IN THE SUPREME COURT OF THE STATE OF FLORIDA

REINEL SANTIAGO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 93,~~833~~ 822

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ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

CELIA A. TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No.: 0134924
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
Telephone (561) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page Number**

STATE CASES

FEDERAL CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellant in the Florida Fourth District Court of Appeal. Petitioner was the defendant in the trial court and appellee in the District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts for purposes of determining the merits of this appeal in so far as that statement presents an accurate, objective and non-argumentative recital of the procedural history and facts in the record, and subject to the additions and clarifications set forth in the argument portion of this brief which are necessary to resolve the legal issues presented upon appeal.

SUMMARY OF ARGUMENT

The term "conviction," as used in section 322.34(1), means a finding of guilt. Thus, the statute does not give the court discretion to determine whether the offense should be classified as a misdemeanor or a felony, and is not unconstitutional as applied to defendants with two prior convictions.

ARGUMENT

SECTION 322.34 FLORIDA STATUTES (1995) IS CONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO HAVE TWO PRIOR CONVICTIONS FOR DRIVING WHILE LICENSE CANCELED, SUSPENDED OR REVOKED.

It is, of course, well settled that statutes come before the Court clothed with a presumption of constitutionality. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879 (Fla. 1983). The Court has a duty, if reasonably possible, and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. Falco v. State, 407 So. 2d 203 (Fla. 1981); Florida Dept. Of Educ. v. Glasser, 634 So. 2d 732 (Fla. 1993).

The Florida Constitution allocates to the legislature the power to enact laws and declare what the law shall be. Article 3 Section 1; B.H. v. State, 645 So. 2d (Fla. 1994). The power to enact law includes the power to prescribe punishment for criminal offenses. See Johnson v. State, 1996 WL 382959 (Fla. 4th DCA 1996).

Section 322.34 Florida Statutes (1996), defines certain behavior which constitutes an infringement of the law: driving while one's license is suspended canceled or revoked. Section 322.34 also clearly sets forth the punishment for such infringement: upon a first conviction defendant is guilty of a misdemeanor of the second degree; upon a second conviction defendant is guilty of a misdemeanor of the first degree; upon a third conviction defendant is guilty of a felony of the third degree.

In finding the statute to be constitutional, the Fourth District Court of Appeal properly found that the word "conviction" is not necessarily is equivalent to adjudication. Section 322.01(10) Florida Statutes (1995), does not indicate that "conviction" is synonymous with adjudication, and,

in fact, section 322.10(10) defines "conviction" very specifically for the purposes of the chapter:

> [A] conviction of an offense relating to the operation of motor vehicles on highways which is a violation of this chapter 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.

According to Florida case law, generally, the term "conviction" means a finding of guilt, although in some limited contexts is has been interpreted to mean adjudication.

Older cases in Florida at first glance seem to define conviction as "the adjudication by the court of the defendant's guilt and the pronouncement by the court of the penalty imposed upon the defendant." State v. Smith, 160 Fla. 288, 34 So. 2d 533 (1948); Weathers v. State, 56 So. 2d 536 (Fla. 1952), cert. denied, 344 U.S. 896, 73 S.Ct. 276, 97 L. Ed. 692 (1952); and Delta Truck Brokers, Inc. v. King, 142 So. 2d 273 (Fla. 1962). However, as pointed out by this Court in Smith v. Bartlett, 570 So. 2d 360 (Fla. 1990), the definition of conviction must be considered in the context of the cases defining it.

In Smith, the Court was asked to determine whether a prison escapee who committed a second felony could be sentenced as a habitual offender even though he had not completed his first sentence. The Court found that the adjudication of guilt and the pronouncement of sentence was sufficient to satisfy the conviction requirement of the habitual offender statute.

In Weathers defendant was tried as an accessory before the fact. At the time of trial, his codefendant had plead guilty and been adjudicated, but had not been sentenced. This Court found that the principal's conviction was complete upon his plea and adjudication, even if punishment was never imposed.

In King, the Court was asked to decide whether an administrative agency could find that an applicant engaged in auto transportation brokerage business without a license when the statute required that the applicant be "convicted" of such conduct before license transfer could be denied. The Court found that the agency could not make such a finding because the statute required a determination of guilt and a judgment of guilt.

Thus, when this Court defined conviction as synonymous with adjudication, it did so within very specific factual contexts, and, Respondent submits, the holdings of Smith, Weathers, and King should be limited to their facts.

Subsequent to Smith, Weathers, and King, this Court in State v. Gazda, 257 So. 2d 242 (Fla. 1971), distinguished the terms "conviction" and "judgment of conviction". The Court found that "'conviction' means determination of guilty by verdict of the jury or by plea of guilty, and does not require adjudication by the court." Id. at 244. "Judgement of conviction," on the other hand, necessarily includes an adjudication. Id. The Court in Gazda went on to hold that in the context of section 775.14[1] the term conviction meant determination of guilty.

Relying on the holding of Gazda, our district courts of appeal have often interpreted the term "conviction" to mean a finding of guilt. In Jones v. State, 502 So. 2d 1375 (Fla. 4th DCA 1987), the Fourth District Court of Appeal specifically acknowledged that "[t]he withholding of adjudication is a conviction for many purposes. In Smith v. Bartlett, 570 So. 2d 360 (Fla. 5th DCA 1990), the Fifth District found that the term conviction was synonymous with a finding of guilt within the

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[1] Section 775.14 provided: "Limitation on withheld sentences.--Any person receiving a withheld sentence upon conviction for a criminal offense, and such withheld sentence has not been altered for a period of five years, shall not thereafter be sentenced for the conviction of the same crime for which sentence was originally withheld."

context of section 775.089(8) Florida Statutes (1989), which provides that the "conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any civil proceeding." Cf Clinger v. State, 553 So. 2d 315 (Fla. 5th DCA 1988)(within the context of section 939.01(1) which provides that costs of prosecution shall be included and entered in the judgment rendered against a convicted person, a defendant is not convicted if imposition of sentence is stayed and withheld and defendant is placed on probation).

In Barber v. State, 413 So. 2d 482 (Fla. 2d DCA 1982), the court found the term "conviction," in the context of the long standing Florida rule that a witness may be impeached by evidence of his prior convictions, means a jury verdict of guilty, even if adjudication is withheld." See also Johnson v. State, 449 So. 2d 921 (Fla. 1st DCA 1984), (Trial court was required to regard witness who had pled guilty to robbery with a firearm and agreed to testify for the state in return for a sentence of 10 years as having been convicted of a crime, even though he had not been formally adjudicated);Cf Parker v. State, 563 So. 2d 1130 (Fla. 5th DCA 1990)(court found that for purpose of impeachment conviction means adjudication--however the court in Bartlett, supra, declined to follow this holding, labeling it dicta);Cf concurring opinion of Judge Anstead in Roberts v. State, 450 So. 2d 1126 (Fla. 4th DCA), review denied, 461 So. 2d 116 (Fla. 1984). Thus, Respondent submits the law is now well settled throughout Florida that "conviction" and "adjudication" are not necessarily synonymous.

Respondent further submits this Court implicitly found that the term "conviction" means a finding of guilt within the context of chapter 322, when it promulgated rule 6.291(d) Florida Rules of Traffic Court. Rule 6.320(d) states:

> (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.

Clearly, the Court would not have needed to specifically state that a withhold of adjudication shall not constitute a "conviction" under chapter 322, unless the term "conviction" means a finding of guilt; it would be self-evident that a withhold of adjudication would not constitute a "conviction," if the term "conviction," as used in chapter 322, was not intended to encompass withhold adjudications.

Finally, public policy supports the legislature's stated intent to discourage repetition of criminal action by individuals, and to impose increased and added deprivation of the privilege of operating a motor vehicle upon offenders who have repeatedly violated traffic laws. That intent would not be fulfilled if this Court overturns the Fourth District's opinion and holds that "conviction" is necessarily synonymous with adjudication. See section 322.263(3) Florida Statutes (1996).

The reasoning of the Second District Court of Appeal in Maxwell v. State, 336 So. 2d 658 (Fla. 2d DCA 1976) may be instructive on the issue of public policy. In Maxwell, the court was asked to decide whether possession of marijuana was a second offense under the statute, and therefore a felony, when defendant had previously been placed on probation, but not adjudicated guilty, for a similar charge. The court found:

> the intent of the legislature was to prevent the conferring of felony status upon the accused the first time he is found in possession of a small quantity of marijuana. But once possession has been judicially established, whether by a guilty plea, a nolo plea, or a jury verdict, the status of the second charge must not be determined on the basis

> of whether or not the judge had withheld adjudication pursuant to RCrP 3.670.

Id. at 659. Although the statute in question in Maxwell did not use the word "conviction", but rather used the word offense, the court found that under Gazda the result would be the same since "conviction" is distinguishable from "judgment of conviction." Id. at 659. The court reasoned that:

> If that [the decision to withhold adjudication] were the controlling factor, a judge may be reluctant to exercise the power to withhold adjudication granted under the above rule. He might be unwilling to give the defendant an unwarranted second chance to risk no more than another misdemeanor charge should the defendant again possess marijuana. This in turn would be a great detriment to first offenders.

Id. The Maxwell court also noted that section 775.084, the Habitual Offender Statute, shows the legislature's view that withholding of adjudication is to be treated as a judgment of conviction for purposes of subsequent punishments, at least where the second crime is committed during the probationary period. See also United States v. Smith, 10 Fla. L. Weekly Fed. C462 (Oct. 9, 1996)(a prior plea of nolo contendere with adjudication withheld in Florida state court is a 'conviction' that supports an enhanced sentence under federal narcotics laws).

Section 322.34 is a statute which deals with subsequent punishments. Therefore, as in Maxwell, the status of the second charge must not be determined on the basis of whether or not the judge withheld adjudication; this would diminish the legislature's stated purpose to increase the punishment for repeat offenders. And, as pointed out in Maxwell, if this Court finds that the term conviction is synonymous with adjudication, a judge may be reluctant to exercise the power to withhold adjudication, to the detriment of first offenders. Clearly, therefore, policy suggests this Court should find that the term conviction, within the context of chapter 322, is not synonymous with adjudication, and therefore the judge's discretion to withhold adjudication has no bearing on

the level of the offense; all withholds should be treated as "convictions," because "conviction" means a finding of guilt.

CONCLUSION

The stated intention of the legislature is to increase punishments for repeat offenders. Clearly, rule 6.291(d) Rules of Traffic Court provides that the term "conviction," in the context of chapter 322, means a finding of guilt. Thus, the statute comports with prior holdings of this Court as well as the Rules promulgated by the Court. Therefore, the statute is constitutional as applied to the Petitioner. Accordingly, based on the foregoing arguments and authorities, the State requests that this Honorable Court AFFIRM the Fourth District Court of Appeal's finding and REMAND the case for trial.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

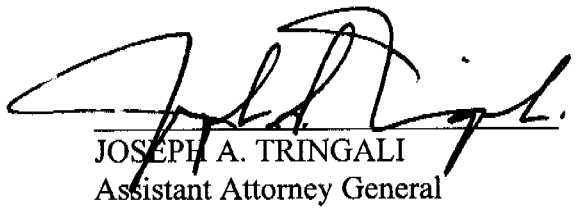
CELIA A. TERENZIO
Senior Assistant Attorney General
Bureau Chief
Florida Bar No. 0656879

JOSEPH A. TRINGALI,
Assistant Attorney General
Florida Bar No. 0134924
1655 Palm Beach Lakes Blvd
Suite 300
West Palm Beach, FL 33401
Telephone (561) 688-7759
FAX (561) 688-7771

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Answer Brief on the Merits" has been sent by sent by United States mail to: H. DOHN WILLIAMS, JR., Esq., Attorney for Petitioner, P.O. Box 1722, Fort Lauderdale, FL 33302 on February 10, 1999.



JOSEPH A. TRINGALI
Assistant Attorney General
Counsel for Respondent