weekly at D33. This court has accepted review on the same jurisdictional basis several times in recent years. Jennings v. State, 682 So. 2d 144 (Fla. 1996); Bouters v. State, 659 So. 2d 235 (Fla. 1995). Petitioner submits that the jurisdictional basis is clear, and that the issue is of sufficient import for the court to accept this case for review.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner prays that this Honorable Court will accept this case for review and order briefing on the merits.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mark Menser, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this 30th day of January, 1998.

Respectfully submitted
& Served,

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