

IN THE SUPREME COURT OF FLORIDA

047
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Chief Deputy Clerk

JORGE CASTRO,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 93,335

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 and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Jorge Castro, 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 three volumes. This brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. The third volume, a transcript of the April 4, 1996, plea hearing, will be referred to as "III." 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.

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

CERTIFICATE OF FONT AND TYPE SIZE

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

STATEMENT OF THE CASE AND FACTS

A copy of the First District's opinion is attached as an appendix. Castro v. State, 710 So. 2d 759 (Fla. 1st DCA 1998).

The State adds the following to Petitioner's statement of the facts.

The plea agreement provided as follows:

Accept this pleas [sic] and dismiss counts II & III. The defendant maintains he does not have the requisite valid prior DWLS convictions for enhanced sentencing as a felony. The court will determine this issue at sentencing. If defendant is sentenced as a felony [sic], the State will recommend a guidelines sentence. (I, 42).

The State agreed it would present documents to prove valid convictions. (III, 3-4). At the sentencing hearing, the State submitted Petitioner's driving record, which showed three prior convictions. (I, 30). The court accepted the driving record as proof of the prior convictions. (II, 10).

The State rejects Petitioner's claim that the written sentencing order granted him only 105 days credit for time served. (IB 4). The written order of probation credits Petitioner with credit for 162 days served. (I, 59).

No motion to correct the sentence appears in the record.

SUMMARY OF ARGUMENT

ISSUE I.

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.

ISSUE II.

This Court should decline to address Petitioner's claim that the State breached a plea agreement and failed to prove Petitioner's prior convictions since this case is only before this Court to determine the constitutionality of section 322.34, Florida Statutes (1995).

If this Court chooses to address Petitioner's claim, it should find it unpreserved since Petitioner did not move to withdraw his plea in the trial court. Further, the State presented competent evidence to show Petitioner's prior convictions were valid. Petitioner's conviction should be affirmed.

ISSUE III.

This Court should decline to review Petitioner's claim that the oral pronouncement of credit for time served does not conform to the written judgment. This Court accepted review of this case to determine whether section 322.34 is constitutional. Petitioner admits, since any jail time has long since been served, the claim is moot. This Court should decline to exercise jurisdiction and affirm the decision of 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 322.34, 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 9). 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 18).

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, as the courts in Crossno, Pirtle, Keirn, and Raulerson did. As noted by Petitioner (IB 9), 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 14). 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). If this Court adopts 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. The State's definition of "conviction," where "conviction" refers to each violation of the statute without regard to adjudication avoids 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 9). 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 17-18). Contrary to Petitioner's assertion, there is no "uncertainty" (IB 17) over the permitted punishments for violations of section 322.44. 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.

ISSUE II

WHETHER THIS COURT SHOULD REVIEW PETITIONER'S
CLAIM THAT THE STATE BREACHED A PLEA AGREEMENT.
(Restated)

This Court should decline to review Petitioner's claim that the State breached a plea agreement and failed to prove that his prior convictions were valid. This Court accepted review of this case to determine whether section 322.34 is constitutional. The First District reviewed the issue of whether the State adequately proved that prior convictions were valid and affirmed the conviction for felony driving with a suspended license. While this Court has jurisdiction to review all issues in a case once it accepts jurisdiction, the State suggests it should decline to exercise that jurisdiction in cases, such as this one, where there is no independent basis for jurisdiction over that issue. Such a policy allows this Court to exercise its jurisdiction in appropriate cases and allows the district courts to retain their place as courts of final jurisdiction. Petitioner presents no independent jurisdictional basis for review of this issue and, in fact, "candidly concedes" (IB 19) that there is none. This Court should decline to exercise its jurisdiction to review this issue.

For completeness, the State will briefly explain why Petitioner's claim lacks merit and was properly rejected by the First District. Petitioner was charged with felony driving while license suspended or revoked. (I, 8-9). Pursuant to a plea agreement, he entered a plea of guilty to the charge. The plea agreement provided as follows:

Accept this pleas [sic] and dismiss counts II & III. **The defendant maintains he does not have the requisite valid prior DWLS convictions for enhanced sentencing as a felony. The court will determine this issue at sentencing.** If defendant is sentenced as a felony [sic], the State will recommend a guidelines sentence. (I, 42). (emphasis added).

The State agreed it would present documents to prove valid convictions. (III, 3-4). At the sentencing hearing, the State submitted Petitioner's driving record, which showed three prior convictions. (I, 30). The court accepted the driving record as proof of the prior convictions. (II, 10).

Petitioner claims that the State breached the plea agreement by failing to produce evidence that he had counsel for his prior convictions. (IB 21-24). This claim was not preserved by a motion to withdraw the plea so it was properly rejected by the First District. According to the Florida Rules of Appellate Procedure:

A defendant who pleads guilty or nolo contendere may otherwise directly appeal only

(i) the lower tribunal's lack of subject matter jurisdiction;

(ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;

(iii) an involuntary plea if preserved by a motion to withdraw plea;

(iv) a sentencing error, if preserved; or

(v) as otherwise provided by law.

Fla.R.App.P. 9.140(b)(2)(B). Petitioner did not argue to the trial court that the State breached any plea agreement. He argued that the State's proof was insufficient. He did not move

to withdraw his plea so his claim is not preserved. The First District properly rejected the claim. This Court should do likewise.

Even on the merits, the claim should be rejected. Under the plea agreement, the State agreed to produce documentation showing valid convictions. It did not, contrary to Petitioner's assertion, agree to show whether or not Petitioner had counsel for his previous convictions. (IB 21-22). The State fulfilled the plea bargain by providing competent evidence of Petitioner's prior convictions. A defendant's computerized driving record is admissible to establish the existence of prior convictions "since it is, as the statute requires, an abstract of the court records of convictions and is a complete driving record duly certified by the machine imprint of the Department of Highway Safety and Motor Vehicles." Kohler v. State, 534 So. 2d 1213, 1213-1214 (Fla. 5th DCA 1988) (holding that computerized driving record was sufficient to prove the requisite prior DUI convictions to support a felony DUI charge). Here, the State presented Petitioner's computerized driving record as evidence of the prior convictions. (II, 9; I, 28-33). This evidence is sufficient to show Petitioner qualified for felony sentencing. The State did not agree to prove Petitioner had counsel during each of the prior proceedings and Petitioner cites no authority for the proposition that the State was required to do so.

In fact, Petitioner did not meet his initial burden of showing that his prior convictions were invalid. When questioning the

validity of a prior conviction on the basis that it was uncounseled, the defendant bears the initial burden of demonstrating that he was entitled to but denied counsel. State v. Beach, 592 So. 2d 237, 239 (Fla. 1992). This Court said:

In order to meet this initial burden, the defendant must assert under oath: (1) that the offense involved was punishable by more than six months of imprisonment or that the defendant was actually subjected to a term of imprisonment; (2) that the defendant was indigent and, thus, entitled to court-appointed counsel; (3) counsel was not appointed; and (4) the right to counsel was not waived. Id.

After the defendant has met this initial burden, only then does the burden shift to the State to show that counsel was provided or, in the alternative, that the defendant waived his right to counsel. Id. In the case at bar, Petitioner provided no testimony under oath that he was entitled to but denied counsel. Thus, he did not meet his initial burden of proof, as outlined in Beach, when challenging the validity of his prior convictions. The State did not agree to prove Petitioner had counsel during his previous proceedings. The State complied with the plea bargain so the result reached by the First District should be approved. Even assuming that the plea agreement shifted the initial burden to the State to prove the validity of the convictions, that burden was met by presumption. See Murray v. State, 616 So.2d 955, 956 (Fla. 1993) ("it is an appropriate presumption that the predicate convictions on the record are valid. The defendant must rebut that presumption...") (Barkett, C.J., specially concurring).

This Court should decline to reach the issue raised by the Petitioner. If it does, it should approve the decision below.

ISSUE III

WHETHER THIS COURT SHOULD ADDRESS PETITIONER'S
CLAIM THAT THE WRITTEN JUDGMENT AND SENTENCE DOES
NOT CONFORM TO THE ORAL PRONOUNCEMENT.
(Restated)

This Court should decline to review Petitioner's claim that the oral pronouncement of credit for time served does not conform to the written judgment. This Court accepted review of this case to determine whether section 322.34 is constitutional. The First District reviewed the issue of whether it was appropriate or necessary to correct the written judgment and affirmed the sentence. While this Court has jurisdiction to review all issues in a case once it accepts jurisdiction, the State suggests it should decline to exercise that jurisdiction in cases, such as this one, where there is no independent basis for jurisdiction over that issue. Such a policy allows this Court to exercise its jurisdiction in appropriate cases and allows the district courts to retain their place as courts of final jurisdiction. Petitioner presents no independent jurisdictional basis for review of this issue. Further, as Petitioner admits, since any jail time has long since been served, the request is moot. This Court should decline to exercise jurisdiction and affirm the decision of the First District.

If this Court decides to reach the merits, it should affirm the trial court's order. At the sentencing hearing, the trial court sentenced Petitioner to one year probation with a special condition of 364 days in jail with credit for 172 days served. (II, 19-20). Probation was to terminate upon release. (II, 20).

By written order, the trial court credited Petitioner with 162 days served. (I, 59).¹ Petitioner asks this Court to correct the sentence to conform with the oral pronouncement.

This Court should reject Petitioner's claim. Florida Rule of Criminal Procedure 3.800(b) permits a defendant to file, within 30 days, a motion to correct sentence. If there is a discrepancy between the oral pronouncement and the written order, defendants can move to correct the written order. From this record, this Court cannot determine whether the appropriate amount of jail credit is 172 days, 162 days, or 105 days. If Petitioner had raised the claim below, the trial court could have quickly resolved any discrepancy. Since Petitioner did not move to correct his sentence, his claim is not preserved so the First District's order should be affirmed.

This Court should decline to address the moot issue of whether Petitioner was properly credited with time served in jail. If this Court addresses the claim, it should hold that defendants must move, pursuant to Florida Rule of Criminal Procedure 3.800(b), to correct any error in a written sentencing order. The decision of the First District affirming the sentence should be affirmed.

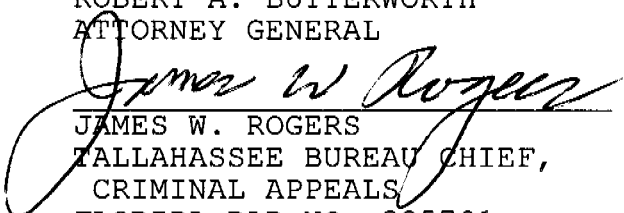
¹Petitioner claims he was only credited with 105 days served. (IB 25). Petitioner cites to a form submitted by the jail officials. (I, 56). The amount of jail credit ordered by the court is shown on the probation order. (I, 59).

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,

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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 Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 3rd day of December, 1998.



L. Michael Billmeier
Attorney for the State of Florida

[C:\USERS\CRIMINAL\PLEADING\98107438\CASTROBA.WPD --- 12/2/98, 3:35 pm]