

IN THE SUPREME COURT OF FLORIDA

SHELDON MONTGOMERY

Petitioner,

vs.

CASE NO. SC02-1943
4DCA NO. DCA00-3201

STATE OF FLORIDA,

Appellee.

_____ /

PETITIONER'S INITIAL BRIEF ON THE MERITS

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

PEGGY NATALE
Assistant Public Defender
Attorney for Sheldon Montgomery
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600
Florida Bar No. 0752355

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii, iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	3

ARGUMENT

THE TRIAL COURT ERRED BY INCLUDING PRIOR WITHHELD ADJUDICATIONS BASED UPON NOLO CONTENDRE PLEAS ON APPELLANT’S CRIMINAL PUNISH- MENT CODE SCORESHEET	5
CONCLUSION	11
CERTIFICATE OF SERVICE	12
CERTIFICATE OF COMPLIANCE	13

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Batchelor v. State</u> , 729 So.2d 956 (Fla. 1 st DCA 1999)	3, 9
<u>Cabal v. State</u> , 678 So.2d 315 (Fla. 1996)	8
<u>Garron v. State</u> , 528 So.2d 353 (Fla. 1998)	6, 10
<u>Garron v. State</u> , 529 So.2d 353 (Fla.1998)	2, 4, 7
<u>Harrison v. State</u> , 641 So.2d 486 (Fla. 5 th DCA 1994)	8
<u>Hudson v. United States</u> , 272 U.S. 451 47 S.Ct.127,71 L.Ed. 347 (1926)	7
<u>Montgomery v. State</u> , 821 So.2d 464 (Fla. 45 th DCA 2002)	3, 7
<u>Negron v. State</u> , 799 So.2d 1126 (Fla. 5 th DCA 2001)	3, 10
<u>Pennsacola Lodge No. 497, Benevolent & Protective Order of Elks v. State</u> , 74 Fla. 498 77, So. 613, 614 (1917)	7
<u>Raydo v. State</u> , 696 So. 2d 1225 (Fla. 1 st DCA 1997)	10
<u>Scates v. State</u> , 603 So.2d 504 (Fla. 1992)	8
<u>State v. Ackerman</u> , 785 So.2d 1229 (Fla. 4 th DCA 2001)	8

<u>State v. Freeman</u> , 775 So.2d 344 (Fla. 2d DCA 2000)	3, 10
<u>State v. Gadza</u> , 257 So.2d 242 (Fla. 1971)	9
<u>State v. Rife</u> , 789 So.2d 288 (Fla. 2001)	9
<u>United States v. Willis</u> , 106 F.2d 966 (11 th Cir 1997)	6

FLORIDA STATUTES

Section 775.021(1)(1999)	8
Section 921.0021(2)	2, 3, 7-9, 11
Section 948.01(2)	7

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.702(d)(2)	9
----------------------------	---

LAWS OF FLORIDA

Chapter 59-130	7
--------------------------	---

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before this Court.

The symbol “R” will denote the Record on Appeal, which consists of the relevant documents filed below.

The symbol “T” will denote the Trial Transcript.

STATEMENT OF THE CASE AND FACTS

Petitioner, Sheldon Montgomery, was charged with Resisting Arrest with Violence (Counts I and II), and Ticket scalping (Counts III and IV). (R 26-27) A jury found petitioner guilty as charged on all counts. (T 346-347, R 48-51).Petitioner was sentenced to 16 months in the Department of Corrections on Count I and time served on Counts II-IV. (R 55-65; T 392-393) He timely appealed. (R 74) Pending appeal, Appellant filed a Motion to Correct Sentencing Error, which raised the same issues as on appeal. The motion was deemed denied because it was not timely ruled upon by the trial court and actually denied by the trial court on September 25, 2001. (SR)

On appeal to the Fourth District Court of Appeal, petitioner argued that pleas of no contests, followed by withheld adjudications should not be scored as prior convictions under the “prior record” section on his criminal punishment scoresheet. Petitioner argued that the Florida Supreme Court holding in Garron v. State, 529 So.2d 353 (Fla.1998) had previously established that a nolo contendere plea with a withheld adjudication did not establish a conviction. Petitioner also argued that under the statutory definition of conviction found in Section 921.0021(2) Florida Statutes, a determination of guilt was required to establish a conviction and that a nolo contendere plea with a withheld adjudication did not involve the requisite determination of guilt.

The Fourth District Court of Appeals disagreed, also relying on the statutory definition of conviction under Section 921.0021(2)(1999) which defines conviction as

follows: “conviction” means a determination of guilty that is the result of a plea or a trial, regardless of whether adjudication is withheld. Montgomery v. State, 821 So.2d 464 (Fla. 45th DCA 2002)

Conflict was certified with the decision of the First District Court of Appeal in Batchelor v. State, 729 So.2d 956 (Fla. 1st DCA 1999), the Second District Court of Appeals in State v. Freeman, 775 So.2d 344 (Fla. 2^d DCA 2000) and the Fifth District Court of Appeals in Negron v. State, 799 So.2d 1126 (Fla. 5th DCA 2001). Notice of intent to invoke the discretionary jurisdiction of this Court was filed on August 22, 2002. An order postponing a decision on jurisdiction and establishing a briefing schedule was issued on October 18, 2002. This brief follows.

SUMMARY OF THE ARGUMENT

Points for prior withheld adjudications, resulting from no contest pleas should not have been scored as prior convictions on petitioners criminal punishment code scoresheet. When a withheld adjudication is based upon a nolo contendere plea or a no contest plea, there is no determination of guilt. Section 921.0021(2) Florida Statutes, which establishes the definition of “conviction” for purposes of the criminal punishment code, requires a “determination of guilt” to establish a conviction. Further, this Court has previously determined that “a no-contest plea followed by a withhold of adjudication is not conviction” for purposes of sentencing in a capital murder case. Garron v. State, 529 So.2d 353 (Fla.1998) Petitioner should, therefore,

receive a new sentencing hearing with a corrected scoresheet which does not score any prior withheld adjudications based on no contest pleas.

ARGUMENT

THE TRIAL COURT ERRED BY INCLUDING PRIOR WITHHELD ADJUDICATIONS BASED UPON NOLO CONTENDRE PLEAS ON APPEL- LANT'S CRIMINAL PUNISHMENT CODE SCORE- SHEET.

At jury trial, petitioner Sheldon Montgomery, was charged and found guilty of two counts of ticket scalping, a second degree misdemeanor, and one count of resisting arrest with violence, a third degree felony. (R 51) Petitioner's scoresheet included points under the section entitled "Prior Record" for one prior aggravated battery, one prior carrying a concealed firearm, and two prior possessions of cocaine, all based upon appellant's pleas of "no contest" or "nolo contendere". (R 61-62) In all the above stated prior cases, petitioner also received withheld adjudications. These facts were undisputed by the state and trial court at sentencing. (T 360-399). At sentencing, defense counsel argued that these prior cases should not be scored because petitioner plead "nolo" and received withheld adjudications in each case. (T 360-379)

Without scoring two charges for possession of cocaine, one for aggravated battery, and one for carrying a concealed firearm on the scoreheet as convictions under "prior record", petitioner's total sentencing points would have been 20.6, as opposed to the 49.4 he ultimately scored. With 20.6 total sentencing points, petitioner's lowest permissible sentence would have been any non-state sanction,

rather than 16 months prison. This resulted in the court relying on an illegally scored Criminal Punishment Code Scoresheet, and deprived petitioner of a fair sentencing hearing.

Case Law Interpretation of “Conviction”

In Florida it is recognized that “conviction” means a determination of guilt by a verdict or by a plea of guilty, with or without an adjudication by the court. This Court has previously determined that a plea of “no contest” followed by an adjudication of guilty qualifies as a conviction, while a plea of “no contest” followed by a withheld adjudication does not qualify as a conviction. Garron v. State, 528 So.2d 353 (Fla. 1998) Accord United States v. Willis, 106 F.2d 966 (11th Cir 1997)(interpreting Florida Law).

The Garron opinion determined what constituted a prior conviction for sentencing purposes in a capital murder case. In Garon this Court explained:

Under the *McCrea* analysis, the plea of guilty is an absolute condition precedent before the lack of adjudication can be considered a conviction. Here appellant pled nolo contendere to the aggravated assault charge and received no adjudication of guilt. It does not follow from *McCrea* that a plea of nolo contendere amounts to either a confession of guilt of a “conviction” for purposes of capital sentencing proceedings. A nolo plea means “no contest” not “I confess”. It simply means that the defendant for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea

528 So.2d at 360.

The Fourth District Court's opinion in petitioner's case held that a nolo contendere plea was an *implied* confession, and therefore the same as a guilty plea, resulting in a conviction. Montgomery v. State, 821 So.2d 464,466 (Fla. 4th DCA 2002) In support of this contention, the Fourth District Court relied on the 1926 case of Hudson v. United States, 272 U.S. 451,47 S.Ct.127,71 L.Ed. 347 (1926) and the 1917 case of Pennsacola Lodge No. 497, Benevolent & Protective Order of Elks v. State, 74 Fla. 498, 77, So. 613, 614 (1917). The District Court's reasoning is inapplicable to the issue at hand, however, because the concept of withheld adjudication is a **statutory creation**, and did not exist at common law, coming into existence in Florida by statute in 1959 by amendment to Section 948.01(2) Florida Statutes. Laws 1959, ch. 59-130. References to 1917 and 1926 cases are not useful in this analysis. The more recent Florida Supreme Court case of Garron v. State is more persuasive.

Interestingly, like petitioner, the Fourth District's opinion in petitioner's case also relied upon the statutory definition of "conviction" in Section 921.0021(2) Florida Statutes. Montgomery at 465. The Fourth District, however, disagreed that the words "determination of guilt" means "that there is a distinction between no-contest pleas and guilty pleas where adjudication is withheld." Montgomery v. State, *supra*.

The Statutory Definition of Conviction

Section 921.0021(2) Florida Statutes, which is part of the criminal punishment code and governs the sentencing scoresheets states:

(2) “Conviction” means a determination of guilt resulting from a plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

(5) “Prior record” means a conviction for a crime committed by the offender, as an adult or juvenile, prior to the time of the primary offense . . .

(Emphasis added)

Penal statutes must be strictly construed against the state. Harrison v. State, 641 So.2d 486, 487 (Fla. 5th DCA 1994). “[W]hen a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused.” Cabal v. State, 678 So.2d 315, 318 (Fla. 1996). This ‘rule of lenity,’ codified by the legislature, states:

The provisions of this code and offenses defined by the other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Section 775.021(1), Florida Statutes (1999); Also See State v. Ackerman, 785 So.2d 1229, 1231 (Fla. 4th DCA 2001)(“We are mindful of the axiom that penal statutes capable of conflicting interpretations be interpreted most favorably in favor of the defendant. See e.g. Scates v. State, 603 So.2d 504 (Fla. 1992). This rule

applies to sentencing statutes as well. State v. Rife, 789 So.2d 288, 294 (Fla. 2001)

In drafting the definition of conviction under Section 921.0021(2), the Florida Legislature purposely included the words “determination of guilt” within the definition. The state’s argument would require that the court disregard the words “determination of guilt” from that legislative definition, arguing that it does not matter if guilt is actually determined. As set forth above, traditionally, a determination of guilt occurs only upon the plea of guilty or by a finding of guilty by the court through adjudication .

Other District Court Opinions on This Issue

In Batchelor v. State, the First District Court of Appeals held that a withheld adjudication resulting from a plea of no contest or nolo contendere cannot be scored as prior crimes on the sentencing scoresheet. 729 So.2d 956 (Fla. 1st DCA 1999) The First District explained:

Florida Rule of Criminal Procedure 3.702(d)(2) defines “conviction” as “a determination of guilt resulting from a plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended”. Our research lead us to conclude that this definition is nothing more than an effort to codify case law. In Florida, it is generally recognized that “the term ‘conviction’ means determination of guilt by a verdict of the jury of by plea of guilty and does not require adjudication by the court”. State v. Gadza, 257 So.2d 242 (Fla. 1971) An adjudication of guilt following a plea of no contest also qualifies as a “conviction”. Raydo v. State, 696 So. 2d 1225 (Fla. 1st DCA 1997), approved in part and quashed

in part, 713 So. 2d 996 (Fla. 1998). However, a no-contest plea followed by a withhold of adjudication is not a “conviction”. Garron v. State 528 So.2d 353 (Fla. 1998) Accord United States v. Willis, 106 F.3d 966 (11th Cir 1997)(interpreting Florida law).

Id. At 958. In Negron v. State the Fifth District followed Batchelor, holding that where a the defendant entered a no contest plea and received withheld adjudication and successfully completed probation, the offense did not entail a determination of guilty and could not be included as a prior record on the sentencing guidelines scoresheet. 799 So.2d 1126.

Similarly, in State v. Freeman the Second District has also followed Batchelor in this regard. 775 So.2d 344 (Fla. 2d DCA 2000).

Policy Argument

Since the creation of the withheld adjudication, parties involved in the criminal justice system have understood and negotiated for the withheld adjudication in the good faith belief that it would result in no conviction on the defendant’s record. Counsel could reasonably rely on the Garron decision in advising their clients that the withholding of adjudication meant no finding of guilt and thus no conviction, against the background of existing law in this state. It seems justifiably reasonable that citizens should continue to rely on this Court’s past rulings, in light of the fact that the Florida legislature has provided no further definition of “determination of guilt” in the definition of “conviction”, and based upon the plain

reading of the definition of “conviction” in Section 921.0021(2) Florida Statutes.

CONCLUSION

In petitioner’s prior crimes, there was never a determination of guilt by the court because petitioner pled “no contest” and received withheld adjudications. Therefore, these prior cases should not have been scored un petitioner’s “prior record” portion on his criminal punishment code scoresheet because they were not convictions. Yet, over petitioner’s objection, these prior crimes were listed by the state as “Prior record” and utilized by the trial court in determining petitioner’s sentence. (T 360-379).

Based on the Criminal Punishment Code Scoresheet in this case, petitioner received time served on the scalping charges and 16 months incarceration in the Florida Department of Corrections for resisting arrest with violence. (R 55-60, 61-62; T 399). Without petitioner’s withheld adjudications on his sentencing guidelines scoresheet, petitioner would have scored “any non State” and without downward departures have been eligible for probation contest” followed by a withheld adjudication. Petitioner respectfully requests this honorable court to remand for a new sentencing hearing on Counts I and II with appropriate instructions to the trial court.

Respectfully Submitted,

CAREY HAUGHWOUT
Public Defender
15th Judicial Circuit

—
Peggy Natale
Assistant Public Defender
Florida Bar No.0752355
Attorney for Sheldon Montgomery
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier,
to Sue-Ellen Kenny, Assistant Attorney General, 1515 North Flagler Drive, North,
West Palm Beach, Florida 33401-3432, this _____ day of November, 2002.

Peggy Natale
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Florida Fla. R. App. P. 9.210. The font is Times New Roman, 14 point.

Peggy Natale
Assistant Public Defender