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IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEWIS GAILLARD, :

Petitioner, :

v. : CASE NO. 92,809

STATE OF FLORIDA, :

Respondent. :

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INITIAL BRIEF OF PETITIONER ON THE MERITS[1]

STATEMENT OF THE CASE AND FACTS

The state charged appellant, Timothy Lewis Gaillard, with driving under the influence of alcohol and driving while license suspended as a third-degree felony. (R1)[2] The case was transferred from county court to circuit court. (R7) Defense counsel moved to dismiss the charge of felony driving while license suspended, 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. (R8-11) In a hearing on the motion, Circuit Judge Terry D. Terrell permitted

[1]Apart from the headings identifying the court and the brief, which are in 14-point CG Times, the type in this brief is all in 12-point Courier New.

[2]Herein, citations to documents in the record on appeal appear as (R[page number]). References to a supplemental record appear as (S[page number]).

counsel to amend the motion to include a claim that the application of the statute to Gaillard violated the *Ex Post Facto* Clause of the Florida Constitution. (S62-63)

After taking the matter under advisement, Judge Terrell denied the motion to dismiss. (R18-21) Gaillard pled no contest to felony driving while license suspended as charged, reserving the right to appeal the denial of the motion to dismiss. (R24-25, 32-33) The court accepted the plea. (R323-27) Gaillard was adjudicated guilty and sentenced to one year in county jail with credit for one year served. (R27-30, 34-35)

Gaillard 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 Gaillard's 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.

This issue is also before the court in Hawkins v. State, Case No. 92,750.

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 Gaillard with felony driving while license suspended on November 15, 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 makes the statute an unconstitutional *ex post facto* law. (S62-63) The motion was denied.

The trial court erred. As applied to Gaillard, 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. Gaillard's 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. (R4-6)

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 22nd day of July, 1998.

Respectfully submitted
& Served,

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