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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE HAWKINS, JR., :

Petitioner, :

v. :

CASE NO. 92,750

STATE OF FLORIDA, :

Respondent. :

_____ /

CLERK, SUPREME COURT
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ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS



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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE HAWKINS, JR.,)
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Petitioner,)
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v.) CASE NO. 92,750
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STATE OF FLORIDA,)
)
Respondent.)
)
)
)
_____)

INITIAL BRIEF OF PETITIONER ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The state charged appellant, Robert Lee Hawkins, Jr., under § 322.34(1)(c), Florida Statutes, with driving while license suspended as a third-degree felony. (R1)¹ Defense counsel moved to dismiss the charge, asserting that in enacting the statute, the legislature unconstitutionally delegated its power to define offenses as felonies or misdemeanors to the judiciary via imposition or withholding of adjudication of guilt. (R4-6) In a hearing on the motion, Circuit Judge Terry D. Terrell permitted counsel to amend the motion to include a claim that the application of the statute to Hawkins violated the *Ex Post Facto* Clause of the Florida Constitution. (R22-23)

After taking the matter under advisement, Judge Terrell

¹In this brief, citations to the single-volume record on appeal follow the format (R[page number]).

denied the motion to dismiss. (R31, 41) Hawkins pled no contest to the allegation as charged, reserving the right to appeal the denial of the motion to dismiss. (R32) The court accepted the plea. (R32-39) Hawkins was adjudicated guilty and sentenced to two years probation with a condition of six months in county jail. (R50, 56-59)

Hawkins raised both the violation of separation of powers and imposition of an ex post facto law on direct appeal. The district court affirmed in a *per curiam* opinion with decision, in which it cited State v. Gloster, 703 So. 2d 1104 (Fla. 1st DCA 1997), *rev. pending*, Fla.Sup.Ct. No. 92,235.

SUMMARY OF THE ARGUMENT

I. Petitioner adopts and incorporates by reference the argument made in the initial brief in Gloster v. State, Fla. Sup. Ct. No. 92,235. For the reasons asserted in Gloster, 322.34(1)(c), Florida Statutes (1995), violates the constitutional requirement of separation of powers embodied in Article II, Section 3 and Article III, Section 1 of the Florida Constitution.

II. Because all but the last of Hawkins' offenses of driving while license suspended occurred before the effective date of the amendment creating § 322.34(1)(c), Florida Statutes, enhancement of the offense to a third-degree felony because of the prior offenses makes that statute an unconstitutional *Ex Post Facto* law. The statute must be construed to require that all three offenses necessary for felony enhancement be committed after the effective date of the new law.

ARGUMENT

I. SECTION 322.34(1)(C), FLORIDA STATUTES (1995), VIOLATES THE CONSTITUTIONAL REQUIREMENT OF SEPARATION OF POWERS BECAUSE IT ALLOWS TRIAL JUDGES TO PRESCRIBE THE SEVERITY OF THE OFFENSE AND PERMISSIBLE PUNISHMENT VIA EXERCISE OF DISCRETION TO IMPOSE OR WITHHOLD ADJUDICATION OF GUILT.

On this issue, this case is in a "pipeline" in which the lead case is Gloster v. State, Florida Supreme Court Case No. 92,235. Therefore, petitioner adopts and incorporates by reference the argument made in the initial brief in Gloster v. State, Fla. Sup. Ct. No. 92,235. For the reasons asserted in Gloster, § 322.34(1)(c), Florida Statutes (1995), violates the constitutional requirement of separation of powers embodied in Article II, Section 3 and Article III, Section 1 of the Florida Constitution.

Consequently, petitioner's conviction of felony DWLS must be reversed and the case remanded for further proceedings pursuant to the remaining valid provisions of § 322.34.

II. RECLASSIFICATION OF AN OFFENSE FROM A MISDEMEANOR INTO A FELONY UPON A THIRD CONVICTION IS AN EX POST FACTO APPLICATION OF A STATUTE WHICH BECAME EFFECTIVE AFTER ALL BUT THE FINAL CONVICTION.

In Chapter 95-278, the legislature amended § 322.34(1), Florida Statutes, which defines the offense of driving while license suspended or revoked to provide that upon

(c) A third or subsequent conviction, [the offender] is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Previously, a second or subsequent conviction was punishable as a misdemeanor in the first degree. The amended statute became effective on October 1, 1995.

The state charged Hawkins with a third-degree felony under the amended statute for an offense committed on September 17, 1996. (R1) Defense counsel moved to dismiss the charge, brought in the circuit court, because reliance on prior offenses committed before the effective date of the amended statute make the statute an unconstitutional *ex post facto* law. (R22-23) The motion was denied.

The trial court erred. As applied to Hawkins, the statute retrospectively increased the punishment for the conviction of three or more violations of § 322.34, violating the *Ex Post Facto* clauses of Article I, Section 10 of both the Florida and United States constitutions and the Savings Clause of Article X, Section 9 of the Florida Constitution.

The standard of review on this issue, which turns solely on a question of law, is *de novo*. See generally, State v. Setzler, 667 So. 2d 343 (Fla. 1st DCA 1995), (application of the law to the facts by the trial court is reviewed *de novo*).

Article X, Section 9 of the Florida Constitution provides:

Repeal or amendment of a criminal statute
shall not affect prosecution or punishment
for any crime previously committed.

In Article I, Section 10 of both the Florida and U.S. constitutions, the people forbid the state from passing any "*ex post facto* Law." An *ex post facto* law is one which operates retrospectively to disadvantage a defendant by increasing the punishment after the fact. Weaver v. Graham, 450 U.S. 24 (1981); McKendry v. State, 641 So.2d 45 (Fla. 1994).

Applied to an offender who has committed only one offense of driving while license suspended after the effective date of the amendment, Chapter 95-278 retrospectively increases the punishment for the offense from the one-year limit of a first-degree misdemeanor to the five-year limit of a third-degree felony. Hawkins' driving record, admitted into evidence, shows that he has no prior violations of the statute before the October 1, 1995 effective date of the amendment. (R28-29)

By its own terms, the statute as amended creates a third-degree felony "upon ... [a] third or subsequent conviction" of driving while license suspended. This court has a duty to avoid

a construction of the statute which renders it unconstitutional. State v. Cohen, 568 So.2d 49 (Fla. 1990). To the extent that definiteness is lacking, the statute must be construed most favorably to the accused. § 775.021(1), Fla. Stat. (1995); Perkins v. State, 576 So. 2d 1310 (Fla. 1991).

The trial court noted that an *ex post facto* challenge had been denied in State v. Barron, 4 Fla. L. Weekly Supp. 363 (17th Cir. Sept. 30, 1996). The judge in Barron wrote:

1. The defendant asserted that Florida Statute 322.34(1)(c) is an *ex post facto* law in violation of the United States and Florida Constitutions. The Florida Supreme Court has upheld laws identical in format or result to the challenged law against this challenge. See State v. Woodruff, 21 Fla. L. Weekly S211 (Fla. May 16, 1996); Reeves v. State, 612 So. 2d 560 (Fla. 1992); State v. Harris, 356 So. 2d 315 (Fla. 1978). This Court finds that there is no violation of the Constitution by virtue of the *ex post facto* law claim.

The precedent cited by the court is inapposite. In State v. Woodruff, 676 So. 2d 975 (Fla. 1996), the issue was whether voluntary dismissals of misdemeanor DUI counts in the face of speedy trial dismissals barred prosecution for felony DUI counts based on the same conduct. No *ex post facto* claim is discernible from the opinion. In Reeves, the court reiterated previous rejections of *ex post facto* challenges to the habitual offender statute. However, as explained in Tillman v. State, 609 So. 2d 1295, 1298 (Fla. 1993), habitual offender punishment is for "the last offense alone". The language of the felony DWLS statute,

providing that "upon a third or subsequent conviction" the offender is guilty of a third degree felony, makes the felony DWLS a new offense which incorporates two prior convictions of DWLS. It is distinctive from a sentencing scheme which merely increases the punishment for an offense based upon the existence of prior offenses. In Harris, the court rejected equal protection and due process challenges to the felony petit larceny (now theft) statute, but did not address any *ex post facto* claim. To appellant's knowledge, no Florida appellate court has written on an *ex post facto* challenge to "a law identical in format or result" to § 322.34(1)(c).

For these reasons, § 322.34(1)(c) should be construed to apply prospectively to offenders who have three or more convictions of driving while license suspended after the October 1, 1995 effective date of the provision. In the alternative, the provision is an unconstitutional *ex post facto* law. In either event, the conviction of felony DWLS must be reversed.

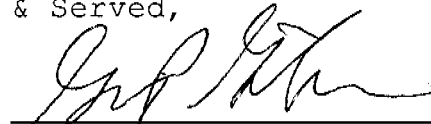
CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court of appeal, declare § 322.34(1)(c), Florida Statutes, unconstitutional, and remand with directions consistent with this disposition.

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 21st day of July, 1998.

Respectfully submitted
& Served,



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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE HAWKINS, JR., :
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_____ /

CASE NO. 92,750

APPENDIX

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ROBERT LEE HAWKINS, JR.,
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

v.

CASE NO.: 97-2500

STATE OF FLORIDA,

Appellee.
_____ /

Opinion filed March 11, 1998.

An appeal from the Circuit Court for Escambia County.
Terry D. Terrell, Judge.

Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant
Public Defender, Tallahassee, for Appellant. .

Robert A. Butterworth, Attorney General; J. Ray Poole, Assistant
Attorney General, Tallahassee, for Appellee.

PER CURIAM

AFFIRMED. See State v. Gloster, 23 Fla. L. Weekly D32 (Fla.
1st DCA December 18, 1997), rev. pending, No. 92,235 (Fla.).
BENTON, VAN NORTWICK AND PADOVANO, JJ., CONCUR.