IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 1999-26

STATE OF FLORIDA,

Petitioner,

- versus -

KAREN FINELLI,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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Preliminary Statement

Petitioner, the State of Florida, was the Appellant in the Fourth District Court of Appeal and the prosecution in the trial court. Respondent, Karen Finelli, was the Appellee and defendant, respectively, in the lower courts. In this brief, the parties shall be referred to as the State and the Respondent. The symbol "R" will designate the record on appeal, the symbol "T" will designate the transcript of proceedings in the trial court and the symbol "A" will designate the Appendix to this Brief.

Certificate of Type Size and Style

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, Petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

Statement Of The Case And Facts

On April 22, 1998, Respondent was charged by Information with felony driving while under the influence (hereinafter referred to as "felony DUI"), in violation of § 316.193, Fla. Stat. (1997) (R. 4-5). Three prior DUI convictions were alleged in the Information (R. 4).

Respondent filed a motion to dismiss the information based on the fact that one of the prior convictions used as an element of the felony DUI offense was on appeal (R. 22-24). A hearing on the motion to dismiss was held on July 16, 1998 (T.) At the hearing, Respondent argued that since one of the three prior DUI convictions was on appeal, it was not final and therefore could not be used as one of the predicate DUI convictions in charging Respondent with felony DUI (T. 2). In her argument, Respondent compared the felony DUI statute with the habitualization statute (T. 2). Respondent argued that since the misdemeanor DUI was being enhanced to a felony DUI, the predicate DUI's had to be "final" as case law has defined "final" for habitualization purposes (T. 2, 4). Respondent further argued that without this finalization, the circuit court was without jurisdiction at the time the Information was filed (T. 4).

The trial court agreed with Respondent that the three prior convictions used to prove felony DUI were an enhancement and that without the finality of the one conviction as defined in the

habitualization cases, the trial court was without jurisdiction to hear this case (T. 11, 12). The trial court granted Respondent's motion to dismiss (T. 12).

On appeal to the Fourth District Court of Appeal, the State argued that a conviction for the purposes of felony DUI occurs at the moment of a guilty adjudication and that the pending appeal of one of the underlying convictions had no effect for purposes of charging felony DUI. Relying on Jovner v. State, 158 Fla. 806, 30 so. 2d 305 (1947), the District Court upheld the trial court's dismissal, finding that in order to be considered a predicate misdemeanor conviction, that conviction must be final on appeal. The District Court specifically rejected the State's reliance on State v. Snyder, 673 So. 2d 9, 10 (Fla. 1996), where this Court had found that a conviction under § 790.23, Fla. Stat. (1991), meant an adjudication after a plea or trial. In distinguishing Snyder, the District Court likened felony DUI to a sentencing enhancement under Joyner (A. 1-2).

The State sought rehearing, which was denied, but the District Court certified the following question as a question of great public importance:

> SHOULD THE DEFINITION OF "CONVICTION" IN FELONY DUI CASES BE IDENTICAL WITH HOW THE TERM IS DEFINED IN STATE V. SNYDER, 673 So. 2d 9 (Fla. 1996), GIVEN THE FACT THAT IN BOTH CASES A PRIOR "CONVICTION" IS AN ELEMENT OF THE SUBSTANTIVE OFFENSE AND THE LEGISLATURE INTENDED TO PROTECT THE GENERAL PUBLIC FROM DANGEROUS INSTRUMENTALITIES SUCH AS FIREARMS AND MOTOR VEHICLES IN THE HANDS OF DRUNK DRIVERS?

(A. 3).

The discretionary jurisdiction of this Court was invoked and this Court has postponed its decision on jurisdiction until after briefing on the merits.

Question Presented

SHOULD THE DEFINITION OF "CONVICTION" IN FELONY DUI CASES BE IDENTICAL WITH HOW THE TERM IS DEFINED IN STATE V. SNYDER, 673 So. 2d 9 (Fla. 1996), GIVEN THE FACT THAT IN BOTH CASES A PRIOR "CONVICTION" IS AN ELEMENT OF THE SUBSTANTIVE OFFENSE AND THE LEGISLATURE INTENDED TO PROTECT THE GENERAL PUBLIC FROM DANGEROUS INSTRUMENTALITIES SUCH AS FIREARMS AND MOTOR VEHICLES IN THE HANDS OF DRUNK DRIVERS?

Summary Of The Argument

Below, relying on this Court's opinion in Joyner v. State, 158 Fla. 806, 30 So. 2d 305 (1947), the District Court upheld the dismissal of Respondent's felony DUI charge, finding that in order to be considered a predicate misdemeanor conviction, that conviction must be final on appeal. However, Joyner analyzed the finality of a "conviction" for purposes of the habitual offender sentencing enhancement. However, in State v. Rodriguez, 575 So. 2d **1262, 1264** (Fla. 1991), this Court held, in construing the felony DUI statute, that the combined existence of three or more prior DUI convictions is an element of the substantive offense of felony DUI as defined by §§ 316.193(1) and (2)(b). Because the existence of three prior DUI convictions is an essential element of the substantive offense of felony DUI, rather than a sentencing enhancement, it is therefore distinguishable from the habitual criminal offender statute and Joyner is not applicable. Instead, this Court's opinion in State v. Snyder, **673** So. 2d 9 (Fla. 1996), is more instructive. In Snyder, this Court determined that a "conviction" for purposes of the possession of a firearm by a convicted felon statute, § 790.23, Fla. Stat. (1991), meant an adjudication after a plea or trial, not the finality required by resolution on appeal. The definition of "conviction" in cases where a prior conviction is a substantive element of the crime should be defined consistently. Additionally, any reversal of one

of the three underlying convictions on appeal may be addressed in a post conviction relief motion. In the meantime, society is protected.

Secondly, the legislative intent behind the felony DUI statute is clearly to keep an automobile, a dangerous instrumentality, out of the hands of individuals who cannot control their behavior and have proven to be a danger on three prior occasions.

Argument

WHERE A PRIOR CONVICTION IS A SUBSTANTIVE ELEMENT OF THE OFFENSE, AS IN THE CASE OF FELONY DUI, THE TERM OF "CONVICTION" SHOULD BE INTERPRETED TO MEAN AN ADJUDICATION OF GUILT.

Respondent was charged by Information with felony DUI, in violation of § 316.193(2)(b), Fla. Stat. (1997). As a basic starting point, § 316.193 provides, in pertinent part, as follows:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the 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 person's normal faculties are impaired;
> >
> > (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
> >
> > (c) The person has a breath-alcohol level of 0.08 grams or more of alcohol per 210 liters of breath.
>
> (2) . . .
>
> (b) Any person who is convicted of a fourth or subsequent violation of this section is guilty of a felony of the third degree punishable as provided in s. 775.082, s. 775.083, or s. 775.084; however, the fine imposed for such fourth or subsequent violation may be not less than $1,001.

§§ 316.193(1) and (2), Fla. Stat. (1997) (emphasis added). The statute doe not otherwise define the term "convicted."

The term "convicted" has various meanings depending upon the context within which the term is used. State v. Keirn, 720 So. 2d

1085 (Fla. 4th DCA 1998), rev. granted, 718 So. 2d 168 (Fla. 1998). Notably, however, no court of this State has determined when a defendant is "convicted" for purposes of the felony DUI statute. Further, there are no cases in Florida that address this issue under the analogous felony petit theft statute or the felony driving while license suspended statute. Therefore, the closest analogy can be found in those cases which interpret "conviction" in the context of the charge of possession of a firearm by a convicted felon.

Importantly, this Court has held that in cases involving the charge of possession of a firearm by a convicted felon, § 790.23, Fla. Stat., a defendant has a prior felony "conviction" if he was adjudicated guilty in the trial court, notwithstanding the fact that the defendant has the right to contest the validity of that conviction by appeal or by other procedure. State v. Snyder, 673 So. 2d 9, 10 (Fla. 1996). This Court reasoned that the purpose of § 790.23 is:

> to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities. Nelson v. State, 195 so. 2d 853, 855 & n.8 (Fla. 1967). In order to achieve this legislative purpose, section 790.23 must apply following an adjudication of guilt in the trial court. Furthermore, the fact that the predicate conviction is pending appeal is irrelevant to the leaislative purpose of protecting the public by preventing convicted felons from possessing firearms. See Lewis v. United States 445 U.S. 55, 67, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980; (stating that federal gun laws focus not on reliability of conviction but on mere fact of conviction in order to

> keep firearms from potentially dangerous persons); accord United States v. Woods, 696 F.2d 566, 569 (8th Cir. 1982) (concluding that conviction need not be final to subject person to statutory restrictions on possession of firearms and person can be prosecuted even while predicate conviction is pending). The legislature never intended for convicted felons to possess firearms during the pendency of their appeals. Accordingly, we hold that a defendant is convicted when adjudicated guilty in the trial court, notwithstanding the fact that the defendant has the right to contest the validity of the conviction by appeal or by other procedures.

Id. at 10-11 (emphasis added). This Court, however, further explained that even though a defendant is "convicted" when adjudicated guilty, fairness requires that he be permitted to attack a conviction for possession of a firearm when the predicate felony "conviction" is subsequently reversed on appeal, thereby giving the defendant means of relief. Id. at 11.

By its ruling, this Court rejected the Second District Court of Appeal's holding in the underlying case, Snyder v. State, 650 so. 2d 1024 (Fla. 2d DCA 1985), rev'd, 673 So. 2d 9 (Fla. 1996), that the prior predicate conviction necessary for charging a defendant with possession of a firearm by a convicted felon could not be used as the predicate felony conviction until the conviction had been affirmed by the appellate court. The Second District had stated in its opinion that their holding was controlled by their opinion in Wheeler v. State, 465 So. 2d 639 (Fla. 2d DCA 1985), which, in turn, relied upon this Court's opinion in Joyner v. State, 158 Fla. 806, 30 So. 2d 304 (1947).

Below, relying on this Court's opinion in Jovner, the District

Court determined that "the function of a conviction under section 316.193(2)(b) is to enhance the charge" and determined that a "conviction" pending appeal is not final for purposes of the felony DUI statute (A. at 2) (emphasis added). However, in State v. Rodriauez, 575 So. 2d 1262, 1264 (Fla. 1991), this Court held that the combined existence of three or more prior DUI convictions is an element of the substantive offense of felony DUI as defined by §§ 316.193(1) and (2)(b). Because the existence of three prior DUI convictions is an essential element of the substantive offense of felony DUI, rather than a sentencing enhancement, it is therefore distinguishable from the habitual criminal offender statute and Joyner is not applicable.

Rather, the reasoning used by this Court in Snyder is more appropriately applicable. In fact, Snyder is factually the same as the instant case. Both §§ 790.23 and 316.193(2)(b) create a substantive offense based upon prior convictions and it is the dangerous nature of the defendant's actions given his past history that is of concern to the legislature. Felony DUI, like the charge of possession of a firearm by a convicted felon, is a substantive offense for which prior DUI convictions must be established. State v. Rodriguez, 575 So. 2d at 1265; Harris v. State, 449 So. 2d 892, 896-97 (Fla. 1st DCA 1984) (prior felony conviction is an element which must be proven in possession of a firearm by a convicted felon charge). Furthermore, in those instances where prior

convictions are a necessary element for a subsequent charge, the mere finding of a prior conviction is sufficient for a conviction on the new charge. Snyder, 673 So. 2d at 10; State v. Keirn, 720 so. 2d at 1086 ("conviction" in driving with a suspended license context where felony could be charged after the third suspension is defined as a plea or verdict of guilt even when adjudication is withheld). Contrary to the District Court's determination below, a finding that a defendant is a habitual felon is solely a sentencing matter; it is not a substantive element of the crime. Thus, this Court's analysis in Snyder is more analogous to felony DUI than to habitual offender sentencing under Joyner.

Secondly, the legislative intent behind § 316.193 is clear. Under this section, a defendant is given three chances to conform his behavior; it is upon the fourth DUI charge that the offense becomes a felony. Like a firearm, an automobile has been held to be a dangerous instrumentality. Sessions v. State, 353 So. 2d 854, 855 (Fla. 4th DCA 1977) (motor vehicle is a dangerous instrumentality); Parker v. State, 318 So. 2d 502, 504 n.4 (Fla. 1st DCA 1975) (same). In the hands of an intoxicated person, this is surely the case. It is well within the legislature's power and discretion to declare the fourth incident of DUI a felony. This should occur at the time of the adjudication of the third incident, not after affirmance on appeal, as obviously the defendant has not learned how to control his behavior and had proven to be dangerous

on three prior occasions. Merely because the defendant was fortuitous to have committed his fourth DUI while his third DUI was on appeal should not mean that he is permitted to frustrate the intent of the legislature and its desire to keep such reckless or unworthy drivers off public highways. See § 322.26, Fla. Stat. (1997) (where driver's license is revoked upon several enumerated events such as any felony where a motor vehicle is used, upon three charges of reckless driving in a 12 month period, and forfeiture of bail, as well as being under the influence of alcohol or a controlled substance). Clearly, it was not the legislature's intent to permit a person to drive after he was adjudicated guilty of DUI while awaiting appellate review. Rejecting the need for completion of appellate review and interpreting "conviction" as an adjudication of guilt, will be consistent with the general purpose of the statute, i.e., to impose more stringent penalties on certain offenders who repeatedly persist in a pattern of criminal conduct.

A recidivist, such as Respondent, who appealed their prior conviction would escape the consequences of her actions, notwithstanding that her previous conviction was ultimately affirmed on appeal. The recent convictions of Respondent, and others like her, would be effectively exempted from the operation of the statute. This would be clearly inconsistent with the obvious purpose of the statute. In fact, not using a prior DUI conviction until every possible remedy was exhausted would result

in the rare prosecution for felony DUI and may even encourage frivolous appeals.

Finally, as discussed by this court in Snyder, if one of a defendant's convictions is reversed on appeal, he is permitted to attack that conviction through a postcoviction motion filed pursuant to Fla. R. Crim. P. 3.850, thereby giving that defendant a means of relief. State v. Snyder, 673 So. 2d at 11.

Therefore, the definition of "conviction" in cases where the prior "conviction" is a substantive element of the crime should be defined consistently. Any reversal on appeal of that prior conviction may be addressed in a postconviction relief motion. In the meantime, society is protected.

Conclusion

WHEREFORE, based on the foregoing arguments and authorities cited herein, Petitioner respectfully requests that this Court quash the decision of the Fourth District Court of Appeal and interpret "conviction," in the context of a felony DUI charged pursuant to § 316.193(2)(b), Fla. Stat., as an adjudication of guilt.

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to J. David Bogenschutz, Esquire, Colonial Bank Building, 600 South Andrews Avenue, Suite 500, Fort Lauderdale, Florida, 33301, this 6TH day of January, 2000.

Heidi L. Bettendorf

HEIDI L. BETTENDORF
Assistant Attorney General

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1999

STATE OF FLORIDA,

Appellant,

v.

KAREN FINELLI,

Appellee.

CASE NO. 98-3 125

Opinion filed September 1, 1999

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Richard D. Eade, Judge; L.T. Case No. 98-8647 CF10A.

Robert A. Butterworth, Attorney General, Tallahassee, and Rochelle Lewis Kirdy, Assistant Attorney General, West Palm Beach, for appellant.

J. David Bogenschutz of Bogenschutz & Dutko, P.A., Fort Lauderdale, for appellee.

PER CURIAM.

The state appeals the trial court's dismissal of the information charging the defendant with felony DUI. The information alleged three prior misdemeanor DUI convictions; however, one of the convictions was pending appeal. The state argues that a conviction for purposes of felony DUI occurs at the moment of a guilty adjudication, and that a pending appeal of one of the underlying convictions has no effect for purposes of charging felony DUI. We disagree and affirm. Further, we write to distinguish the case upon which the state primarily relies, State v. Snyder, 673 So. 2d 9 (Fla. 1996).

This is yet another case where a court is called on to determine the meaning of the word "conviction," because a criminal statute has not specifically defined the term. Over time, the meaning given to the term has varied, depending on the specific statute in which the word appears. See State v. Keirn, 720 So. 2d 1085 (Fla. 4th DCA 1998), rev. granted, 718 So. 2d 168 (Fla. 1998).

Beginning with Jovner v. State, 158 Fla. 806, 30 So. 2d 304 (1947),[1] Florida has followed the rule that in charge or sentencing enhancement statutes, the use of the term "conviction" requires a finality that occurs when the conviction has been affirmed by an appellate court if an appeal has been taken. See Delguidice v. State, 554 So. 2d 35 (Fla. 4th DCA 1990); State v. Villafane, 444 So. 2d 71 (Fla. 4th DCA 1984); Garrett v. State, 335 So. 2d 876 (Fla. 4th DCA 1976).

Construing Statutes which are not charge or sentencing enhancement statutes, the supreme court has defined "conviction" in a way that did not require an appellate resolution. In Ruffm v. State, 397 So. 2d 277 (Fla. 198 1), receded from on other grounds, Scull v. State, 533 So. 2d 1137 (Fla. 1988), the supreme court held that a conviction still on appeal could nonetheless be considered as an aggravating circumstance in deciding whether to impose the death penalty. The court distinguished Jovner by pointing out how the habitual offender statute differed from the law concerning aggravating circumstances in capital cases:

> In Jovner v. State . . . we explained that the purpose of the habitual offender statute "is to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed."

[1] Jovner v. State, 158 Fla. 806, 30 So. 2d 304 (1947), superseded by statute on other grounds as recognized in State v. Barnes, 595 So. 2d 22 (Fla. 1992), superseded by statute as recognized in Mancini v. State, 693 So. 2d 64 (Fla. 4th DCA 1997).

30 So. 2d at 306.

> On the other hand, the purpose of considering previous violent convictions in capital cases differs from the purpose of the habitual offender statute. In Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977), we said "the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge."

Ruffin, 397 So. 2d at 282-83,

State v. Peterson, 667 So. 2d 199 (Fla. 1996), held that it was proper toinclude a conviction still on appeal on a sentencing guidelines score sheet. The supreme court distinguished Jovner by focusing on the definition of a conviction in Florida Rule of Criminal Procedure 3.701(d)(2), which broadly defined the term as "a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of a sentence was suspended." Peterson, 667 So. 2d at 200 (citation omitted). The court reasoned that the sentencing guidelines allowed the sentencing judge to have information concerning all past crimes, regardless of whether the convictions were affirmed on appeal. See id. at 200-01.

Snvder involved the issue of whether a defendant is "convicted" for the purpose of section 790.23, Florida Statutes (1991) (possession of a firearm by convicted felon), when adjudicated guilty by the trial court, even though the defendant had "the right to contest the validity of the conviction by appeal or other procedures." 673 So. 2d at 10. The supreme court treated section 790.23 differently from charge or sentencing enhancement statutes:

> Section 790.23 is intended to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities. In order to achieve this legislative purpose, section 790.23 must apply following an adjudication of guilt in the trial court. Furthermore, the fact that the predicate conviction is pending on appeal is irrelevant to the legislative purpose of protecting the public by preventing convicted felons from possessing firearms. The legislature never intended for convicted felons to possess firearms during the pendency of their appeals. Accordingly, we hold that a defendant is convicted when adjudicated guilty in the trial court, notwithstanding the fact that the defendant has the right to contest the validity of the conviction by appeal or by other procedures.

Id. at 10 - 11 (citations omitted).

In the context of the DUI statute, a person charged with three prior DUI convictions can thereafter be charged with felony DUI. See § 3 16.193(2)(b), Fla. Stat, (1997). As such, the function of a conviction under section 3 16.193(2)(b) is to enhance the charge, For that reason, this case is controlled by the line of cases following Jovner and not by Snyder, Peterson, and Ruffin. Consequently, the misdemeanor DUI conviction pending appeal in the present case cannot serve as one of the three required underlying convictions, Therefore, we affirm the trial court's order dismissing the information.

AFFIRMED.

GUNTHER, GROSS, and HAZOURI, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF **ANY TIMELY FILED MOTION FOR REHEARING.**

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1999

STATE OF FLORIDA,

Appellant,

v.

KAREN FINELLI,

Appellee.

CASE NO. 98-3 125

Opinion filed November 17, 1999

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Richard D. Eade, Judge; L.T. Case No. 988647 CF10A.

Robert A. Butter-worth, Attorney General, Tallahassee, and Rochelle Lewis Kirdy, Assistant Attorney General, West Palm Beach, for appellant.

J. David Bogenschutz of Bogenschutz & Dutko, P.A., Fort Lauderdale, for appellee.

ON MOTION FOR REHEARING OR REHEARING EN BANC AND/OR CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE

PER CURIAM.

We deny the State's motions for rehearing or rehearing en banc, but grant its motion to certify a question of great public importance. Accordingly, we certify the following question to be of great public importance:

SHOULD THE DEFINITION OF "CONVICTION" IN FELONY DUI CASES BE IDENTICAL WITH HOW THE TERM IS DEFINED IN STATE V. SNYDER, 673 SO. 2D 9 (FLA. 1996), GIVEN THE FACT THAT IN BOTH CASES A PRIOR "CONVICTION" IS AN ELEMENT OF THE SUBSTANTIVE OFFENSE AND THE LEGISLATURE INTENDED TO PROTECT THE GENERAL PUBLIC FROM DANGEROUS INSTRUMENTALITIES SUCH AS FIREARMS AND MOTOR VEHICLES IN THE HANDS OF DRUNK DRIVERS?

GUNTHER, GROSS and HAZOURI, JJ., concur.