

FILED

SID J. WHITE

DEC 30 1998 ✓

IN THE SUPREME COURT OF FLORIDA

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RENIEL SANTIAGO,

Petitioner/Defendant

vs.

Case no. ⁹³~~98~~, 822

STATE OF FLORIDA,

Respondent/Plaintiff,

_____ /

Appeal from the Fourth District Court of Appeal

BRIEF OF PETITIONER

**H. DOHN WILLIAMS, JR. P.A.
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By: H. Dohn Williams Jr.

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18 U.S.C. 921(a)(20)

PRELIMINARY STATEMENT

The Respondent is the State of Florida, and will be referred to as the "State." The Petitioner is Reniel Santiago, and will be referred to as "Santiago." Reference to the record will be by the symbol "R."

STATEMENT OF THE CASE AND FACTS

The Petitioner, Reniel Santiago (Santiago), was charged with the felony offense of driving with a suspended license contrary to s. 322.34(1)(c), Fla. Stat. (1995). Santiago moved to dismiss the charge. (R. 17-18) The trial court heard argument on May 22, 1996 and July 31, 1996, and on August 2, 1996, the trial court filed a written order granting Santiago's motion to dismiss. The State appealed. The Fourth District Court of Appeal reversed the trial court, and found the statute constitutional.

Santiago was stopped for speeding. A records check revealed Santiago had a suspended license. He was arrested for the offense of driving on a suspended license. (R. 14, probable cause affidavit). An Information was filed charging Santiago with the offense of driving with a suspended license. (R. 15-16). The Information charged that Santiago was previously convicted of the offense of driving on a suspended license on December 12, 1989 and April 23, 1990. It was stipulated that Santiago had two prior "adjudications of guilt" (convictions) of the

offense of driving with a suspended license. Based on this stipulation, the trial court considered Santiago's challenge to the statute, and found it unconstitutional as applied to him.

SUMMARY OF ARGUMENT

In 1995, when the legislature substantially amended the driving with a suspended license statute, it sought to provide for progressively harsher sentences for multiple "convictions." Instead of using the language of the DUI statute, the petit theft statute, or the disciplinary statutes, the legislature sought to re-invent the wheel. The flaw in drafting the statute has created confusion about what the term "conviction" means. The statute does not define the term "conviction." Upon "a third conviction," the offender is punished as a third-degree felon. However, the statute does prohibit the trial court from "withholding adjudication of guilt." The common understanding in Florida jurisprudence is a "conviction" means an adjudication of guilt. The District Court bucked the tide of authority and construed the term "conviction" to mean "an admission or determination of guilt regardless of whether adjudication of guilt is withheld." The District Court created this definition so the trial court could have jurisdiction to impose a sentence in this case.

ARGUMENT

Florida Statute 322.34(1)(c) (1995) is unconstitutional as applied to offenders, such as the Petitioner, with two prior convictions for driving with a suspended license.

In 1995, s. 322.34, Fla. Stat. (1995), relating to driving while license suspended, revoked, canceled or disqualified, was substantially amended to add a new subsection making a third or subsequent "conviction" a third degree felony.

The revised statute provided:

(1)(a)ny person whose driver's license or driving privilege has been canceled, suspended, or revoked as provided by law, except persons defined in s. 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, as punishable as provided in s. 775.082 or s. 775.083.

(b) a second conviction is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(c) a third or subsequent conviction is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (emphasis added)

The statute does not prohibit the trial court from withholding adjudication of guilt per s. 948.01 Fla. Stat. (1995). No related statute prohibits the trial court from withholding adjudication of guilt. The statute does not prohibit the trial court from exercising its discretion and withholding adjudication of guilt whether the offense

be a first offense, second offense, third or subsequent offense.

While statutes are presumed constitutional, the rules of statutory construction require penal statutes to be strictly construed. State v. Camp, 596 So.2d 1055 (Fla. 1992). When a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. Scates v. State, 603 So.2d 504 (Fla. 1992). This principle is codified in s. 775.021(1), Fla. Stat. (1989), which provides, “(t)he provisions of this code and offenses defined by other statutes shall be strictly construed; **when the language is susceptible to differing constructions, it shall be construed most favorably to the accused.**” (emphasis added)

The statute specifically requires successive “convictions” for the escalating penalties to apply. By the clear wording of the statute, the conduct of driving with a suspended license does not become a felony offense, until there is at least a “third conviction.” After-all Subsection (1)(c) states, “(a) third or subsequent conviction is a felony of the third degree punishable as provided (by law).” Until the offender is actually “convicted” a third time, his conduct is not felonious, and he is not subject to third degree felony sanctions. (emphasis added)

The question presented is what does the word “conviction” mean for purposes of this statute? Santiago opines the term “conviction” means an “adjudication of guilt?” The District Court opines that the term “conviction” simply means “an admission or determination of guilt regardless of whether adjudication of guilt is

withheld.” The gist of the District Court’s reasoning is the term “conviction” is chameleon-like term, which has long been held to require an “adjudication of guilt,” but in some instances does not require an adjudication of guilt. To hold this statute constitutional, it defined the term to mean “an admission of guilt or determination of guilt regardless of whether adjudication of guilt is withheld.”

The long-held and common perception in Florida jurisprudence is that “conviction” must include an adjudication of guilt. In Smith v. State, 75 Fla. 468, 78 So. 530 (Fla. 1918), Smith was convicted of the offense of selling alcoholic beverages in a dry county. A first offense was a misdemeanor; however, selling intoxicating liquors, having been before convicted of a like offense, was a felony. This Court construed “convicted” to mean the adjudication by the court of the defendant’s guilt. “When the law speaks of ‘conviction’ it means a judgment, and not merely a verdict, which in common parlance is called a conviction.” “Id. at 532. See also, Weathers v. State, 56 So.2d 536, 537 (Fla. 1952).

The common perception that "conviction" means an adjudication of guilt was recently re-affirmed in Childers v. Department of Environmental Protection, 696 So.2d 962 (Fla. 1st DCA 1997). Childers challenged that "convicted" meant an adjudication of guilt, and conversely that a withheld adjudication of guilt did not constitute a conviction. The District Court agreed.

Childers was cited for using an illegal shrimp net. After a non-jury trial, the circuit court found him guilty, but withheld adjudication of guilt, in keeping with Fla.R.Crim.P. 3.670 and s. 948.01(2), Fla. Stat.(1995). Thereafter, Childers was notified that his saltwater products license was suspended per s. 370.092(8)(b), Fla. Stat. (1995), which provided:

(b) In addition to being subject to the other penalties provided in this chapter, any violation of s. 16, Art. X of the State Constitution or any rules of the Marine Fisheries Commission which implement the gear prohibitions and restrictions specified therein shall be considered a major violation; and any person, firm, or corporation convicted of such violation shall be subject to the following additional penalties:

1. For a first major violation within a 7-year period, suspension of the saltwater products license for 90 days. (emphasis added)

In holding that a "conviction" means an adjudication of guilt, the District Court drew upon this Court's reasoning in Smith v. State, supra.

The Childers court noted that after Childers' arrest the legislature recognized that the term "conviction" commonly required an adjudication of guilt; absent an adjudication of guilt there was no conviction. To close this "loophole," it amended the saltwater products licensing statute by substituting for the word "convicted," the phrase "receiving any judicial disposition other than acquittal or dismissal." Section 370.092(4)(a), Fla. Stat. (Supp. 1996). Compare, in our case, the Fourth District Court recognized that the term "conviction" commonly

required an adjudication of guilt. State v. Keirn, 23 Fla. Law W. D1144 (Fla. 4th DCA 1998). To cure the error, it usurped the Legislature's function and impermissibly rewrote the statute to define the term "conviction" to mean "an admission of guilt or determination of guilt regardless of whether adjudication of guilt is withheld."

The case law interpreting the term "conviction," as it relates to the offense of possession of a firearm by a convicted felon, is consistent with the perception that "conviction" equals an adjudication of guilt. In Castillo v. State, 590 So.2d 458 (Fla. 3rd DCA 1991), the court construed s. 790.23, Fla. Stat., relating to possession of a firearm by a convicted felon. Castillo had a prior criminal record, but the prior proceedings had resulted in a withheld adjudication. The court held, "for purposes of this statute, we construe 'conviction' to mean an adjudication of guilt."

In Malcolm v. State, 605 So.2d 945 (Fla. 3rd DCA 1992), Malcolm was convicted of possession of a firearm by a convicted felon. However, his prior felony conviction was reversed and remanded for a new trial. Thereafter, he pled guilty and the trial court withheld adjudication of guilt. This meant he was never convicted of a felony. So, his conviction for possession of a firearm by a convicted felon was set aside, because it cannot be predicated on a withheld adjudication.

In U.S. v. Gispert, 864 F.Supp. 1193 (S.D. Fla. 1994), the court, granted

Gispert's motion for judgment of acquittal of the offense of possession of a firearm by a convicted felon. In doing so, the court noted that the federal law, regarding possession of a firearm by a convicted felon, defines "conviction" in accordance with the law of the jurisdiction in which the proceedings were held. 18 U.S.C. 921(a)(20). Gispert's prior offense was a violation of Florida law, so Florida law determined what constituted a "conviction." The federal court noted that a review of the law pertaining to the Florida statute, relating to possession of a firearm by a convicted felon, revealed that a "conviction" normally requires an adjudication of guilt. The federal court found that the term "conviction" for purposes of the federal statute must include an adjudication of guilt. Or, it may include a withheld adjudication, if the defendant is still on probation, because the court still has the jurisdiction to adjudicate the defendant guilty.

In U.S. v. Lester, 785 F.Supp. 976 (S.D. Fla. 1991) the court held that a plea of nolo contendere, with adjudication withheld, in a prior Florida proceeding is not a "conviction" for purposes of the Federal Firearms Statute, relating to possession of a firearm by a convicted felon. In so holding, the court relied heavily upon the decision in U.S. v. Thompson, 756 F.Supp. 1492 (N.D. Fla. 1991), wherein the court held, **"(u)nder Florida law, a nolo plea, with adjudication withheld, was not equivalent to a conviction.** The Thompson court wrote, **"there appears to be a**

common perception among persons involved in the Florida criminal justice system that a defendant, for whom adjudication is withheld, has not been 'convicted' under Florida law." 756 F.Supp. at 1496. (emphasis added)

Justice Beranek, sitting as a member of the Fourth District Court, recognized the problem when the term "conviction" is defined differently. In Roberts v. State, 450 So.2d 1126 (Fla. 4th DCA 1984), Justice Beranek's concurring opinion stated, "(a)s the Supreme Court in Smith, I would opt for the established and **clear-cut legal meaning of conviction which includes adjudication**. Adopting different meanings for the same word depending on the situation can only result in confusion and inconsistency in purpose and result when anyone uses the term." (emphasis added)

The potential for confusion and inconsistency recognized by Justice Beranek is reflected by the prosecutor's interpretation of the term "conviction," which differed from the District Court's interpretation. In filing charges against Santiago, the prosecutor opined "conviction" meant an "adjudication of guilt." According to Santiago's driving record, on May 29, 1991, he was charged with driving with a suspended license, and on July 15, 1991, the court "withheld adjudication of guilt." (R. 17) If the prosecutor opined that a "withheld adjudication" was a conviction, the Information would have alleged or plead all his

“dispositions,” instead of just his convictions. The prosecutor’s common perception was that a “withheld adjudication” was not a “conviction.” The prosecutor, like Santiago, also interpreted “conviction,” as it is regularly construed by persons in the criminal justice system, to include an adjudication of guilt.

In the 1970’s the legislature recognized that the common perception that “conviction” means an adjudication of guilt, when it amended the DUI statute to provide for harsher penalties for multiple convictions. The DUI statute provides:

(1) a person is guilty of the offense of driving under the influence and is subject to punishment as provided in Subsection (2) if such person is driving or in actual physical control of a vehicle within this state, and:

(a) the person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the persons normal faculties are impaired: or

(b) the person has a blood or breath alcohol level of 0.08 percent or higher.

(2)(a) except as provided in paragraph (b), subsection(3) or subsection(4), any person who is convicted of a violation of subsection (1) shall be punished:

* * *

2. by imprisonment for:

- a. not more than six months for a first conviction.
- b. not more than nine months for a second conviction.
- c. not more than twelve months for a third conviction.

(b) any person who is convicted of a fourth or subsequent violation of this section is guilty of a felony of the third degree. s. 316.193, Fla.

Stat. (1995)

The DUI statute works in conjunction with s. 316.656(1), Fla. Stat., which provides, “(n)otwithstanding the provisions of s. 948.01, no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of (the DUI statute)...” The law prohibits a court from withholding adjudication of guilt for the offense of DUI.

In Wooten v. State, 332 So.2d 15 (Fla. 1976), the defendant challenged the DUI statute’s mandatory adjudication of guilt provision. This Court, in upholding the DUI statute’s mandatory adjudication of guilt provision, wrote, “(t)he requirement that offenders who have been proven guilty be so adjudged is part and parcel of the legislative scheme to discourage drunken driving by authorizing progressively harsher sentences for multiple offenders. In order for a repeat offender to be subject to enhanced punishment for subsequent offenses... there must have been at least one previous conviction... **(the statute) does not authorize stiffer punishment in the absence of a prior adjudication of guilt; previous entry of a judgment of conviction is a necessary pre-condition.**” Likewise, the common interpretation is that the driving with suspended license does not authorize stiffer punishment in the absence of a prior adjudication of guilt; a previous judgment of conviction is a necessary pre-condition. (emphasis added)

The common perception that “conviction” includes an adjudication of guilt is reflected in the Traffic Court Rules. This Court promulgated Rule 6.560, titled, “Conviction of Traffic Infraction,” which provides:

An admission or determination that a defendant has committed a traffic infraction shall constitute a **conviction** as that term is used in Chapter 322, Florida Statutes, and section 943.25, Florida Statutes, **unless adjudication is withheld** by an official in those case in which withholding of adjudication is not otherwise prohibited by statute or rule...(emphasis added)

Likewise, Rule 6.291(d), titled “convictions,” provides, “(e)lections 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.” (emphasis added)

The perception that a “conviction” commonly means an “adjudication of guilt” is borne out in the professional disciplinary statutes. The professional disciplinary statutes are penal in nature. Most of the disciplinary statutes have been amended in recent years to modify the “loophole” that a withheld adjudication is not a “conviction” for disciplinary purposes.

The chiropractic disciplinary statute provides, “(b)eing convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of chiropractic, or the ability to practice chiropractic. Any plea of nolo contendere shall be considered a conviction for the purposes of this

chapter.”¹ The osteopathic disciplinary statute provides, “(b)eing convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of osteopathic medicine or the ability to practice osteopathic medicine. A plea of nolo contendere shall create a rebuttable presumption of guilt to the underlying criminal charges.”² The medical practice disciplinary statute provides, “(b)eing convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or the ability to practice medicine.”³ The nursing disciplinary statute is even more definitive. It provides, “(b)eing found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of nursing or the ability to practice nursing.”⁴ See also, the optometry disciplinary statute,⁵ the podiatric medicine disciplinary statute,⁶ the dentistry disciplinary statute,⁷ the engineering disciplinary statute,⁸ and the real estate salesmen and brokers disciplinary statute.⁹ The common perception is that the term “conviction” means an “adjudication of guilt.” If the perception was otherwise, the

¹ s. 460.413(1)(c), Fla. Stat. (1995)

² s. 459.015(1)(c), Fla. Stat. (1995)

³ s. 458.331(1)(c), Fla. Stat. (1990)

⁴ s. 464.018(1)(c), Fla. Stat. (1989)

⁵ s. 463.016(1)(d), Fla. Stat. (1992)

⁶ s. 461.013(1)(c), Fla. Stat. (1992)

⁷ s. 466.028(1)(c), Fla. Stat. (1995)

⁸ s. 471.033(1)(d), Fla. Stat. (1992)

⁹ s. 475.25(1)(f), Fla. Stat. (1991)

added language -- regardless of adjudication -- would be superfluous.

Consistent with this perception, the Florida sentencing guidelines specifically define and expand the term "conviction" to include, "a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld." s. 921.0011(2), Fla. Stat. (1993). If the common perception was that a "conviction" was merely "an admission of guilt or determination of guilt," then the definition would not have to include the additional language, "regardless of whether adjudication is withheld."

The overall legislative perception is that the offender must be "adjudicated guilty" to be "convicted." So, when the legislature wants to include all dispositions, it includes the language, "regardless of whether adjudication is withheld." With the added language, there is no confusion, and no doubt.

Is the conduct a felony or misdemeanor?

If a defendant, who receives a "withheld adjudication", is not "convicted," there is a jurisdictional problem with the driving with a suspended license statute. The statute, nor any related statute, does not prohibit the trial court from withholding adjudication of guilt. Section 948.01, Fla. Stat. (1995) The trial court cannot impose felony sanctions, until the offender has a third adjudication of guilt (conviction).

What happens if the trial court exercises its discretion and withholds adjudication of guilt? At the motion to dismiss, the State argued the trial court would impose the penalties applicable to a first degree misdemeanor, which is the next lesser degree of punishment provided by the statute. Applying this reasoning, if the trial court exercises its discretion, withholds adjudication of guilt, and places him on misdemeanor probation, what happens if he violates probation? If he violates his probation, is he only subject to incarceration in the county jail for up to a year, because, according to the State, first degree misdemeanor sanctions apply? Or, can the trial court find him in violation of probation, adjudicate him guilty and transpose his prior misdemeanor sanctions into felony sanctions by the act of adjudication, which makes him a felon.

Because the statute requires an adjudication of guilt (conviction) for the conduct to be punishable as a felony, and because s. 948.01, Fla. Stat., allows the trial court to withhold adjudication of guilt, the end result is that the trial court has the unbridled discretion to make an offender's conduct a felony or a misdemeanor by simply exercising its discretion regarding the withholding of adjudication of guilt. However, the Legislature is vested with the sole authority and responsibility to make the criminal laws, including classifying transgressions of the criminal law as either a felony or a misdemeanor. It is an unconstitutional

delegation of legislative power to grant to the trial court the power to make an offender's conduct a felony or a misdemeanor simply by it exercising its discretion to withhold adjudication of guilt. (emphasis added)

The trial court lacked jurisdiction

The trial court's dismissal of the charges was "right for the wrong reason." Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1950). The Fourth District Court's reasoning fails to recognize that proof of the prior convictions is a substantive element of the offense. Santiago agrees with the Childers court that when a prior conviction is an element of a crime, a "conviction" includes an adjudication of guilt. Childers id at 964. Consider, a prior conviction (adjudication of guilt) is a substantive element that must be alleged and proven in a prosecution for possession of a firearm by a convicted felon. Harris v. State, 449 So.2d 892 (Fla. 1st DCA 1984), review dismissed 453 So.2d 1364 (1984). Regarding driving on a suspended license, "a third or subsequent conviction" is the condition precedent to make the offense a third degree felony. In our case, the "third conviction" is a substantive element of the felony offense of driving on a suspended license, which must be alleged and proven. How can the State allege, much less prove, a substantive element that has not happened?

The circuit court has jurisdiction over all felony offenses and of all

misdemeanor offenses arising out of the same circumstance as a felony which is also charged. The circuit court lacks subject-matter jurisdiction over an Information, which as written, only alleges a misdemeanor offense, and does not charge a felony offense. Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981); Wesley v. State, 375 So.2d 1093 (Fla. 3rd DCA 1979). The accusatory pleading, on its face, must charge a felony offense.

The statute specifically requires three “convictions” for the conduct to escalate from a misdemeanor to a felony. By the clear wording of the statute, the conduct of driving with a suspended license is not a felony offense until there is a “third conviction.” Given the common definition of the term “conviction” means an “adjudication of guilt,” the conduct of driving with a suspended license is not felonious until there are “three adjudications of guilt (convictions).” The accusatory pleading (Information) in this case, on its face, does not charge a felony offense, because it only alleges two prior convictions. The circuit court lacked jurisdiction, because Santiago did not have a “third conviction” when he was charged.

The Solution

The problem can easily be remedied by the legislature. The statute can be amended to define the term “conviction” to mean “being found guilty, regardless of adjudication.” Or, the statute can be amended to be analogous to the DUI statute

by mandating an adjudication of guilt whenever there is a plea of guilty or nolo contendere or a verdict of guilty.

Or, the statute can be amended to read like the petit theft statute. It provides, "(a) person who commits petit theft and who has previously been convicted two or more times of any theft commits a felony of the third degree..." It does not require a third "conviction" for felony sanctions to be imposed. It only requires two prior "convictions" of theft. If the statute read, "(a) person who drives with a suspended license and who has previously been convicted two or more times of driving with a canceled, suspended, or revoked license commits a felony of the third degree..." the legislative intent would be achieved; and the court could still exercise its discretion regarding adjudication of guilt. This wording does not require a third "conviction" for the conduct to be felonious. It only requires two prior adjudications (convictions) of guilt.

CONCLUSION

The common perception in the Florida criminal justice system is that when adjudication of guilt is withheld, a defendant is not "convicted." In the challenged statute, the term "conviction" is not defined, so the ordinary perception is that a conviction means an adjudication of guilt.

The legislature attempted to create a statute that mirrored the DUI statute

and provided for progressively harsher punishment, but its wording created confusion. When there is confusion about the interpretation of a penal statute, the rule of lenity provides the benefit of the doubt goes to the accused, and it is construed most favorably to the accused. In this case, the dilemma about whether "conviction" must include an adjudication of guilt renders the statute unconstitutional. The charge must be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed and/or hand-delivered and/or faxed on the 29 day of December 1998, to:

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DEC 30 1998

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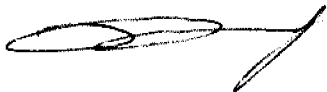
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RE: Santiago v. State

Dear Sirs:

Enclosed is the Respondent's brief and a computer disk in WordPerfect format.

Sincerely yours,



H. Dohn Williams Jr.

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