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IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

AUG 11, 1998

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

TIMOTHY LEWIS GAILLARD,

Petitioner,

CASE NO. 92,809

v.

STATE OF FLORIDA,

Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

The record on appeal consists of two volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

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

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts as found on pages one and two of the Initial Brief.

SUMMARY OF ARGUMENT

ISSUE I. This issue is presently pending before this Court in State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997), rev. pending, No. 92,235 (Fla. May 19, 1998). The State adopts and by reference incorporates its argument in Gloster on this point.

ISSUE II. Florida's felony DWLSR statute does not run afoul of the constitutional prohibition against ex post facto laws. More specifically, the felony DWLSR statute's inclusion of prior DWLSR convictions as an element of the new substantive offense, without more, does not make the statute retrospective in its effect. To the contrary, the statute operates prospectively by creating a separate substantive offense that is punishable independent of the earlier offenses.

ARGUMENT

ISSUE I

WHETHER SECTION 322.34(1)(C), FLORIDA STATUTES,
VIOLATES THE SEPARATION OF POWERS DOCTRINE?
(Restated)

This issue is presently pending before this Court in State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997), rev. pending, No. 92,235 (Fla. May 19, 1998). The State adopts and by reference incorporates its argument in Gloster on this point.

ISSUE II

WHETHER SECTION 322.34(1)(C), FLORIDA STATUTES,
AS APPLIED IN THE CASE AT BAR, CONSTITUTES AN EX
POST FACTO LAW? (Restated)

Gaillard contends that the felony DWLSR statute, as applied in the case at bar, violates the constitutional prohibition against ex post facto laws.

Preservation. Gaillard preserved this issue for appellate review.

Jurisdiction. Respondent acknowledges that this Court has jurisdiction over this issue. Pursuant to Article V § 3(b)(3), Florida Constitution, this Court "[m]ay review any decision of a district court of appeal...that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." In the case at bar, the district court of appeal issued a per curiam opinion that cited State v. Gloster, 703 So. 2d 1104 (Fla. 1st DCA 1997), which is currently pending review in this Court, as controlling authority and thereby created conflict jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981).

The State submits, however, that this Court should decline to exercise its jurisdiction over this issue. See, e.g., Keane v. Andrews, 581 So. 2d 160 (Fla. 1991); State v. Burgess, 326 So.2d 441 (Fla. 1976); Stein v. Darby, 134 So.2d 232 (Fla. 1961); Coffin v. State, 374 So.2d 504, 508 (Fla. 1979). This Court's jurisdiction in the present case is predicated upon the district

court's citation to Gloster, which is currently pending before this Court, as controlling authority. The Gloster opinion, however, did not address this issue, i.e., whether the felony DWLSR statute violate the ex post facto clause.

Standard of Review. Legislative acts are presumed to be constitutional. See, Bunnell v. State, 453 So. 2d 808, 809 (Fla. 1984). Thus, when reviewing the constitutionality of a statute, a court must resolve all doubts in favor of the statute's validity and must construe the statute, whenever possible, so as not to conflict with the constitution. See, State v. Stalder, 630 So. 2d 1072 (Fla. 1994); State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997).

Burden of Persuasion. Gaillard bears the burden of demonstrating prejudicial error. According to statute:

In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Section 924.051(7), Fla. Stat. (1997); see also, Savage v. State, 156 So. 2d 566, 568 (Fla. 1st DCA 1963) (Judgments are presumed to be correct, and appellants carry the burden clearly to demonstrate harmful error arising from actions of the trial judge in the proceedings below.).

Merits. The ex post facto clauses of the Florida and United States constitutions do not bar recidivist statutes. When considering whether a statute violates the ex post facto clause,

a court must apply a two prong analysis: "(1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Gwong v. Singletary, 683 So. 2d 109, 112 (Fla. 1996).

A recidivist statute's inclusion of prior convictions as an element of a new substantive offense, without more, does not make the statute retrospective in its effect. This Court long ago explained that:

The statute is in no sense retroactive. It is prospective in its operation. It imposes enhanced punishment for none but future crimes committed after its enactment. It deals with offenders only for offenses committed after its passage, but provides that in fixing the punishment for the later offense, the condition into which the offender has brought himself by his previous conduct shall be taken into consideration. In punishing offenders for a criminal habit, the existence of which cannot be established without showing their former convictions as well as the conviction for which the enhanced punishment is imposed, the increased severity of the punishment for the second or subsequent offense is not a punishment of the person a second time for his former offenses but is a more severe punishment for the last offense, the commission of which is a manifestation of a criminal habit which may be taken into account in determining the adequacy of punishment to be imposed upon habitual offenders for offenses committed subsequent to the enactment of the statute. But for the commission of the subsequent offense, the enhanced penalty would not be imposed.

Cross v. State, 119 So. 380, 385 (Fla. 1928). The Ninth Circuit Court of Appeals more recently noted, "[i]t is hornbook law that no ex post facto problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct took place after

the law was passed." Russell v. Gregoire, 124 F.3d 1079, 1088-89 (9th Cir. 1997).

This Court has repeatedly rejected ex post facto challenges to recidivist statutes. See, e.g., Zarsky v. State, 300 So.2d 261 (Fla. 1974) (habitual traffic offender statute does not violate prohibition against ex post facto laws); Washington v. Mayo, 91 So. 2d 621 (Fla. 1956) (habitual offender statute does not violate ex post facto clause); Reynolds v. Cochran, 138 So. 2d 500 (Fla. 1962); Reeves v. State, 612 So. 2d 560 (Fla. 1992).

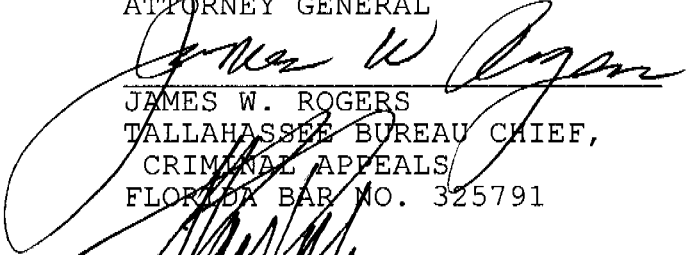
Florida's felony DWLSR statute does not run afoul of the constitutional prohibition against ex post facto laws. As with other recidivist statutes, the felony DWLSR statute does not apply retroactively to earlier offenses, but operates prospectively by creating a separate substantive offense that is punishable independent of the earlier offenses. Compare, State v. Woodruff, 676 So.2d 975, 977 (Fla. 1996) (felony DUI and misdemeanor DUI are separate substantive offenses); Gayman v. State, 616 So.2d 17, 19 (Fla. 1993) (felony petit theft and misdemeanor petit theft are separate substantive offenses).

CONCLUSION

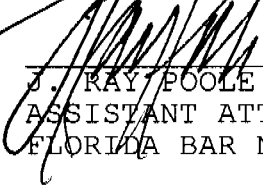
Based on the foregoing, the State respectfully submits that the decision of the District Court of Appeal should be approved, and that the order denying Petitioner's motion to dismiss entered in the trial court should be affirmed.

Respectfully submitted,

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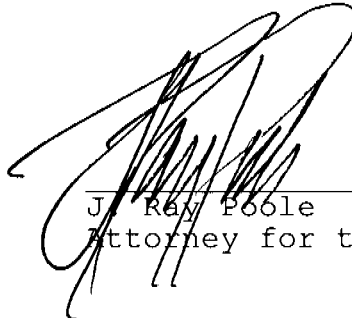
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CERTIFICATE OF SERVICE

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, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of August, 1998.



J. Ray Poole
Attorney for the State of Florida

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