IN THE SUPREME COURT OF FLORIDA

PAUL THOMPSON,

Petitioner,

v. S.Ct. Case No. SC02-800

STATE OF FLORIDA, DCA Case No. 5D01-1947

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA,
FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner Paul Thompson was charged with felony driving while license suspended, revoked, canceled, or disqualified ("DWLS"), in violation of Section 322.34(2)(c), Florida Statutes (Supp. 1997). (Supp. 26).[1] He pled guilty. (R 10). The state successfully appealed from the ensuing downward departure sentence and the case was remanded for a guidelines sentence. (R 10). State v. Thompson, 754 So. 2d 126 (Fla. 5th DCA 2000). Thompson received the new sentence on August 16, 2000, (R 10), and did not appeal therefrom. (R 8).

Thompson filed a timely motion for postconviction relief and a subsequent motion entitled "Amended Rule 3.850 Motion/Motion to Correct Illegal Sentence." (R 1-2,7-9). He later asked the trial court to consider only the amended motion. (T 2). Thompson sought to vacate his conviction and sentence on the ground that his prior DWLS convictions could not be used as predicates for the felony charge because they were for offenses which occurred under a prior version of the statute which did not include the element of knowledge. (R 7-8). For this proposition, he relied upon the November 9, 2000, opinion in Huss v. State, 771 So. 2d 591 (Fla. 1st DCA 2000). (R 7-8; T 3-4). The State responded that Huss, which was decided after Thompson's conviction and sentence became final, was not

[1]"R" refers to the record-on-appeal. "Supp" refers to the supplemental record. "T" refers to the transcript of the May 22, 2001, hearing.

entitled to retroactive application. (R 3-6; T 4-6).

The matter was discussed at a brief hearing on May 22, 2001, before the Honorable Hale R. Stancil. (T 1-8). No evidence was offered. (T 1-8). Judge Stancil gave the parties until the morning of Thursday, May 24, 2001, to file any additional memoranda and said he would try to rule by May 24 or 25. (T 7). On May 24, Judge Stancil rendered a signed written order denying Thompson's motion on the ground that Huss was not retroactive. (R 10-12). On May 29, Thompson filed a memorandum arguing that "the issue of retroactivity is misplaced," because Huss involved the interpretation of a statute rather than a change of law through judicial decision. (R 13-14).

The Fifth District Court of Appeal issued an opinion on March 1, 2002, affirming the trial court's denial of his postconviction motion. Thompson v. State, 808 So. 2d 284 (Fla. 5th DCA 2002). Petitioner Paul Thompson sought discretionary review of the Fifth District Court of Appeal's opinion affirming the denial of Thompson's motion for postconviction relief and this Court accepted jurisdiction in an order dated September 20, 2002.

SUMMARY OF ARGUMENT

The opinion below does not expressly and directly conflict with Huss v. State, 771 So. 2d 591 (Fla. 1st DCA 2000). The district court did not disagree with the holding of Huss, but merely held that it did not apply retroactively. Because Huss did not address the issue of retroactivity, there is no conflict between the two opinions.

Moreover, the trial court properly denied Thompson's motion for postconviction relief. The case upon which Thompson relies, Huss v. State, 771 So. 2d 591 (Fla. 1st DCA 2000), represents an evolutionary refinement in the case law and is not entitled to retroactive application.

Finally, even if it were retroactive, Huss was wrongly decided and should not be followed. Thompson was properly convicted of felony driving while license suspended, revoked, canceled, or disqualified.

ARGUMENT

POINTS I, II & III (combined)[2]

THIS COURT SHOULD DENY REVIEW OF THE DISTRICT COURT'S OPINION BECAUSE THERE IS NO EXPRESS AND DIRECT CONFLICT; MOREOVER, THE TRIAL COURT PROPERLY DENIED THOMPSON'S AMENDED MOTION FOR POSTCONVICTION RELIEF.

Petitioner Paul Thompson (Thompson) seeks discretionary review of the Fifth District Court of Appeal's March 1, 2002, opinion affirming the denial of Thompson's motion for postconviction relief. Thompson v. State, 808 So. 2d 284 (Fla. 5th DCA 2002). He contends that Thompson expressly and directly conflicts with Huss v. State, 771 So. 2d 591 (Fla. 1st DCA 2000). Respondent respectfully disagrees as there is no express and direct conflict.

This Court has the discretion to review district court opinions which expressly and directly conflict with opinions of other district courts or this Court on the same question of law. Art. V, § 3(b)(3), Fla. Const.; The Florida Star v. B.J.F., 530 So. 2d 286 (Fla. 1988). However, the conflict must be found within the four corners of the lower court's opinion. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

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[2]Respondent has combined the issues raised by Thompson in his brief since all three issues (i.e., (1) illegal felony sentence;(2) Huss prohibits the use of prior DWLR convictions as predicate offenses; and (3) Huss applies to Thompson's collateral proceeding as the holding in Huss constituted a legislative change and not decisional law requiring retroactivity analysis) stem from a single claim, that is, that Thompson should have been convicted of a misdemeanor and not a felony pursuant to the Huss opinion.

There is no express and direct conflict. While Huss was a direct appeal, the opinion in Thompson was rendered on appeal from the denial of postconviction relief. Thompson did not disagree with Huss. On the contrary, the Fifth District Court of Appeal has followed Huss. See State v. Burke, 799 So. 2d 1099 (Fla. 5th DCA 2001)(citation *per curiam* affirmance relying on Huss). In this case, the district court merely held that Huss does not apply retroactively. Thompson, 808 So. 2d at 285; see also Martin v. State, 809 So. 2d 65, 66 n.2 (Fla. 5th DCA 2002). The issue of retroactivity was not addressed in Huss. Accordingly, there is no conflict between Huss and Thompson.

Addressing the merits Thompson, relying on Huss, supra, complains that he was improperly convicted and illegally sentenced upon his conviction of felony driving while license suspended, revoked, cancel or disqualified (DWLS) under Section 322.34(2)(c), Florida Statutes (Supp. 1997), because his prior convictions all occurred prior to October 1, 1997. The motion was properly denied and that denial upheld on appeal, and Thompson is entitled to no relief from this Court.

Huss interpreted section 322.34(2), which reads as follows:

> **322.34 Driving while license suspended, revoked, canceled, or disqualified**. -
>
> * * *
>
> (2) Any 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, who, *knowing of such cancellation, suspension, or revocation*, drives any motor vehicle upon the highways of this state while such license or privilege is canceled, suspended,

> or revoked, upon:
>
> * * *
>
> (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.
>
> *The element of knowledge is satisfied if the person has been previously cited as provided in subsection (1); or the person admits to knowledge of the cancellation, suspension, or revocation; or the person received notice as provided in subsection (4). There shall be a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order as provided in subsection (4) appears in the department's records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation.*

§ 322.34, Fla. Stat. (Supp. 1998)(italics added). As the italicized portion of the statute demonstrates, knowledge is an express statutory element of 322.34(2). The statutory language regarding knowledge was added October 1, 1997. Ch. 97-300, § 40, Laws of Fla. Huss held that violations which occurred prior to October 1, 1997 could not be used as predicate offenses in a felony prosecution under 322.34(2)(c) because the statute in effect at that time did not include knowledge as an element of the offense. Id. at 593.

Because his prior convictions were for offenses occurring prior to October 1, 1997, Thompson contends he could not be convicted of felony DWLS. His argument fails for two reasons. First, Huss is not retroactively applicable to this case, and second, even if applicable, Huss was wrongly decided and should not be followed.

First, Huss is not entitled to retroactive application. Because of a strong policy in favor of decisional finality, only rare and exceptional decisions should be deemed to require retroactive application. See State v. Glenn, 558 So. 2d 4, 7 (Fla. 1990); State v. Oehling, 750 So. 2d 109, 111 (Fla. 5th DCA 1999).

In order to merit retroactive application, a decision must meet three requirements: 1) it must originate in the state or federal Supreme Court; 2) it must be constitutional in nature; and 3) it must have fundamental significance. Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980); State v. Callaway, 658 So. 2d 983, 986 (Fla. 1995), receded from on other grounds, Dixon v. State, 730 So. 2d 265 (Fla. 1999). Cases that satisfy the third requirement fall into two different categories: 1) those removing from the State the authority to regulate certain conduct or impose certain penalties; or 2) those of such magnitude that they warrant retroactive application under the three-part test announced in Stovall v. Denno, 388 U.S. 293 (1967). Callaway, 658 So. 2d at 986-987. Stovall requires the consideration of three factors: 1) the purpose to be served by the new rule; 2) the extent of reliance on the old rule; and 3) the effect on the administration of justice of retroactive application of the new rule. Callaway, 658 So. 2d at 987.

Huss fails Witt's first step. It was issued by a district court of appeal, not the state or federal supreme court. See

State v. Washington, 453 So. 2d 389, 392 (Fla. 1984) ("[In *Witt*], [w]e...expressly held that only this Court and the Supreme Court of the United States could adopt a change of law sufficient to precipitate a post-conviction challenge to a final conviction and sentence.").

Huss fails Witt's second step. The decision is not constitutional in nature, but rather is based solely on an analysis of the statutory language. See Ferguson v. State, 789 So. 2d 306, 310 (Fla. 2001)(failure to articulate constitutional basis for opinion, while not dispositive of Witt's second step, is undoubtedly relevant). Huss concluded that its decision was dictated by the plain language of the statute.

Huss fails Witt's third step. It does not have fundamental significance. Witt emphasized that "only major constitutional changes of law" will be retroactively applied in post-conviction proceedings. 387 So. 2d at 929; see also, Glenn, 558 So. 2d at 6. This is a fluid concept which is not easy to pin down. Hodges v. State, 741 So. 2d 1262 (Fla. 5th DCA)(Sharp, J., concurring), rev. dismissed, 744 So. 2d 454 (Fla. 1999). However, examples of this type of case cited by the Florida Supreme Court in Witt are Gideon v. Wainwright, 372 U.S. 335 (1963)(recognizing right to counsel at all critical stages of proceeding for indigent defendants charged with a felony) and Coker v. Georgia, 433 U.S. 584 (1977)(death penalty for crime of rape constitutes cruel and unusual punishment).

In contrast with these major rulings, the decision in Huss

is merely an "evolutionary refinement[] in the criminal law," not a "jurisprudential upheaval" such as would warrant retroactive application. See Witt, 387 So. 2d at 929. Such evolutionary changes in the law "do not compel an abridgement of the finality of judgments. To allow them that impact would . . . destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." 387 So. 2d at 929-930. Huss therefore fails the third step of the Witt test for retroactive application.

This Court has applied the Witt test in similar circumstances and refused to retroactively apply changes in decisional law. See e.g., Jimenez v. State, 810 So. 2d 511, 512 (Fla. 2001)(reiterating that the Court's opinion in Delgado v. State, 776 So. 2d 233, 241 (Fla. 2001), should not be retroactively applied as decision concerning interpretation of "remaining in" language in burglary statute was not constitutional in nature and did not have fundamental significance); State v. Woodley, 695 So. 2d 297 (Fla.)(Court's State v. Gray 654 So. 2d 552 (Fla. 1995), decision, holding that attempted felony murder is not a crime, should not be applied retroactively to overturn conviction of person convicted of that crime, after case has become final on appeal), cert denied, 522 U.S. 893 (1997); Glenn, supra, 558 So. 2d 4, 5 (Fla. 1990)("Carawan [v. State, 515 So. 2d 161 (Fla. 1987)], was an evolutionary refinement in the law which should not have

retroactive application."); Henderson v. Dugger, 522 So. 2d 835, 837 (Fla. 1988)("We find that the rule set forth in [Michigan v.]Jackson[, 475 U.S. 625 (1985),] wherein the Supreme Court held that any waiver of defendant's [Sixth Amendment] right to counsel for police-initiated interrogation is invalid does not represent the type of major constitutional change in the law contemplated by Witt as proper for retroactive application."). Huss is a mere evolutionary refinement based on the court's interpretation of the statutory language.

The following language from Glenn is applicable here:

> We must emphasize that the policy interests of decisional finality weigh heavily in our decision. At some point in time cases must come to an end. Granting collateral relief to Glenn and others similarly situated would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases. Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records. We believe that a court's time and energy would be better spent in handling its current caseload than in reviewing cases which were final and proper under the law as it existed at the time of trial and any direct appeal.

Glenn, 558 So. 2d at 8. It is rare that a case is entitled to retroactive application, see Glenn, 558 So. 2d at 5, and Huss does not fit the bill.

Thompson acknowledges that Huss does not meet the three-part test for retroactive application, but contends that is irrelevant because his argument is based on a change in

statutory law, rather than case law. This argument is both unpreserved and without merit. It is unpreserved because it was not properly raised below. Thompson first presented this argument in his memorandum, filed May 29, 2001. However, the trial court had set a deadline of May 24, 2001, for filing additional memoranda and had already ruled by the time Thompson belatedly filed his memorandum. Because the memorandum was filed beyond the judicially imposed deadline, it was tardy and the trial court was not required to consider it. Cf. Powell v. State, 717 So. 2d 1050 (Fla. 5th DCA), rev. denied, 727 So. 2d 909 (Fla. 1998). In fact, in the absence of a motion for rehearing, there was no basis for the trial court to revisit its order upon the tardy filing of the memorandum. Even if properly before this Court, Thompson's argument fails on the merits. The Huss court's interpretation of the statute is indeed a matter of decisional law and it is not entitled to retroactive application. See Glenn, supra, 558 So. 2d at 5 (Fla. 1990)("Carawan was an evolutionary refinement in the law which should not have retroactive application.").

The State also acknowledges Byrd v. State, 789 So. 2d 1147 (Fla. 4th DCA), rev. denied, 805 So. 2d 809 (Fla. 2001),in which the district court danced around the three-part test for retroactive application with the following reasoning:

> We had not previously addressed the precise issue decided in [State v. Lainez, 771 So.2d 617 (Fla. 4th DCA 2000)], as our opinion carefully shows. When we construe a statute for the first time, as we obviously

> did in Lainez, we are not changing the law but merely "discovering" it. We have no power to change statutes anyway and, unless we have previously construed the statute on the same issue, our initial such construction is merely a function of our traditional role of saying what the law is. Hence our decision in Lainez is fully cognizable in all cases decided after it in which the same statutory issue is raised, for in such matters we customarily apply the law in effect at the time we render our decision.

Byrd, 789 So. 2d at 1148. With all due respect to the Fourth District Court of Appeal, this is sophistry. When a court rules on an issue of first impression, its opinion necessarily constitutes a new development in the case law. Moreover, there is a difference between deciding an issue on direct or interlocutory appeal, as occurred in Huss and Lainez,[3] and vacating an already final conviction in collateral proceedings, as occurred here. See Glenn, 558 So. 2d at 8. The Byrd court's cavalier pronouncement that it applies the law in effect at the time of its decision ignores the importance of finality that applies to convictions and contravenes the well-settled principle that a conviction and sentence are governed by the law in effect at the time the crime is committed. See Glenn, 558 So. 2d at 8; see also Castle v. State, 330 So. 2d 10 (Fla. 1976); Payne v. State, 538 So. 2d 1302, 1303 (Fla. 1st DCA), rev. dismissed, 550 So. 2d 1120 (Fla. 1989).

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[3]Both Huss and Lainez raised their issues in motions to dismiss during the prosecution of their cases. Huss was a direct appeal and Lainez a state appeal from the granting of the motion to dismiss.

Even assuming Huss were retroactively applicable, it was wrongly decided and should not be followed.[4] Legislative intent is the polestar of statutory analysis. State v. Patterson, 694 So. 2d 55, 58 (Fla. 5th DCA 1997). It is apparent from the face of Section 322.34(2)(c) that the legislative intent is to more severely punish those who repeatedly drive on our streets without a valid license. Additionally, the legislature provided an express statement of legislative intent in Chapter 322:

> It is declared to be the legislative intent to:
>
> (1) Provide maximum safety for all persons who travel or otherwise use the public highways of the state.
>
> (2) Deny the privilege of operating motor vehicles on public highways to persons who, by their conduct and record, have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state and the orders of the state courts and administrative agencies.
>
> (3) Discourage repetition of criminal action by individuals against the peace and dignity of the state, its political subdivisions, and its municipalities and impose increased and added deprivation of the privilege of operating motor vehicles upon habitual offenders who have been convicted repeatedly of violations of traffic laws.

§ 322.263, Fla. Stat. (1997). The provisions of Chapter 322 are to be liberally construed in order to give them maximum force and effect for the promotion of public safety. § 322.42, Fla.

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[4]This issue is currently before the Court in State v. Burke, case no. 5D01-275, and State v. Ellis, case no. 5D01-973.

Stat. (1997).

The opinion in Huss, which does not discuss Sections 322.263 or 322.42, contravenes legislative intent because it essentially grants defendants amnesty for convictions obtained under the pre-amendment version of 322.34(1). Under Huss, defendants who violated the statute before October 1, 1997, now have a blank slate and can violate the statute without having to worry about facing a felony charge. Thus, despite having prior convictions which are perfectly valid, and despite the express legislative intent of more severely punishing repeat offenders, a defendant with a prior conviction under the pre-amendment statute will only be subject to misdemeanor charges.

Under Huss, convictions obtained under the pre-amendment version of the statute exist in a kind of limbo. No one disputes the validity of these prior convictions. Yet the opinion in Huss accords these valid prior convictions a diminished status by refusing to recognize them as predicates for a felony driving while license suspended charge under 322.34(2)(c). This is contrary to the spirit of the state constitution, which provides, "[A]mendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Art. X, § 9, Fla. Const.

Whenever possible, courts should give full effect to all statutory provisions. Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996)(quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 456 (Fla. 1992)). Courts must choose the

interpretation of a statute which renders its provisions meaningful. Hawkins v. Ford Motor Co., 748 So. 2d 993, 1000 (Fla. 1999)(quoting Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986)). Huss violates these principles by according a diminished efficacy to convictions obtained under the pre-amendment statute. Such an interpretation dilutes the effect of the pre-amendment statute.

Additionally, Huss violates the settled principle that it is not a judicial function to add words to statutory language. See National Airlines, Inc. v. Division of Employment Security of Florida Department of Commerce, 379 So. 2d 1033, 1035 (Fla. 3d DCA 1980); see also Sarasota Herald-Tribune Co. v. Sarasota County, 632 So. 2d 606, 607 (Fla. 2d DCA 1993). The Huss court has rewritten the statute to provide that only violations occurring after October 1, 1997, may be used as predicate offenses.

Huss is contrary to express legislative intent, general rules of statutory construction, and the specific provision mandating liberal construction of Chapter 322. Thus, even if retroactive, Huss was wrongly decided and should not be followed.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Honorable Court deny review of the opinion below or, in the alternative, affirm the Fifth District Court's opinion upholding the denial of Thompson's motion seeking collateral relief in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been furnished by U.S. Mail to James R. Baxley, Asst. Public Defender, Lake County Judicial Center, 550 West Main Street, Tavares, FL 32778, this 8th day of November, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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