IN THE SUPREME COURT OF FLORIDA

MICHAEL KEIRN,

Petitioner,

vs. Case No. 93,114

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

The State certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. The Honorable Robert Carney
2. Charles Bechart, Assistant State Attorney
3. Bernard Hollar, Assistant State Attorney
4. Michael Keirn, defendant
5. Robert Buschel, Assistant Public Defender
6. Karen Ehrlich, Assistant Public Defender
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PRELIMINARY STATEMENT

Respondent, State of Florida, was the Prosecution in the trial court below and Appellant on appeal to the Fourth District Court of Appeal. Petitioner, Michael Keirn, was the Defendant in the trial court and Appellee on appeal in the Fourth District Court of Appeal.

Reference to the pleadings will be by the symbol "R," reference to the transcripts will be by the symbol "T," and reference to any supplemental pleadings and transcripts will be by the symbols "SR[vol.]" or "ST[vol.]" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Petitioner was charged in the lower court by Information with felony driving while license suspended, possession of cannabis, and driving under the influence (R-3-4). Petitioner moved to dismiss the driving while license suspended charge on the basis that section 322.34 Florida Statutes was unconstitutional in that the circuit court's jurisdiction is dependent on whether the court chooses to adjudicate the Defendant (R-21-37). In support of his motion to dismiss, defendant relied on Judge Kaplan's decision in State v. Santiago, 4 Fla. L. Weekly Supp. 220 (Fla. Cir. Ct. August 2, 1996)(R-24).

At the hearing on the motion to dismiss, the trial court found that a withhold of adjudication is not a conviction (T-16,19). The trial court expressed concern that under the statute if he does not convict the Defendant than the charge would only be a misdemeanor, and he would no longer have jurisdiction (T-17). The State argued that once there is a determination of guilt the court has the power to adjudicate or withhold adjudication, but there is still a finding of guilt, which is what is required by the statute (T-14). The State also pointed out that the Defendant had three prior convictions for driving while license suspended, and therefore the constitutionality of the statute is moot (T-22).

The trial court deferred ruling. At a subsequent hearing the court addressed whether the information as charged was unconstitutional. Prior to ruling on the motion to dismiss, the State moved to orally amend the information to reflect Defendant's

adjudications, which the State represented would make this issue moot (Nov. 14 T-3). The trial court, rather than ruling on the State's motion to amend, dismissed the information (Nov. 14 T-3;R-38). After the order was reversed by the 4th District Court of Appeal in State v. Keirn, 23 Fla. L. Weekly D1144 (Fla. 4th DCA 1998), Petitioner sought discretionary review before this Court. Jurisdiction was accepted on July 22, 1998.

SUMMARY OF ARGUMENT

The term "conviction," as used in section 322.34(1) constitutes a conviction regardless of adjudication, unless the adjudication was withheld pursuant to § 318.14(10). Furthermore, §322.334(1)(C) does not violate the constitutional protection of separation of powers. Since all dispositions under §322.34 are convictions regardless of adjudication, the court does not have discretion to determine whether the offense should be classified as a misdemeanor or a felony.

Appellee has failed to demonstrate that section 322.34(1)(c) did not give him fair notice of what type of conduct was forbidden by the statute, and thus, the statute is not void for vagueness.

ARGUMENT

ISSUE I

THE FOURTH DISTRICT COURT OF APPEALS CORRECTLY HELD THAT DISPOSITIONS UNDER SECTION 322.34(1)(C) FLORIDA STATUTES (1995) CONSTITUTE CONVICTIONS REGARDLESS OF ADJUDICATION, UNLESS ADJUDICATION WAS WITHHELD PURSUANT TO SECTION 318.14(10), ADDITIONALLY, SECTION 322.34(1) FLORIDA STATUTES DOES NOT VIOLATE THE CONSTITUTIONAL PROTECTION OF SEPARATION OF POWERS.

Petitioner contends that the Fourth District Court of Appeal erred in holding that all dispositions under § 322.34(1)(C) Florida Statutes (1995) constitute a conviction regardless of adjudication, unless the adjudication was withheld pursuant to § 318.14(10). Furthermore, Petitioner contends that section 322.34(1)(c) is unconstitutional. Respondent disagrees.

Section 322.34 (1)(C) Florida Statutes (1995), provides in pertinent part:

> (1) Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, except persons defined in § 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:
>
> (C) a third or subsequent conviction is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, § 775.084.

"In Florida law, 'conviction' is a chameleon-like term which draws meaning from its statutory context." State v. Keirn, 23 Fla. L. Weekly D1144 (Fla. 4th DCA 1998). Where the statutory context requires it, the term 'conviction' has been construed broadly to include dispositions where there has been no adjudication of guilt. Id. Some rules and statutes specifically include a withhold of

adjudication within the statutory definition of the term 'conviction'. Id.

The Fourth District Court of Appeal in State v. Keirn, 23 Fla. L. Weekly D1144 (Fla. 4th DCA 1998) used the following analysis in determining what the term "conviction" means under §322.34 Florida Statutes. Respondent agrees with and adopts the following analysis set forth by the Fourth District Court of Appeal:

> To properly determine the meaning of the term "conviction" in section 322.34, it is necessary to read that section in conjunction with other provisions of Chapter 322 and Chapter 318, Florida Statutes, entitled "Disposition of Traffic Infractions." Sections in each chapter cross-reference the other. The Chapters have been amended in the same session laws. Viewed together, Chapters 318 and 322 comprise the legislative scheme for regulating the privilege to drive a motor vehicle in Florida.
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> Section 322.263, Florida Statutes (1995), expressly declares the legislative intent underlying all of Chapter 322:
>
> It is declared to be the legislative intent to:
>
> (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state.
>
> (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies.
>
> (3) Discourage repetition of criminal action by individuals against the peace and dignity of the state ... and impose increased and added deprivation of the privilege of operating motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.
>
> For section 322.34 suspensions, the legislature has specified both the type of suspension entitled to leniency and the procedure for obtaining a special

disposition of a charge.

In 1985, the legislature added subsection 10(a) to section 318.14. Ch. 85-250, § 2, at 1668, Laws of Fla. Even though section 318.14 was entitled "Noncriminal traffic infractions; exception; procedures," section 318.14(10) established a procedure for handling certain criminal violations. One of these criminal charges was "operating a motor vehicle with a license which has been suspended for failure to appear, failure to pay civil penalty, or failure to attend a driver improvement course." §318.14(10)(a)1, Fla. Stat. (1995). Under section 318.14(10)(a), any person cited for such a suspension may, in lieu of payment of fine or court appearance, elect to enter a plea of nolo contendere and provide proof of compliance to the clerk of the court.... In such case, adjudication shall be withheld; however, no election shall be made under this subsection if such person has made an election under this subsection in the 12 months preceding election hereunder. No person may make more than three elections under this subsection.

By enacting this section, the legislature recognized that leniency was appropriate for certain types of license suspensions. Subsection (10) allows a person to reinstate his or her driver's license with the clerk prior to the court appearance date indicated on the citation or notice to appear. Traffic Rule 6.360(b) authorizes the clerk to allow a person up to 60 additional days to reinstate the license. If a defendant still needs additional time to comply with section 318.14(10), a judge or traffic hearing officer may extend the time for compliance. Fla. R. Traf. Ct. 6.360(b); 6.040(a).

In 1990, the legislature moved away from the "adjudication" concept in defining a chapter 322 conviction, to make that definition coincide with those cases reserved for special treatment under section 318.14(10). Ch. 90-230, Laws of Fla. § 3, at 1722. Prior to the 1990 amendment, a "conviction" was defined as,

an adjudication of guilt; a determination in a court of original jurisdiction or an administrative proceeding that a person has violated, or failed to comply with, the law; a forfeiture of bail or collateral deposited to secure the person's appearance in court, unless such forfeiture is vacated; a plea of guilty or nolo contendre accepted by a court; the payment of a fine, penalty, or court costs, regardless of whether such fine, penalty, or

cost is rebated, suspended, or probated; a ruling which withholds adjudication; or a violation of a condition of release.

§ 322.01(10), Fla. Stat. (1989) (emphasis supplied). Significantly, since this section defined "a ruling which withholds adjudication" as a conviction, a withhold of adjudication in a suspension case under section 318.14(10) would still have counted as a conviction for the purpose of Chapter 322.

The legislature remedied this anomaly in 1990 by eliminating the 1989 version of section 322.01(10), redefining a conviction under that section, and adding a section addressing the relationship between a withhold of adjudication and a conviction. Ch. 90-230, Laws of Fla. § 2, 3, at 1722. These amendments were to operate "retroactively to July 1, 1989," prior to the effective date of the 1989 version of section 322.01(10). Id.; see ch. 89-282, Laws of Fla. § 3, at 1664. The 1990 amendment defined "conviction" without reference to an adjudication, reflecting a legislative intent to remove that concept from the Chapter 322 "conviction" equation. The amendment adopted the current form of the statute, which states,

"Conviction" means a conviction of an offense relating to the operation of motor vehicles on highways which is a violation of this chapter or any other such law of this state or any other state, including an admission or determination of a noncriminal traffic infraction pursuant to s. 318.14, or a judicial disposition of an offense committed under any federal law substantially conforming to the aforesaid state statutory provisions.

§ 322.01(10), Fla. Stat. (1995); ch. 90-230, § 3, at 1722, Laws of Fla.

The focus of this definition is whether an offense was committed and not on the judicial decision of whether to impose or withhold adjudication. For example, the definition includes a "judicial disposition" of federal offenses, language signifying the closing of a case without regard to the adjudication of guilt. Similarly, for a traffic infraction, the definition refers not to an adjudication, but to an "admission or determination," words that precisely echo the language of section 318.14. From issuance of the citation through conviction, section 318.14 sets out the procedure for handling a traffic infraction without any mention of an adjudication of

guilt.

In the same 1990 statute that changed section 322.01(10)'s definition of conviction, the legislature added section 318.14(11), which provides:

If adjudication is withheld for any person charged or cited under this section, such action shall not be deemed a conviction.

Ch. 90-230, § 2, at 1722, Laws of Fla. It is significant that the legislature included section 318.14(11) in the same session law that redefined a conviction. If a withhold of adjudication on a criminal charge generally did not constitute a conviction, then subsection (11) would have been unnecessary.

The adoption of subsection (11) evidences the legislative intent that all dispositions of driving under suspension charges amount to convictions under section 322.01(10), unless adjudication has been withheld pursuant to the procedures of section 318.14(10), for the three types of license suspensions enumerated in that section. This interpretation is consistent with the stated legislative intent found at section 322.263. The legislature has placed a ceiling on both the frequency and the number of times a person may avoid the full sanction of a license suspension--- one time every twelve months and three elections in a lifetime. A disposition outside of the section 318.14(10) procedure, regardless of whether adjudication is withheld or imposed, is a "conviction" within the meaning of section 322.01(10), which can be used to habitualize under section 322.264(1)(d), Florida Statutes (1995), or for aggravation under section 322.34.

The Rules of Traffic Procedure mirror section 318.14(11). Rule 6.560 states that elections under "section 318.14(9) or (10) ... when adjudication is withheld, shall not constitute convictions." Rule 6.291 governs "procedures on withheld adjudication in driving while license suspended." Rule 6.291(d) provides:

(d) Convictions. Elections under section 318.14(10), Florida Statutes, when adjudication is withheld, shall not constitute convictions as that term is used in chapter 322, Florida Statutes.

Rule 6.291(d) and the last sentence of Rule 6.560 explicitly tie the absence of a Chapter 322 conviction in suspension cases to the withholding of adjudication under section

> 318.14(10) procedures, and not to a withhold of adjudication in any other situation. Outside of section 318.14, a judge is authorized to withhold adjudication in criminal cases if he or she places a defendant on probation. See Waite v. City of Fort Lauderdale, 681 So.2d 901 n. 1 (Fla. 4th DCA 1996); State v. Gloster, 703 So.2d 1174, 1175 (Fla. 1st DCA 1997); § 948.01(2); 921.187(1)(a)3; Fla. Stat. (1997); Fla. R.Crim. P. 3.670. These types of dispositions fall outside of Chapter 322's definition of a conviction.
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> Given this construction of the term "conviction," the concern noted by the trial judge does not exist. Even if the judge in this case were to withhold adjudication on the driving while license suspended charge after a plea or verdict, such a disposition would still amount to a third "conviction" under section 322.34(1)(c), because it is a disposition outside of section 318.14(10).

Thus, based on the holding in State v. Keirn, 23 Fla. L. Weekly D1144 (Fla. 4th DCA 1998), a "conviction" under section 322.34 Florida Statutes (1995) occurs after a final disposition of a case, as a result of a trial or plea, without regard to the court's decision on adjudication of the defendant, unless the disposition is made pursuant to section 318.14(10), Florida Statutes (1995).

Petitioner's relies upon Wooten v. State, 332 So. 2d 15 (Fla. 1976), as part of his argument. Respondent contends that this argument is without merit. As stated by the Fourth District Court of Appeal in State v. Keirn, 23 Fla. L. Weekly D1144 (Fla. 4th DCA 1998), in determining the proper construction of the term "conviction", it is essential to examine the statutory context, and legislative history and development of section 322.34(1)(C) Florida Statutes. Thus, the statute addressed in Wooten, supra, is not at issue in the case at bar, and therefore the statutory context, and

legislative history and development of that statute should not be applied.

Petitioner also contends that section 322.34(1), Fla. Stat. (1995) is unconstitutional because it violates the constitutional protection of separation of powers set forth in Art. II, § 3 of the Florida Constitution.[1] Petitioner argues that § 322.34(1) is unconstitutional because it unlawfully delegates a legislative function to the judicial branch by affording the circuit court the discretion to determine whether a third or subsequent offense of driving while license is canceled, suspended or revoked after the prior adjudications were withheld, is a felony or misdemeanor. Respondent disagrees.

In assessing a statute's constitutionality, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)(quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)). Further, "[w]henever possible, a statute should be construed so as not to conflict with the constitution. Just as federal courts are authorized to place

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[1] Article II, § 3 provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the branches unless expressly provided herein.

narrowing constructions on acts of Congress, this Court may, under the proper circumstances, do the same with a state statute when to do so does not effectively rewrite the enactment." Id. (quoting Firestone v. News-Press Publishing Co., 538 So. 2d 457, 459-60 (Fla. 1989) (citations omitted)). The crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislative intent. Tory v. State, 686 So. 2d 689 (Fla. 4th DCA 1996), Citing, Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815, 819 (Fla.1983), appeal dismissed, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984).

In Raulerson v. State, 699 So. 2d 339, 340 (Fla. 5th DCA 1997), the court was called upon to determine the constitutionality of section 32.34(1)(C) Florida Statutes based on alleged lack of separation of powers. The court in Raulerson held, as did the Fourth District Court of Appeals (by a different path) in State v. Keirn, 23 Fla. L. Weekly D1144 (Fla. 4th DCA 1998), that determination of whether §322.34(1)(C) was constitutional hinged on whether the Defendant's violation of §322.34(1)(C) constituted a "conviction" when the sentencing court decides to withhold adjudication of guilt instead of entering a judgment against the defendant. The Fifth District Court of Appeal stated that if a withhold of ajudication is a "conviction" for purposes of § 322.34(1)(C) then Petitioner's argument fails because all prior

violations of the statute would count in determining whether the violation is a felony. Thus, there would be no encroachment by the trial court, and no separation of powers violation. Raulerson v. State, 699 So. 2d 339, 340 (Fla. 5th DCA 1997).

In Raulerson the court opined:

> A common sense reading of the instant statute indicates that the legislature intended the term "conviction" to mean a determination of a defendant's guilt by way of plea or verdict. There appears to be no requirement that there be an adjudication. The obvious legislative intent of section 322.34(1) is to increase the penalty for repeat violations of the statute. The legislative goal is accomplished by application of the Gazda definition of conviction. Accordingly, we conclude that the statute is constitutional.

Raulerson v. State, 699 So. 2d 339, 340 (Fla. 5th DCA 1997); See State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997)(found section 322.34 Florida Statutes constitutional for different reasons). Therefore, the determination by the Fifth District Court of Appeal and the Fourth District Court of Appeal that a "conviction" under § 322.34(1) includes adjudications which are withheld is the only interpretation which comports with the legislative intent of the statute. Any other construction would frustrate this intent and lead to absurd results. This Court is required to construe a statute so that it will not conflict with the constitution. State v. Stalder, 630 so. 2d 1072, 1076 (Fla. 1994). Even if this statute must be given a strict construction in favor of the defendant, there is no requirement that the statute be 'so strictly interpreted as to emasculate the statute and defeat the obvious intention of the legislature. State v. Brigham, 694 So. 2d 793,

798 (Fla. 2nd DCA 1997)(citing, State ex rel. Washington v. Rivkind, 350 So. 2d 575, 577 (Fla. 3rd DCA 1977). Determining that "conviction" under § 322.34(1) includes instances where an adjudication of guilt is withheld embraces this rule of statutory construction.

However, should this Court reject the Respondent's argument that "conviction" under § 322.34(1) includes adjudications which are withheld, the Respondent urges this Court to consider and adopt the reasoning of the First District in Gloster which upholds the constitutionality of § 322.34(1) on different grounds.

Nevertheless, should this Court find that § 322.34(1) does unconstitutionally delegate legislative authority to the judicial branch, this finding should not result in the entire statute being declared unconstitutional. Rather, the unconstitutional component of the statute -- the escalation in the degree of the offense upon subsequent convictions -- should be severed and the remained of the statute enforced without this subunit. Schmitt v. State, 590 So. 2d 404, 414-15 (Fla. 1991), cert. denied, 112 S.Ct. 1572 (1992).

ISSUE II

SECTION 322.34(1)(C) FLORIDA STATUTES IN NOT UNCONSTITUTIONALLY VOID FOR VAGUENESS.

Petitioner contends that if a withhold of adjudication is a "conviction" for purposes of §322.34(1)(C) Florida Statute (1996), then the statute is void-for-vagueness. Respondent disagrees. A statute will withstand constitutional scrutiny under a void-for-vagueness challenge if it is specific enough to give persons of common intelligence and understanding adequate warning of the proscribed conduct." Frear v. State, 700 So. 2d 465 (Fla. 1st DCA 1997), citing, Sanicola v. State, 384 So.2d 152, 153 (Fla.1980).

Section 322.34(1)(C) Florida Statutes clearly sets forth what conduct is prohibitive by law, i.e. driving while one's license is suspended, canceled or revoked, and what the punishment is for said violation. Section 322.34 (1)(C) Florida Statutes (1995), provides in pertinent part:

> (1) Any person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, except persons defined in § 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:
>
> (C) a third or subsequent conviction is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, § 775.084.

Thus, a person of common intelligence would have adequate warning as to the proscribed conduct.

Further, "conviction" is defined in the statute as a conviction, as opposed to a judgment of conviction, which includes

an admission or determination of a noncriminal traffic infraction pursuant to s. 318.14, or a judicial disposition of an offense committed under a substantially conforming federal law.

However, even if this Court considers this definition to be ambiguous, it is well-settled that a court may resort to case law which has construed the term in the context of another statute. See Tingley v. Brown, 380 So. 2d 1289, 1290 (Fla. 1980); State v. De La Llana, 22 Fla. L. Weekly D1248 (Fla. 2d DCA May 16, 1997). This Court in State v. Gazda, 257 So. 2d 242 (Fla. 1971) clearly differentiated between "conviction" and "judgment of conviction." Thus, the term "conviction" is not vague since case law defines the term to mean a finding of guilt. "All doubts as to the validity of a statute are to be resolved in favor of constitutionality where reasonably possible." L.B. v. State, 700 So. 2d 370 (Fla. 1997). Therefore, this Court must find this statute to be constitutional.

Further, it should be noted that Petitioner at all times had notice that he was not to drive while his license was suspended, and that he had two prior convictions for driving with license suspended (under either definition of the term) [2]. Thus, at all times Petitioner knew that he was to steer clear of driving with his license suspended, or he could be facing felony charges.

Thus, Petitioner has failed to demonstrate that section 322.34(1)(c) did not give him fair notice of what type of conduct

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[2] The State pointed out to the lower court that Petitioner's driving record showed that he had three prior convictions for driving on a suspended license (T 22).

was forbidden by the statute, and thus, this court should find the statute constitutional.

CONCLUSION

Based on the foregoing argument and authority, the Respondent respectfully requests that this Court uphold the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been delivered by courier to: Karen E. Ehrlich, Assistant Public Defender, Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on September 3, 1998.

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