IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC02-1943

SHELDON MONTGOMERY,

Petitioner/ Appellant,

vs.

STATE OF FLORIDA,

Respondent/ Appellee.

RESPONDENT'S/ APPELLEE'S ANSWER BRIEF ON THE MERITS

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Table of Contents

Page:

Table of Citations

FEDERAL CASES

STATE CASES

STATE STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

Preliminary Statement

Appellant/Petitioner was the Defendant in the trial court below, and will be referred to herein as "Appellant," "Petitioner" and "Defendant." Appellee/Respondent, the State of Florida, was the prosecution in the court below and will be referred to herein as "Appellee," "Respondent" or "the State." Reference to the record on appeal will be by the symbol "R;" reference to the transcripts will be by the symbol "T;" reference to any supplemental record or transcripts will be by the symbols "SR" or "ST;" and reference to Appellant's brief will be by the symbol "IB;" all followed by the appropriate volume and page numbers. For example page one of volume two of the supplemental record would appear as (SR 2 at 1).

Statement of the Case and Facts

On December 27, 1999, Petitioner was arrested for: two (2) counts of "scalping" tickets to the Miami Dolphins v. New York Jets football game in violation of § 817.36(1)(a)(Fla. Stat. 1999); resisting arrest with violence (felony) in violation of § 843.01 (Fla. Stat. 1999); and resisting arrest without violence (misd) in violation of § 843.02 (Fla. Stat. 1999). (R 1). On January 8, 2000, Petitioner was charged by a four count information of the above listed offenses. (R 2-3). On August 30, 2000, an Amended Information was filed. (R 26-27). Trial was held on August 30, 2000. (R 157-356). On August 30, 2000, the jury rendered its verdict finding Petitioner guilty of: resisting arrest with violence as charged in the information; resisting arrest without violence as charged in the information; and both counts of scalping as charged in the information. (R 48-51).

Prior to voir dire, the trial court heard Petitioner's motion regarding whether to count a "withhold of adjudication" as a conviction for the purposes of calculating the score sheet. (T 3). The trial court indicated that after reading the case provided by Petitioner, "[U]nless you tell me otherwise, withholding adjudication is going to be counted by this Court on the sentencing scoring sheet, so I don't have a problem, I

guess, with the score sheet that the State has presented." (T 3). The trial court then allowed Petitioner the opportunity to proffer his argument for the record. (T 3).

On September 1, 2000, a judgement was entered finding Petitioner guilty as charged on all four counts. (R 55-56). Petitioner was sentenced to 16 months incarceration in the custody of the Department of Corrections. (R 58-60). Petitioner's sentence was calculated pursuant to the Criminal Punishment Code Scoresheet. (R 61-62). In the "Prior Record" section of this scoresheet, Petitioner was assessed 20.8 points for the prior offenses of aggravated battery, carrying a concealed firearm and two possessions of cocaine. (R 61-62). At the sentencing hearing, Petitioner argued that pursuant to Batchelor,[1] his prior offenses should not be scored as a prior record on his scoresheet as he had pled no contest or *nolo contendere* and adjudication was withheld. (T 360-380). On September 1, 2000, Petitioner timely filed his Notice of Appeal to the Fourth District Court of Appeal. (R 74).

On July 12, 2001, Petitioner filed his Motion to Correct Sentencing Error Pursuant to Rule 3.800(b)(2), Fla. R. Crim. P. (SR 1-4). On July 23, 2001, the trial court entered an order

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[1] Batchelor v. State, 729 So. 2d 956 (Fla. 1st DCA 1999).

directing the State to respond. (SR 5). The State responded that as more than 60 days had accrued since the filing of the motion, said motion is deemed denied. (SR 10). On September 25, 2001, the trial court entered an order denying the motion for the reasons set forth in the attached State's Response. (SR 11).

In his Initial Brief to the Fourth District Court of Appeal, Petitioner relied upon Batchelor, Freeman,[2] and St.Lawrence,[3] for the proposition that a plea of 'no contest' followed by a withheld adjudication is not a conviction for scoresheet purposes. The State pointed out the inapplicability of cases relied upon by Batchelor to the issue at hand. Further, the State argued that a *nolo contendere* plea is treated in the same manner as a guilty plea by the trial courts pursuant to Fla. R. Crim. P. 3.172(a). Additionally, the State argued that the definition of conviction varies depending upon the statutory context within which it is used. The Fourth District Court of Appeal held that the trial court did not err and that for the purposes of the criminal punishment code score sheet, a "conviction" includes those offenses to which a defendant pled

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[2] State v. Freeman, 775 So. 2d 344 (Fla. 2nd DCA 2000).

[3] St. Lawrence v. State, 785 So. 2d 728 (Fla. 5th DCA 2001).

nolo contendere or "no contest" wherein adjudication was withheld. Montgomery v. State, 821 So. 2d 464 (Fla. 4th DCA 2002).

Summary of the Argument

The definition of “conviction” pursuant to Florida law is an elusive, “chameleon-like” term of art which is completely dependent upon the context in which it is used. Factors to be considered in determining the different contextual definitions include legislative intent as well interaction with other statutes. In the case at bar, the definition of previous “conviction” includes a plea for *nolo contendere*. The legislative intent behind the enactment of the criminal sentencing scoresheet was to emphasize incarceration for those repeat offenders who have demonstrated an inability to comply with less restrictive penalties previously imposed.

Argument

THE TRIAL COURT DID NOT ERR BY CONSIDERING PRIOR CONVICTIONS BASED UPON PETITIONER'S PLEA OF 'NOLO CONTENDERE' WHERE ADJUDICATION WAS WITHHELD ON PETITIONER'S CRIMINAL PUNISHMENT CODE SCOREHEET AS A "PRIOR RECORD" IN DETERMINING APPELLANT'S SENTENCE. (Restated).

Petitioner fails to recognize the "chameleon-like" nature of the definition of "conviction" and urges this court to blindly adopt the holdings of the First District Court of Appeal in Batchelor v. State, 729 So. 2d 956 (Fla. 1st DCA 1999); the Second District Court of Appeal in State v. Freeman, 775 So. 2d 344 (Fla. 2d DCA 2000)and the Fifth District Court of Appeal in St. Lawrence v. State, 785 So. 2d 728 (Fla. 5th DCA 2001). These district courts of appeal provide no analysis for their position that a plea of *nolo contendere* when adjudication is withheld does not constitute a "conviction" for purposes of a prior record within the meaning of § 921.0021(5), Fla. Stat. (2001).

The sum total of the Second District Court of Appeal's holding and rationale is, "[W]e align ourselves with the First District and affirm the trial court's ruling. *See Batchelor v. State*, 729 So. 2d 956 (Fla. 1st DCA 1999)." Freeman, 775 So. 2d at 345. Likewise, the Fifth District Court of Appeal provides no analysis other than citing verbatim language from Batchelor.

St. Lawrence v. State, 785 So. 2d at 730. The rationale espoused in Batchelor is, ". . . a no-contest plea followed by a withhold of adjudication is not a 'conviction'. Garron v. State, 528 So. 2d 353 (Fla. 1988). Accord United States v. Willis, 106 F. 3d 966 (11th Cir. 1997)(interpreting Florida law)." Batchelor, 729 So. 2d at 958. The First District Court of Appeal's lack of analysis and misreliance upon inapplicable case law renders what little of the holding there is fatally flawed.

Petitioner provides no further elucidation as to the reason a plea of *nolo contendere* when adjudication has been withheld is not a "conviction" for purposes of a prior record than citing Bachelor, citing two clearly distinguishable cases. As this Court and previously the Fourth District Court of Appeal (in State v. Keirn, 720 So. 2d 1085, 1086 (Fla. 4th DCA 1998)) have recognized, ". . . the term 'conviction' as used in Florida law has been a 'chameleon-like' term that has drawn its meaning from the particular statutory context in which the term is used." Raulerson v. State, 763 So. 2d 286, 291 (Fla. 2000). Any analysis as to whether a *nolo contendere* plea where adjudication has been withheld constitutes a "conviction" for purposes of a prior record within the meaning of § 921.0021, Fla. Stat. (2001), must necessarily begin with an examination of the

statutory context within which it is used.

The legislative intent behind the enactment of Florida Statutes Chapter 921 is clearly enunciated. § 921.0001, Fla. Stat. (2001). This legislation is, ". . . designed to emphasize incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and have demonstrated an inability to comply with less restrictive penalties previously imposed." § 921.0001, Fla. Stat. (2001). Pursuant to Section 921.0021(2), Fla. Stat. (2001), "'Conviction' means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld." It is well settled in Florida that a plea of *nolo contendere* is a determination of guilt. Pensacola Lodge No. 497, Benevolent & Protective Order of Elks v. State, 77 So. 613 (Fla. 1917). A *nolo contendere* plea, ". . . like the plea of guilty, it is an admission of guilt for the purposes of the case." Hudson v. U.S. 47 S.Ct. 127, 129, (3rd Cir 1926) . See also Peel v. State, 150 So. 2d 281 (Fla. 2d DCA 1963). Further, this Court has previously held that "conviction" for purposes of calculating a criminal sentence scoresheet includes determinations of guilt "without regard to whether they have yet been reviewed on appeal." State v. Peterson, 667 So. 2d 199, 201 (Fla. 1996). This is so as, "the guidelines contemplated

that all relevant information be included in the scoresheet calculation." Id. at 200-201.

For purposes of calculating a criminal sentence pursuant to the Federal sentencing guidelines, the Eleventh Circuit Court of Appeal specifically held that, a *nolo contendere* plea followed by a withheld adjudication, "is a 'diversionary disposition' under section 4A1.2(f) of the Sentencing Guidelines and is counted as a prior sentence in computing the criminal history category." U.S. v. Rockman, 993 F.2d 811, 811-812 (C.A.11 (Fla.) 1993). The court reasoned that policy considerations of the Sentencing Guidelines mandated that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency and therefore, all prior criminal conduct should be counted. Id. at 814. See also United States v. Jones, 910 F.2d 760 (11th Cir. 1990) (holding that where the defendant enters a *nolo contendere* plea and adjudication is withheld, the disposition is a "conviction" which makes the defendant eligible for career offender status under section 4B1.1 of the Sentencing Guidelines); United States v. Tamayo, 80 F.3d 1514 (11th Cir. 1996) (unadjudicated *nolo contendere* disposition constituted "diversionary disposition" recognized by Sentencing Guidelines and properly included in calculating criminal history); United

States v. Pierce, 60 F.3d 886, 892-893 (1st Cir. 1995) (plea of *nolo contendere* and state's withholding of adjudication is diversionary disposition properly calculated in defendant's criminal history category). Thus, the most analogous federal cases, *i.e.* those considering the meaning of "conviction" for purposes of the sentencing guidelines, treat *nolo contendere* pleas in which adjudication was withheld as convictions.

Furthermore, Black's Law Dictionary defines *nolo contendere* as,

> a plea in criminal court which has a similar legal effect as pleading guilty. . . The principal difference between a plea of guilty and a plea of *nolo contendere* is that the latter may not be used against the defendant in a civil action based upon the same acts. . . A defendant may plead *nolo contendere* only with the consent of the court. . .

BLACK'S LAW DICTIONARY 1048 (6th ed. 1990).

Prior to an acceptance of a plea of *nolo contendere* the Florida courts are mandated to judicially determine the facts underlying the offense pled. Fla.R.Crim. P. 3.172(a). *See also* Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1068 (Fla. 1995). In fact both guilty and *nolo contendere* pleas are scrutinized in the same manner prior to acceptance. Fla. R. Crim. P. 3.172. Petitioner fails to recognize the duty and responsibility imposed upon Florida courts pursuant to Fla. R. Crim. P.

3.172(a) to not only ensure the voluntariness of a plea but also to determine that a factual basis exists for the plea. If a plea of *nolo contendere* has been accepted and entered by the court, a judicial determination of guilt has been made. Fla. R. Crim. P. 3.172(a). Thus, a plea of *nolo contendere* which has been accepted by the court falls squarely within the definition of "conviction" found in the Criminal Punishment Code. § 921.0021(2), Fla. Stat. (2001). In Montgomery, the Fourth District Court of Appeal cited further instances in the sentencing context wherein *nolo contendere* pleas are treated in an identical manner to guilty pleas.

> a judgment must be entered, even where the defendant pleads no-contest and adjudication of guilt is withheld. Fla. R. Crim. P. 3.986. And when a defendant pleads no contest and the court withholds adjudication of guilt, it must either place the defendant on probation or community control. § 948.01(2) and (3), Fla. Stat. (1999).

Montgomery, at 465.

The Florida Criminal Punishment Code defines "conviction" to mean, ". . . a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld." § 921.0021(2), Fla. Stat. (2001). A determination of guilt arises through a guilty plea, a plea of *nolo contendere* or a verdict. As previously discussed, a plea of *nolo contendere*

falls squarely within this definition. The plain language of the statute expressly states that adjudication is not required for a determination of guilt to be deemed a "conviction." This language is not, ". . . susceptible of differing constructions. . ." § 775.021, Fla. Stat. (2001). The statute does not impose a special requirement of adjudication dependent upon the method by which determination of guilt was made. § 921.0021(2), Fla. Stat. (2001).

In Florida, the definition of "conviction" draws its meaning from its statutory context. Raulerson v. State, 763 So. 2d 285, 290 (Fla. 2000). When determining the meaning of "conviction," there must be an analysis of the law to which it is applied. This Court's analysis in Raulerson noted that "one of the fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature." Raulerson, at 291, citing Green v. State, 604 So. 2d 471, 473 (Fla. 1992). In the case at bar, the definition for conviction is specifically provided by statute. § 921.0021(2), Fla. Stat. (2001). The meaning of this definition, specifically the "determination of guilt," is defined by the "clear intent of the legislature," as enunciated in § 921.0001, Fla. Stat. (2001).

Another fundamental tenet of statutory construction mandates that "courts must follow what the legislature has written and neither add, subtract, nor distort the words written." State v. Byars, 804 So. 2d 336 (Fla. 4th DCA 2001). *Citing*, 62 Cases More or Less, Each Containing Six Jars of Jam v. U.S., 340 U.S. 593, 596, 71 S.Ct. 515, 95 L.Ed. 566 (1951); Donato v. American Tel. & Tel. Co., 767 So. 2d 1146, 1150-1151 (Fla. 2000) (a court abrogates legislative power when it construes an "unambiguous statute in a way which would extend, modify, of limit its express terms or its reasonable and obvious implications."). Further, this Court has held that this "principle is 'not a rule of grammar; it reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature.'" State v. Rife, 789 So. 2d 288 (Fla. 2001), citing State v. Brigham, 694 So. 2d 793, 797 (Fla. 2nd DCA 1997). Petitioner's argument requires this Court to violate both of these tenets. Petitioner's argument first requires the word "determination of guilt" be modified and expanded to include "guilty pleas" and "guilty verdicts." Such judicial modification of an unambiguous statute is not permitted. Further, Petitioner's argument would require this court to provide a definition which is inconsistent with the Legislature's express intent. This Court has previously recognized that such expanded judicial interpretation

in clear contravention to expressed legislative intent, is not permissible. State v. Finelli, 780 So. 2d 31 (Fla. 2001).

A "conviction" which arises by guilty plea, verdict or judicial determination, " . . . for a crime committed by the offender, as an adult or a juvenile, prior to the time of the primary offense," is a prior record for the purposes of computation of the sentence worksheet. § § 921.0021(5) and 921.0024, Fla. Stats. (2001). Thus, scoring Petitioner for one prior aggravated battery, one prior carrying a concealed firearm and two prior possessions of cocaine based upon Petitioner's pleas of *nolo contendere* was not error. (R 61-62). In fact, the scoring of these offenses for the purpose of sentencing comports with the legislative intent of the statute. It is apparent from appellant's prior record that he has, ". . . repeatedly committed criminal offenses and has [have] demonstrated an inability to comply with less restrictive penalties previously imposed." § 921.0001, Fla. Stat. (2001).

Petitioner urges this Court to adopt the holdings of the First, Second and Fifth District Courts of Appeal which bar the consideration of a defendant's *nolo contendere* plea if adjudication is withheld for purposes of scoring sentences. Batchelor v. State, 729 So.2d 956 (Fla. 1st DCA 1999); State v. Freeman, 775 So. 2d 344 (Fla. 2d DCA 2000); St. Lawrence v.

State, 785 So. 2d 728 (Fla. 5th DCA 2001); and Negron v. State, 799 So. 2d 1126 (Fla. 5th DCA 2001). The Second and Fifth District Courts of Appeal merely adopted the holding of Batchelor, providing no analysis. Freeman, 775 So. 2d 344; St. Lawrence, 785 So. 2d 344; Negron, 799 So. 2d 1126. In Batchelor, the First District Court of Appeal's brief analysis was fatally flawed in that it relied upon inapplicable cases.

The Batchelor court relied upon Garron v. State, 528 So. 2d 353 (Fla. 1988) and United States v. Willis, 106 F. 3d 966 (11th Cir. 1997). The Batchelor court did no more than see a definition for the word "conviction" and apply the definition to its facts. As discussed above, the context in which this legal term of art is applied is germane. Further analysis was required to determine whether the definition in either of the relied upon cases was applicable in the least to the factual situation at hand. The simple answer was no.

In Garron v. State, 528 So. 2d 353 (Fla. 1988), the court addressed the meaning of "conviction" in the context of capital sentencing proceedings when determining aggravating factors for purposes of whether to impose the death penalty. Id. at 359-360. An examination of § 921.0021, (Fla. Stat. 2001), the definitional section for the chapter, specifically precludes its application to capital felony cases. Id. The Batchelor court

failed to consider the context and limitations upon the term "conviction" as defined and used in Garron.

The context in which "conviction" was defined in United States v. Willis, 106 F. 3d 966 (11th Cir. 1997), is similarly distinguishable from the case at bar as well as the factual situation presented in Batchelor. In Willis the court was looking for the definition of "conviction" applicable to a charge of possession of a firearm by a convicted felon. Id. The defendant in Willis argued that because he pled *nolo contendere* to the earlier Florida charges of carrying a concealed firearm and grand theft of a firearm and adjudication was withheld this did not meet the definition for "convicted felon" for the purposes of the pending federal violation. Id. The Eleventh Circuit Court of Appeal determined that Florida law defined "conviction" for the purposes of establishing an essential element of the underlying offense of possession of a firearm by a convicted felon as being a plea of guilty not *nolo contendere*. Id. Neither the Batchelor court nor this Court are presented with this definitional context.

In State v. Raydo, 713 So. 2d 996 (Fla. 1998), this court was called upon to determine whether a plea of *nolo contendere* was a "conviction" within the context of the Florida Evidence Code for the purposes of impeachment of a testifying defendant.

The Raydo court acknowledged that analysis of this issue was not necessary as § 90.410, (Fla. Stat. 1995), specifically excluded *nolo contendere* pleas from admissibility in both civil and criminal proceedings.

> To resolve the precise issue in this case, we need not reach a decision as to the scope of the term "conviction" pursuant to section 90.610(1). In this case, we need look no further than the express statutory prohibition of *section 90.410*, Florida Statutes (1995). This section explicitly precludes evidence of a nolo contendere plea in any criminal proceeding: "Evidence of . . . a plea of nolo contendere . . . is inadmissible in any civil or criminal proceeding. (Emphasis added). This specific section of the Evidence Code prohibiting nolo contendere pleas from being admitted into evidence takes precedence over the more general impeachment provisions of section 90.610(1).

Id. at 1001. (Footnote and citations omitted).

In Montgomery, for the first time, a proper analysis was conducted by the court in determining the meaning of "conviction" within the context of the sentencing provisions of the Criminal Punishment Code. A careful analysis of the context in which the definition of "conviction" is sought in this case, mandates a plea of *nolo contendere* be considered a "conviction" for the purposes of the criminal score sheet computation. As discussed earlier, the legislative intent for which prior "convictions" are considered is to emphasize incarceration for

those offenders who have repeatedly committed criminal offenses demonstrating an inability to comply with less restrictive penalties previously imposed. § 921.0001, Fla. Stat. (2001). Appellant's string of *nolo contendere* pleas clearly demonstrates his inability to comply with less restrictive penalties imposed. In order to follow the intent of the legislature in the enactment of the score sheet considerations, *nolo contendere* pleas must be deemed "convictions."

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court affirm the ruling of the Fourth District Court of Appeal in Montgomery v. State, 821 So. 2d 464 (Fla. 4th DCA 2002), holding that a plea of no contest, followed by adjudication withheld, is a prior conviction when calculating a criminal punishment code scoresheet.

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 PEGGY NATALE, ESQUIRE, Assistant Public Defender, counsel for Petitioner, at 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this _____ day of December, 2002.

SUE-ELLEN KENNY
Assistant Attorney General

Certificate of Type Size and Style

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

SUE-ELLEN KENNY
Assistant Attorney General