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IN THE SUPREME COURT OF FLORIDA

KEITH JEROME HARVEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,334

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

L. MICHAEL BILLMEIER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0983802

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Keith Jerome Harvey, the Appellant in the district court 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 one volume. This brief will refer to the record as "R." A citation to the record will be followed by the appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

In addition the arguments presented in this brief, the State incorporates the arguments it made in Gloster v. State, Case No. 92,235 and Castro v. State, Case No. 93,335.

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 adds the following to Petitioner's statement of the case and facts.

When it denied Petitioner's motion to dismiss, the trial court stated:

> The Court is going to enter an order denying the defendant's motion to dismiss. The Court notes that it

> was the intent of the legislature to increase punishments for repeat offenders. The Court also notes that the statute, as written by the legislature, would make no sense if I were to assume that the legislature intended the word conviction to mean adjudication, because if after finding a defendant had committed a first offense of [driving] while license suspended, the county court then decided to withhold adjudication, there would be no penalty for that offense, because the legislature provides that upon a first conviction, a defendant is guilty of a second degree misdemeanor.
>
> The Court will make a specific finding that as it relates to this statute, the word conviction is not synonymous with adjudication, and instead that the word conviction means a finding of guilt. (R, 87).

The First District affirmed Petitioner's conviction, Harvey v. State, 710 So. 2d 760 (Fla. 1st DCA 1998), with a citation to State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997). The opinion is attached as an Appendix.

SUMMARY OF ARGUMENT

This Court should hold that section 322.34, Florida Statutes (1995), does not violate the Florida Constitution's separation of powers provision. Petitioner claims that a withhold of adjudication does not operate as a conviction under section 322.34 so the trial court's ability to withhold adjudication allows the trial court to define the crime. This claim should be rejected. The statute clearly defines the crime of driving with a suspended license and explains how punishment should be determined based on the number of prior convictions. This legislative function is separate from the trial court's ability to withhold adjudication in appropriate cases. The intent of the Legislature in enacting section 322.34 is clear: to discourage persons from driving with suspended or revoked licenses. Defining conviction as the number of times the statute is violated furthers that legislative intent. This Court should hold that section 322.34 does not violate the separation of powers and approve the result reached by the First District.

ARGUMENT

ISSUE I

WHETHER SECTION 322.34, FLORIDA STATUTES (1995) VIOLATES THE SEPARATION OF POWERS PROVISION OF THE FLORIDA CONSTITUTION. (Restated).

This Court should reject Petitioner's claim that section 322.34, Florida Statutes (1995), violates the separation of powers provision of the Florida Constitution. Petitioner claims that the trial court's authority to withhold adjudication gives the trial court, rather than the Legislature, the power to prescribe punishment for criminal offenses and asks this Court to hold section 322.34 unconstitutional. To the contrary, the statute defines the crime of driving with a suspended or revoked license and defines appropriate punishment depending on the number of prior offenses. This is separate from the trial court's power to withhold adjudication. Contrary to Petitioner's claim, "conviction" as used in section 322.34 does not refer only to crimes for which a defendant was adjudicated guilty; it refers to all instances of criminal conduct without regard to adjudication. This Court should follow all five District Courts of Appeal, reject Petitioner's claim, and approve the decision of the First District.

Standard of Review

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.

Accordingly, Petitioner must overcome the presumption that the statute is constitutional.

Merits

Section 332.34, Florida Statutes (1995), does not violate the Florida Constitution. The challenged statute, section 322.34(1)(c), 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.

Each of the District Courts of Appeal have found this statute to be constitutional. See State v. Gloster, 703 So. 2d 1174 (1st DCA 1997), rev. granted, 717 So. 2d 531 (Fla. 1998); State v. Crossno, 23 Fla. L. Weekly D1683 (2d DCA July 17, 1998), dismissed, Case No. 93,884 (Fla. Sept. 28, 1998); Pirtle v. State, 700 So. 2d 1258 (Fla. 3d DCA 1997); State v. Keirn, 23 Fla. L. Weekly D1144 (Fla. 4th DCA May 6, 1998), rev. granted, 718 So. 2d 168 (Fla. July 22, 1998); Raulerson v. State, 699 So. 2d 339 (5th DCA 1997), rev. granted, 709 So. 2d 537 (Fla. 1998). This Court should likewise find the statute is constitutional.

Petitioner claims that section 322.34(1)(c) violates the separation of powers provision of Florida's constitution. Petitioner claims that, under Florida law, a defendant is only "convicted" of a crime if the trial court adjudicates the defendant guilty. (IB 8). Proceeding from this faulty premise, Petitioner asserts that because the trial court can withhold adjudication of guilt, the trial court can change a felony conviction to a misdemeanor by simply withholding adjudication. (IB 16).

Each of Petitioner's claims should be rejected. First, this Court should reject Petitioner's claim that a "conviction" under section 322.34 requires an adjudication of guilt. This claim was specifically rejected by the trial court below (R, 87) and by the courts in Crossno, Pirtle, Keirn, and Raulerson. As noted by Petitioner (IB 7), the meaning of conviction differs depending on the context in which it is used. In section 322.34, the number

of "convictions" determines the sentence for the crime so the word "conviction" in that statute is used in the context of sentencing. Section 921.0011(2), Florida Statutes (1995), defines "conviction" in the context of sentencing:

> "Conviction" means a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld.

See also Fla.R.Crim.P. 3.702(d)(2), Fla.R.Crim.P. 3.703(d)(6)("conviction" is a determination of guilt without regard to whether adjudication is withheld). Accordingly, "conviction" under section 322.34 should be defined just as it is in other sentencing contexts: as a determination of guilt by plea or trial without regard to adjudication.

Such an interpretation of section 322.34 is consistent with the purpose behind the statute: preventing persons with a suspended or revoked driver's license from operating motor vehicles. Section 322.263, Florida Statutes (1995), states the legislative intent 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, its political subdivisions, and its municipalities 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. (emphasis added).

As the Raulerson court noted:

> The obvious legislative intent of section 322.34 is to increase the penalty for repeat violations of the statute. Raulerson, 699 So. 2d at 340.

This Court should reject Petitioner's argument that Raulerson "did not recognize that no contest pleas without adjudication are not convictions." (IB 12). Raulerson's statement that a conviction is a determination of guilt by plea or verdict, Raulerson, 699 So. 2d at 340, clearly shows that the court considered and rejected this claim. Keirn also discussed legislative intent and found that each incident of driving with a suspended license is a conviction pursuant to section 322.34 because section 322.34 defines an offense specifically excluded from a list of statutory violations for which a withheld adjudication is **not** a conviction pursuant to chapter 318. Both cases implement the intent of the Legislature by defining "conviction" without regard to adjudication and increasing the punishment each time defendants violate section 322.34. All four district courts which have addressed the meaning of conviction in the context of section 322.34 have found that a conviction is not contingent on whether the trial court enters an adjudication. This Court should hold likewise.

It is well-settled that statutes should not be construed to yield absurd results. State v. Iacovone, 660 So. 2d 1371, 1373 (Fla. 1995); Williams v. State, 492 So. 2d 1051, 1054 (Fla.1986). As the trial court below noted (R, 87), under Petitioner's

definition of "conviction", trial judges could effectively overrule all findings of guilt for violations of section 322.34. Pursuant to section 322.34, upon a "first conviction," a defendant is guilty of a first degree misdemeanor, upon a "second conviction," a defendant is guilty of a second degree misdemeanor, and upon a "third or subsequent conviction," a defendant is guilty of a third degree felony. § 322.34(1)(a), (b), (c). Under Petitioner's definition of "conviction", if there is no adjudication, there is no "conviction", and no punishment would be permitted, even upon a first conviction in county court. Obviously, such a result is absurd. This Court should adopt the State's definition of "conviction," where "conviction" refers to each violation of the statute without regard to adjudication, and avoid this absurdity.

Other cases support the State's position that a withheld adjudication can be treated as a conviction. In State v. Gazda, 257 So. 2d 242 (Fla. 1971), 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., 454 U.S. 1041 (1981), this Court held that for capital sentencing purposes under section 921.141, Florida Statutes, a "prior conviction" used as an aggravating factor meant a determination of guilt even without an adjudication. In Canion v. State, 661 So.2d 931 (Fla. 4th DCA 1991), the court said that a withheld adjudication operates as a

conviction for sentencing purposes. In Ryals v. State, 516 So.2d 1092 (Fla. 5th DCA 1987), the court said 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.

Petitioner's reliance on Castillo v. State, 590 So. 2d 458 (Fla. 3d DCA 1991), is misplaced. (IB 7). In Castillo, the defendant was charged with 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.

Petitioner next claims that because the trial court can withhold adjudication, the trial court can determine whether a particular instance of driving with a suspended license is a felony or a misdemeanor by adjudicating or withholding adjudication. This claim should be rejected as well. Trial

courts in Florida have the legislative authority to withhold adjudication in criminal cases under section 948.01, Florida Statutes, 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. § 948.01, Fla. Stat. (1995). A withheld adjudication is not an acquittal. 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. 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.

This Court should ignore Petitioner's "critique" of the First District's opinion in Gloster. (IB 15-16). Contrary to Petitioner's assertion, there is no "uncertainty" (IB 15) over the permitted punishments for violations of section 322.34. If a defendant is convicted of a misdemeanor under sections 322.34(1)(a) or 322.34(1)(b), he or she is punished for the appropriate misdemeanor. If the defendant is convicted of a felony pursuant to section 322.34(1)(c), he or she is punished for a third degree felony. There is no uncertainty. The statute is clear.

This Court should hold section 322.34 does not violate the Florida Constitution. The result reached by the First District should be approved.

CONCLUSION

Based on the foregoing, the State respectfully submits that this Court should hold that section 322.34, Florida Statutes (1995), is constitutional, that the decision of the District Court of Appeal should be approved, and that the conviction entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

L. MICHAEL BILLMEIER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0983802

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT. 4595

COUNSEL FOR RESPONDENT
[AGO# L98-1-7439]

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 Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 4TH day of December, 1998.

L. Michael Billmeier
Attorney for the State of Florida

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