

IN THE SUPREME COURT OF FLORIDA

SHELDON MONTGOMERY

Petitioner,

vs.

CASE No. SC02-1943

STATE OF FLORIDA,

Appellee.

PETITIONER'S REPLY BRIEF ON THE MERITS

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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 “IB” will denote the Petitioner’s Initial Brief on the Merits, which consists of the relevant documents filed below.

The symbol “AB” will denote the Respondent/Appellee’s Answer Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely upon the Statement of the Case and Facts as presented in Petitioner's Initial Brief on the Merits.

SUMMARY OF THE ARGUMENT

Petitioner will rely on the Summary of the Argument presented in Petitioner's Initial Brief on the Merits.

ARGUMENT

THE TRIAL COURT ERRED BY INCLUDING PRIOR WITHHELD ADJUDICATIONS BASED UPON NOLO CONTENDRE PLEAS ON APPELLANT'S CRIMINAL PUNISHMENT CODE SCORESHEET.

STATE'S ANSWER

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 SCORESHEET AS A "PRIOR RECORD" IN DETERMINING APPELLANT'S SENTENCE. (Restated)

REPLY

Contrary to the State's assertion that "Petitioner 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 reasoning articulated in the Batchelor opinion, as set forth fully in Petitioners Initial Brief on the Merits(AB 3; IB 5-6) explains that is it generally recognized in Florida that the term "conviction" means a determination of guilty by verdict of the jury or by plea of guilty. An adjudication of guilty following a plea of "No contest" also qualifies as a conviction. But a no contest plea followed by a withhold of adjudication is not a conviction. The Batchelor opinion and Petitioner's Initial Brief on the Merits also then cites to Garron v. State 528 So.2d 353 (Fla. 1998) which provides further analysis of this reasoning. (IB 5- 6) The Garron

opinion in particular gives an elaborate explanation why a plea of *nolo contendere* is not a “conviction” when adjudication has been withheld:

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 guilty. It does not follow from *McCrea* that a plea of *nolo contendere* amounts to either a confession of guilt or a “conviction” for purposes of capital sentencing proceedings. A *nolo* plea means “no contest,” no “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.. .

Garron at 360.

Further, this Court determine in State v Raydo “ a defendant entering a plea of *nolo contendere* does not admit guilt. Further, at sentencing a trial court might decide to withhold adjudication. If adjudication is withheld, there would be no conviction under section 90.610(1).” 713 So. 2d 996 (Fla. 1998)(holding defendant’s *nolo contendere* plea, without an adjudication, was not admissible for impeachment purposes).

Like the Fourth District Court of Appeals, in its opinion , the state relies on the 1917 case of Pennsacola Lodge No. 497, Benevolent & Protective Order of Elks v. State, 77 So. 613 (Fla. 1917) and a 1926 federal case , Hudson v. U.S., 47 S.Ct. 127, 129 (3d Cir 1926). As discussed in Petitioner’s Initial Brief, these are inappropriately

applied by the state and District Court, because withheld adjudication is a statutory creation and did not exist at common law, coming into existence in Florida by statute in 1959. (IB 7)

The state refers to several federal cases interpreting federal guidelines sentencing and whether, in that situation, a withhold adjudication counts as a conviction for purposes of federal sentencing. (AB 7-9) Federal cases interpreting federal sentencing statutes, however, are not applicable to Florida law and Florida statutes. What is important, however, is that the Eleventh Circuit has recognized that

Florida law provides that a conviction requires either an adjudication of guilty by a verdict of the jury or a plea of guilty. *Garron v. State*, 528 So.2d 353, 360 (Fla. 1988); *State v. Gazda*, 257 So.2d 242, 243-44 (Fla. 1971); See also *United States v. Thompson*, 756 F. Supp 1492 (N.D. Fla. 1991). A *nolo contendere* plea, however, does not amount to a confession of guilt. at 1496. Thus a *nolo contendere* plea is not a under Florida law.

Id.

The state is in error by stating “If a plea of nolo contendere which has been accepted and entered by the court, a judicial determination of guilty has been made.” citing Fla. R. Crim. P. 3. 172(1).(AB 9) Rule 3.3172(a) says absolutely nothing about a judicial determination of guilty being made by the court. Furthermore, the fact that a court accepts a plea of nolo contendere does not mean that a determination of guilt has been made as this court has determined in State v. Raydo that a defendant entering

a plea of nolo contendere does not admit guilt. Raydo supra. at 1000. Therefore, the state's further analysis based upon this erroneous interpretation of this rule is also erroneous.

In addition to the foregoing, petitioner continues to rely on his Initial Brief on the Merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to Sue-Ellen Kenney, 1515 N. Flagler Dr., W. Palm Beach, FL 33401, this 13th day of December, 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