W O O A

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IN THE SUPREME COURT OF FLORIDA

ALBERT GLOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 92,235

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the Appellant in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, and will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Mr. Gloster, was the Appellee in the DCA and the defendant in the trial court, and will be referenced in this brief as Petitioner or by proper name.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Gloster's statement of the case and facts, adding only that Gloster has eight prior convictions for the offense at bar.

It should be noted that the Fifth District Court of Appeal recently upheld the constitutionality of the statute at bar, rejecting a "separation of powers" argument, in a case currently under review in this Court. See, Raulerson v. State, case 91,611 (and consolidated cases 92,066 and 92,143).

SUMMARY OF ARGUMENT

The "separation of powers" clause of the Florida Constitution is not violated when a trial judge, in a felony case, exercises the statutorily authorized authority to enter or deny a "withheld adjudication" in a properly filed case. The act of withholding adjudication is not a legislative act.

In this case, the Petitioner challenges the constitutionality of section 322.34(1)(c), Fla. Stat., on the grounds that he will not be convicted of a felony should the Court, for some reason, withhold adjudication after considering his case. The trial court erroneously agreed with the petitioner's separation of powers theory, and the First District Court of Appeal correctly reversed.

The petitioner also proffers a vagueness challenge despite the fact that we are not dealing with a constitutionally protected activity. The State submits that the challenged statute is not vague, since it is interpreted as relying upon the general statutory definition of a "conviction" as it relates to sentence enhancement in the absence of any specific exception.

The State adopts the answer brief submitted in the pending case of Raulerson v. State, case 91,611.

ARGUMENT

ISSUE I

WHETHER SECTION 322.34(1)(C) IS CONSTITUTIONAL UNDER THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION. (Restated)

The petitioner, Mr. Gloster, contends that Section 322.34(1)(C), Fla. Stat., is unconstitutional under the "separation of powers" clause of the Florida Constitution. See, Article II, Section 3, Florida Constitution. The State will begin by addressing the standards of review which control this inquiry.

A: STANDARD OF REVIEW

The issue before the Court involves the constitutionality of a Florida Statute, particularly under Article II, Section 3, of the Florida Constitution. The petitioner alleges that all statutes must be strictly interpreted in favor of the defendant, thus making all statutes presumptively unconstitutional if an unconstitutional construction is possible. This is obviously not the law and it is astonishing that the petitioner would so argue.

Florida statutes are presumed to be constitutional, State v. Stalder, 630 So.2d 1072 (Fla. 1994), and any court reviewing the constitutionality of a statute must give the statute an interpretation which is consistent with constitutionality if possible. As noted in Felts v. State, 537 So.2d 995 (Fla. 1st DCA 1988).

> Every reasonable doubt should be resolved in favor of the constitutionality of a legislative act, since the presumption of constitutionality continues until the contrary is proven beyond all reasonable doubt. If a

> statute which is claimed to be unconstitutional is susceptible of two interpretations, one of which would lead to a finding of unconstitutionality and the other of validity, the court must adopt the construction which will support the validity of the statute. In testing the constitutionality of a statute, the court should take into consideration the whole of the act, and may consider its history, the evil to be corrected or the object to be obtained, and the intention of the lawmaking body.

There is also an issue regarding the alleged "vagueness" of the statute. Petitioner's arguments on that point indicate a heavy reliance upon hypothetical factual circumstances having nothing to do with the case at bar. In State v. Barnes, 686 So.2d 633 (Fla. 2nd DCA 1996), the Court correctly noted that a "roving search" for hypothetical situations which would call the constitutionality of a statute into question violates "fundamental principles of appellate review". The existence of what the court called "marginal hypotheticals" does not call into question the constitutionality of a statute. See, Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979), see also, State v. Dye, 346 So.2d 538 (Fla. 1977).

B: THE STATUTE

The challenged statute is Section 322.34(1)(c). The statute 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 Section 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 Sec. 775.082 or 775.083.
>
> (B) A second conviction is guilty of a misdemeanor of the first degree, punishable as provided in Sec. 775.082 or 775.083.
>
> (C) A third or subsequent conviction is guilty of a felony of the third degree, punishable as provided in Sec. 775.082, Sec. 775.083 or Sec. 775.084.

It is to be noted that the act outlawed by the statute is "driving while license suspended or revoked", and not "driving after a third conviction". The presence of prior convictions, therefore, is a sentencing factor, not an element of the crime itself. See, e.g., Mann v. State, 603 So.2d 1141 (Fla. 1992); Hildwin v. Florida, 490 U.S. 638 (1989) (Aggravating factors are not the same as elements of the offense).

C: ARGUMENT: SEPARATION OF POWERS

Mr. Gloster's challenge to the constitutionality of the statue begins with a claim that the statute somehow violates the "separation of powers clause" of the Florida Constitution. According to Gloster, a defendant facing a third prosecution for a violation of this statute (hereafter identified as "DWLS", for "driving while license suspended") might be guilty of a felony if adjudicated, but would either be acquitted or only be guilty of a misdemeanor if adjudication was withheld. This, according to Gloster, means that the trial court is "legislating" when it makes the decision to impose or withhold adjudication, since it is "creating" a felony or a misdemeanor by its decision.

We begin dismantling this theory by noting that trial courts in Florida have the legislative authority to withhold adjudication in criminal cases under §948.01, Fla. Stat., as well as a recognized inherent authority to do the same. The purpose of a withheld adjudication is to enable the court to avoid entering a judgment when the interests of society are better served. A withheld adjudication is not an acquittal.

What the petitioner fails to grasp is the fact that the entry, or withholding, of an "adjudication" is a completely different act than "legislating". A "withheld adjudication" merely means that the Court is declining to enter a series of findings regarding the evidence as it applies to the statute. It does not mean that the court is drafting a new statute. Furthermore, the act of entering or withholding an adjudication is no different in DWLS cases than it is in any other criminal case where withheld adjudications are authorized.

The petitioner has conceded the fact that the crime of DWLS was created by act of the Florida Legislature, not the Circuit Court. Furthermore, the petitioner offers no evidence that any statutory element of the crime was created, enacted or defined by the Circuit Court. Thus, the petitioner's "separation of powers" argument must fail because of its fundamental misconception regarding the terms used and its failure to consider the inherent (and statutorily authorized) power of trial courts to withhold adjudication.

D: ARGUMENT: WHETHER THE AVAILABILITY OF A WITHHELD ADJUDICATION RENDERS THE STATUTE UNCONSTITUTIONAL.

The Petitioner contends that the trial court's ability to withhold adjudication in a DWLS case renders the statute unconstitutional because it is unclear whether a "withheld adjudication" constitutes a conviction which can be factored into a sentencing decision. There are two hypotheticals involved.[1]

First, the petitioner argues that a withheld adjudication in a "third" prosecution under the statute, if not a conviction, would not enable the court to impose probation. According to petitioner, a "felony" length probation would be inappropriate if there was not a third conviction, while a misdemeanor length probation could not be imposed. This argument can be rejected easily.

The purpose behind a withheld adjudication and probation is to give a defendant a chance to demonstrate rehabilitation. If the defendant completes probation, the matter is closed. If the defendant violates probation, the Court enters an adjudication on the felony. That was the point made by the First District Court of Appeal in this case. The petitioner's argument, therefore, overlooks the entire purpose of withheld adjudications and is not worthy of extended consideration. (Interestingly, petitioner's theory, if accepted, would appear to render unconstitutional any statute for which a conviction on a lesser included offense could

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[1] The consideration of hypotheticals rather than the facts of this case, as suggested by Mr. Gloster, is not necessarily appropriate. See, State v. Barnes, 686 So.2d 633 (Fla. 2nd DCA 1996), however, several consolidated appeals are now before the Court on this point.

be entered, while his general criticism of withheld adjudications would seem to apply to all Florida Statutes for which that result is possible.)

The second issue involves the treatment of withheld adjudications at the time of a third trial for DWLS. If prior withheld adjudications are not convictions, then the jurisdiction of the Circuit Court during a third prosecution could be affected. Similarly, there would be a direct impact upon any available sentence.

It is beyond peradventure that the courts of this state have wrestled with the concepts of "conviction" and "withheld adjudication". Raulerson v. State, 699 So.2d 399 (Fla. 5th DCA 1997) (review pending, case 91,611). From any survey of both the caselaw and Florida Statutes, it is obvious that the issue (of whether a withheld adjudication qualifies as a conviction) is clearly a matter of context and, most importantly, of Legislative intent. In recognizing the division of authorities, however, the State must point out that any failure to precisely define "conviction" in the subsection of ch. 322 at bar does not render the statute unconstitutionally vague. Cf., State v. Mitro, 700 So.2d 643 (Fla. 1997). The State also notes that Section 921.0011, Fla. Stat., provides an overarching definition of the term "conviction" (which disposes of the issue of withheld adjudications) which uniformly applies to all Florida statutes for which no legislative or judicial exception has been recognized. Therefore, Section 322.34 is not unconstitutionally vague, since it

demurs to the general definition of "conviction" in the absence of a specific exception.

The petitioner does not contest the presence of substantial authority, under the caselaw, rules and statutes, for the proposition that a withheld adjudication can be treated as a conviction. For example, Section 921.0011, Fla. Stat., specifically defines a "conviction" as being a "determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld." This same definition appears in Fla.R.Cr.P. 3.703(6), as approved in Amendment to Fla.R.Cr.P. re: Sentencing Guidelines, 685 So.2d 1213 (Fla. 1996). The existence of such statutory authority clearly supports the interpretation of "conviction" argued by the State. See, State v. Mitro, supra.

In State v. Gazda, 257 So.2d 242 (Fla. 1971), the defendant, after entering a guilty plea to a charge of grand larceny, received a "withheld adjudication pending presentence investigation". Gazda subsequently disappeared for over 5 years. Upon his recapture, there was an issue as to whether he could be sentenced, since he had been on a "withheld adjudication" for over five years after being convicted. This Court agreed that an adjudication is not necessary for a "conviction" to exist, while attaching significance to the adjudication as a triggering mechanism for sentencing purposes.

In McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. den., McCray v. Florida, 454 U.S. 1041 (1981), this Court held that for capital sentencing purposes under §921.141, Fla. Stat., a "prior

conviction" used as an aggravating factor meant a determination of guilt even without an adjudication .

In cases arguing claims of "double jeopardy", the courts have been consistent in finding that a case disposed of by withheld adjudication constitutes a "conviction". See, Canion v. State, 661 So.2d 931 (Fla. 4th DCA 1991).

In Ryals v. State, 516 So.2d 1092 (Fla. 5th DCA 1987), the court held that a defendant who represented that he had no prior convictions misstated his record when he relied upon "withheld adjudications" to claim a lack of prior convictions.

In Harrison v. State, 585 So.2d 393 (Fla. 5th DCA 1991), the court determined that withheld adjudications do, in fact, qualify as prior convictions both under Chapter 921 and under the Habitual Offender Act, §775.084(2) (subject to limitations).

For what they are worth, federal decisions on this issue have consistently recognized that, under Florida law, a withheld adjudication may qualify as a prior conviction, contingent upon the nature of the plea.[2] U.S. v. Willis, 106 F.3d 966 (11th Cir. 1997), citing to U.S. v. Thompson, 756 F.Supp. 1492 (N.D. Fla. 1991); U.S. v. Bruscantini, 761 F.2d 640 (11th Cir. 1985); U.S. v. Grinkewicz, 873 F.2d 253 (11th Cir. 1989) (Thompson, however, is

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[2] The federal position regarding nolo pleas is based upon Garron v. State, 528 So.2d 353 (Fla. 1988). The Respondents respectfully disagree with the conclusion reached in Garron. While it is true that a nolo plea is not a confession, it is an admission of the sufficiency of the state's evidence to satisfy the requirements of a prima facie case, and should support a "conviction".

critical of the confusion surrounding withheld adjudications in Florida).

In contrast to these decisions stand a line of cases cited by petitioner which, again, reflect the contextual treatment of withheld adjudications, and thus provide no basis for declaring the instant statute unconstitutional.

In Castillo v. State, 590 So.2d 458 (Fla. 3rd DCA 1991), the defendant was charged with the crime of "possession of a firearm by a convicted felon". The court determined that when the fact of a prior conviction is an essential *element of the crime*, that element is to be established by showing an *adjudication*. The "element of the crime" approach was also utilized in the ancient case of Smith v. State, 75 Fla. 468, 78 So. 530 (1918). In both cases, the determination went to such factors as the quantum of proof to be met by the state and the existence of the crime itself.

The crime at bar involves driving a motor vehicle on a suspended or revoked license. The fact of a prior conviction is not an element of the offense. Rather, it is a sentence enhancement, which promotes consecutive convictions from misdemeanor to felony status. Aggravating sentencing factors are not elements of the offense. See, Hildwin v. Florida, 490 U.S. 638 (1989); cited in Mann v. State, 603 So.2d 1141 (Fla. 1992); see also, McMillan v. Pennsylvania, 477 U.S. 79 (1986).

In reviewing this statute, Legislative intent must be considered. It is given that there is no constitutional right to drive a motor vehicle. Driving is a privilege, and it is a

privilege which is subject to legislative control. Chapter 322.34 was created to punish the offense of driving on a suspended or revoked license, and to increase the punishment each time the law is broken. (In this case, Gloster has eight prior convictions, none of which were "withheld adjudications".) Section 322.34 defines an offense which is specifically *excluded* from the list of statutory violations for which a withheld adjudication is not a conviction under Ch. 318, Fla. Stat., and goes so far as to delineate misdemeanor and felony treatment for repeated violations of the section. The Legislature having excluded these crimes from Chapter 318, it would be a violation of the separation of powers concept to judicially inject crimes under §322.34 into §318.14.

In a final argument, the petitioner asks the court to consider Chapter 316, Fla. Stat., and its ban on "withheld adjudications" as proof of the "common perception" (at least by members of the Legislature) of withheld adjudications not constituting convictions. The Legislature is also presumptively aware of its own statutes, including §921.0011. Thus, the invitation to resolve constitutional issues on the basis of perceptions, feelings or illusions ought not to be accepted.

The State submits that a prior withheld adjudication does not preclude the finding of a prior conviction, under Florida law, unless a specific exception is recognized either by the Legislature or by the Court. This is particularly true when the importance of a prior conviction relates to a sentencing factor rather than an element of a crime. Thus, the statute at bar is not

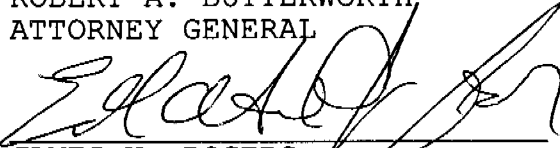
unconstitutionally vague to the extent that it relies upon the general and established statutory definition of a "conviction" as expressed in Ch. 921.

CONCLUSION

Based on the foregoing, the State respectfully submits that the constitutionality of §322.34(1)(c) should be upheld.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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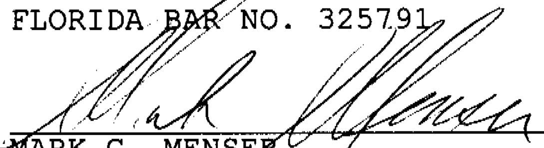

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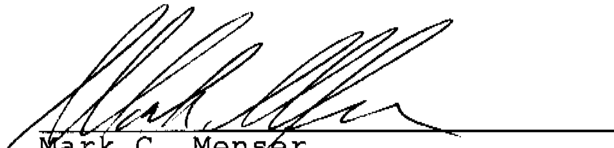
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Glen P. Gifford, Assistant Public Defender, Office of the Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301, this 8th day of July, 1998.



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