

IN THE SUPREME COURT OF FLORIDA

PAUL THOMPSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____ /

CASE NO. SC02-800
LOWER TRIBUNAL # 5D01-1947

INITIAL BRIEF OF PETITIONER

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INITIAL BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

Paul Thompson was the defendant in the trial court, and the appellant before the District Court of Appeal, Fifth District of Florida. He will be referred to in this brief as "Petitioner," "Appellant," or by his proper name.

Reference to the record on appeal will be by use of the volume number (in roman numerals) followed by the appropriate page number in parenthesis.

II. STATEMENTS OF THE CASE AND FACTS

Petitioner was originally charged with, and plead guilty to the felony charge of knowingly driving while license suspended, canceled or revoked, a violation of Section 322.34(2)(c), Florida Statutes (Supp.1998), and was sentenced to the Department of Corrections for a period of 36 months. (R-10) Thereafter, the State Attorney's office filed an appeal because Petitioner's sentence was below the guidelines (R-10). The Fifth District Court of Appeal reversed and remanded the case for imposition of a guideline sentence. (R-10) On August 16, 2000, the Petitioner was re-sentenced to 57.9 months in the Department of Corrections. (R-10).

Petitioner filed a Rule 3.850 motion in the trial court arguing that the two convictions which the state relied upon in enhancing his sentence from a misdemeanor to a felony occurred prior to October 1, 1997, and therefore, according to *Huss v. State*, 771 So. 2d 591 (Fla. 1st DCA 2000), his pre 1997 convictions could not be used as predicates to enhance his sentence. (R-1) The Petitioner filed an amended 3.850 on or about May 22, 2001. (R-7)

Following an evidentiary hearing, the trial court denied Petitioner's motion.(R-10) Petitioner filed an appeal with the 5th District Court of Appeal. (R15-17). The Fifth District Court of Appeal affirmed the lower court's decision in

Thompson v. State, 808 So.2d 284 (Fla. 5th DCA 2002).

The Appellant filed a jurisdictional brief, and the Supreme Court of Florida accepted jurisdiction. This appeal follows.

III. SUMMARY OF ARGUMENT

The Appellate Court erred by not granting Petitioner relief

under his 3.850 Motion. A conviction for driving while license suspended or revoked ("DWLSR") in accordance with Florida Statute §322.34 (1), Fla. Stat.(1995) occurring prior to 1997 cannot be used as a predicate to enhance the Petitioner's conviction from a misdemeanor to a third degree felony under Florida Statutes 322.34 (2) (c), Fla. Stat. (Supp.1998). §322.34 (1), Fla. Stat. (1995) was changed by the legislature in 1997 to include the new element that an individual needs to have knowledge that his or her licenses were suspended before they can be convicted of violating § 322.34 (2) (c), Fla. Stat. (Supp.1998). The change in the statute creates a new law.

A conviction under § 322.34 (1), Fla. Stat. (1995) prior to 1997, which did not contain the knowledge element, cannot be used to enhance a defendant's sentence from a misdemeanor to a third degree felony, since they are different crimes. *Huss* held that a conviction for DWLSR under § 322.34 (1), Fla. Stat. (1995) prior to 1997 cannot be used as a predicate to enhance a defendant's DWLSR convictions subsequent to 1997. *Huss*, 771 So. 2d at 593. However, *Martin* held that *Huss* did not apply retroactively and that relief under a 3.850 motion due to a new change in law shall not be considered unless the

change emanates from the Florida Supreme Court or the United States Supreme Court, is constitutional in nature and constitutes a development of fundamental significance. *Martin v. State* 809 So. 2d 65, fn. 2 (Fla. 5th DCA 2002). The *Martin* Court, in determining whether a law should be applied retroactively, applied the *Witt* test. *Id.* ((See *Witt v. State*, 387 So.2d 922 (Fla. 1980)). However, the *Witt* test is only applied when there is a change in case law. *Witt*, 387 So. 2d at 924.

In the instant case, the change in § 322.34 (2) (c), Fla. Stat. (Supp.1998) was promulgated by the legislature; the new offense created by the amendment of § 322.34 (2) (c), Fla. Stat. (Supp.1998) is not a change in case law, but merely a new offense with new elements as compared to § 322.34 (1), Fla. Stat. (1995). Therefore, the *Witt* analysis cannot be used to determine if *Huss* should be applied retroactively. The issue of retroactivity is not present in the instant case.

The Court in *Huss* merely interpreted the statute by its plain meaning. Therefore under a "plain wording" analysis of § 322.34 (2) (c), Fla. Stat. (Supp.1998), a conviction prior to 1997 under § 322.34 (1), Fla. Stat. (1995) cannot be used to enhance a defendant's conviction for an offense of § 322.34 (2) (c), Fla. Stat. (Supp.1998) occurring after 1997, because they are different offenses with different elements. The

Petitioner was sentenced to an illegally enhanced sentence, and therefore, the trial court's sentence should be vacated and remanded so the Petitioner is sentenced to a first degree misdemeanor.

ISSUE I

PETITIONER RECEIVED AN ILLEGAL SENTENCE AS HE WAS SENTENCED TO A FELONY WHEN THE PLAIN READING OF §322.34 (2)(c), Fla. Stat. (Supp.1998) REQUIRED HIM TO BE SENTENCED TO A MISDEMEANOR.

The trial court as well as the Court in *Thompson*, erred by sentencing the Petitioner as a felon, because the Petitioner should have been sentenced to a misdemeanor. The Petitioner pleaded guilty to felony DWLSR in violation of § 322.34 (2) (c), Fla. Stat. (Supp.1998), and received a sentence of 57.9 months Department of Corrections. (R-10) In sentencing the Petitioner, the trial court used his two prior convictions which occurred prior to 1997 as a predicate to enhance his punishment from a misdemeanor to a third degree felony. (R-26) *Huss* held that convictions prior to 1997 cannot be used as predicates in order to enhance the punishment for violations of §322.34 (2) (c), Fla. Stat. (Supp.1998). *Huss*, 771 So.2d at 593. Thus, only convictions for violations of § 322.34 (2) (c), Fla. Stat. (Supp.1998) can be used to enhance the Petitioner's sentence.

Maddox held that even when a defendant has pleaded guilty, the trial court may not impose a sentence exceeding the statutory maximum. *Maddox v. State*, 760 So. 2d 84, 101 (Fla. 2000). (See *King v. State*, 681 So. 2d 1136, 1140 (Fla. 1996); *Williams v. State*, 500 So. 2d 501, 503 (Fla. 1986)). An error that improperly extends a defendant's sentence of

incarceration is deemed fundamental. *Id.*

In the instant case, even though the Petitioner entered a plea of guilty, he was sentenced using pre-1997 convictions to enhance his punishment. *Huss* holds that pre-1997 convictions cannot be used to enhance his punishment. Therefore, the Petitioner has only one conviction under §322.34 (2) (c), Fla. Stat. (Supp.1998) which would result in him being sentenced to a misdemeanor, and resulting in the statutory maximum of one year county jail.

The instant case is analogous to *Leonard v. State*, wherein a defendant pleaded nolo contendere to a violation of probation and was sentenced to a term of thirty years incarceration when the statutory maximum was fifteen years. *Maddox*, 760 So.2d at 101; *Leonard v. State*, 731 So. 2d 287, (Fla. 2d DCA 1998) review granted, 719 So.2d 287 (Fla. 1998). The Court stated that this type of sentencing error results in a sentence exceeding the statutory maximum and is an "illegal sentence." *Id.*

In the instant case, even though the Petitioner entered a plea of guilty to the offense of felony DWLSR, it is an illegal sentence. *Huss* held that in order for a defendant's sentence be enhanced from a misdemeanor to a third degree felony, all convictions must be under §322.34 (2) (c), Fla. Stat. (Supp.1998). *Huss*, 771 So. 2d at 593. *Maddox* holds that the defendant cannot be sentenced above the maximum, which in the instant case is one year county jail, and any

sentence above the statutory maximum is illegal and the error is fundamental.

Therefore, the trial court and the *Thompson* Court erred by sentencing the Petitioner to a felony; the Petitioner's sentence is illegal, and the Petitioner's sentence should be vacated and remanded to sentence him to a first degree misdemeanor.

ISSUE II

A CONVICTION FOR DRIVING WHILE LICENSES SUSPENDED, CANCELED, OR REVOKED PRIOR TO 1997 CANNOT BE USED AS A PREDICATE TO ENHANCE THE OFFENSE FROM A MISDEMEANOR TO A FELONY, FOR CONVICTIONS AFTER 1997.

This issue has been decided by *Huss*. *Huss* held that convictions under §322.34 (1), Fla. Stat. (1995) occurring prior to 1997 cannot be used as a predicate to enhance a defendant's sentence to a felony for convictions after 1997 under §322.34 (2) (c), Fla. Stat. (Supp.1998). *Huss*, 771 So.2d at 593. According to *Huss* at the time the appellant received the prior convictions, the statute did not require proof of "knowledge" as an element of the offense, and his prior convictions could not be used as "convictions" under the amended provisions of §322.34 (2) (c), Fla. Stat. (Supp.1998). *Id.* *Huss* also stated that the law under which the defendant received his prior convictions under is no longer in effect. *Id.* The plain reading of the statute requires at least two prior convictions with the additional knowledge element under the new statute, for purposes of enhancement of the conviction from a misdemeanor to a felony. *Id.*

Therefore, the Court in *Thompson* erred by not granting the Petitioner relief as outlined in his 3.850 motion, because convictions prior to 1997 were used to enhance the Petitioner's sentence from a misdemeanor to a felony. The Petitioner was sentenced to an illegal sentence. Thus, the

Petitioner's sentence should be vacated, and this case remanded directing appropriate disposition as a misdemeanor.

ISSUE III

THE CHANGE PROMULGATED BY THE LEGISLATURE IN FLORIDA STATUTE §322.34 (2) (c), Fla. Stat. (Supp.1998) IS NOT A CHANGE IN DECISIONAL LAW, BUT A CHANGE CREATED BY THE LEGISLATURE, AND THEREFORE *HUSS* DID NOT CREATE NEW LAW WHICH WOULD REQUIRE A RETROACTIVE ANALYSIS UNDER *WITT*; *HUSS* INTERPRETED THE STATUTE BY THE PLAIN MEANING INTERPRETATION.

The legislature amended §322.34 (2) (c), Fla. Stat. (Supp.1998) effective October 1, 1997, to incorporate the knowledge element. The change promulgated by the legislature in effect created a new offense, containing new elements as compared to §322.34 (1), Fla. Stat. (1995). In deciding if convictions prior to 1997 could be used as prior convictions to enhance a defendant's sentence under the new statute, *Huss* used the "plain wording" analysis. *Huss* 791 So.2d at 593. The Court concluded that only convictions under the new statute could be used to enhance a defendant's sentence, since the knowledge element was not contained in the pre-1997 statute. *Id.* The two statutes were different, with different elements. *Id.*

Therefore the retroactivity of the *Huss* decision is not in question. §322.34 (2) (c), Fla. Stat. (Supp.1998) represents a change in the law created by the legislature; to wit, the creation of a new law.

In deciding if a law should be applied retroactively, the *Witt* analysis is utilized. *Witt* stated, "we are confronted with a threshold decision as to when a change of **decisional**

law mandates a reversal of a once valid conviction and sentence of death" *Witt* at 387 So. 2d 924. The Court further stated,

It should be noted that our analysis is applicable only to those situations where a change of law is asserted as a ground for collateral relief under Rule 3.850. Post-conviction claims involving the other enumerated grounds of Rule 3.850 for example, a claim that the trial court was without jurisdiction need not be of constitutional stature in order to provide a viable basis for relief. Indeed, the majority of cases under Rule 3.850 have not involved changes of law, and those cases will not be affected by today's ruling. *Id.* at 925, fn. 24.

The Court outlined the test determining whether a change in decisional law should be applied retroactively as follows: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule. *Id.* at 925. However, in the instant case, the *Witt* analysis need not be applied.

The *Huss* decision was not a change in the decisional law of this state to which a *Witt* retroactive analysis would apply. *Stutts v. State*, 821 So. 2d 449, (Fla. 1st DCA 2002). "*Huss* did not change the law; the legislature did when it created a new DWLSR offense." *Id.* The Court in *Huss* only interpreted the new statute. "In short, the law under which appellant received his prior conviction is no longer in effect, and for purposes of enhancement under the new statute

for multiple convictions, the statute by its plain wording applies only to a 'conviction' for the offense prescribed the new statute". *Huss* 771 So. 2d at 593. Therefore, the court in *Huss* merely interpreted the statute by its plain meaning and did not create new decisional law which would require a *Witt* analysis.

Therefore, applying the plain wording analysis used in *Huss*, no convictions prior to 1997 can be used as a predicate to enhance the appellant's conviction under the new statute. When *Huss* was issued is not determinative, because the requirement that the offenses be sufficiently similar for treatment as prior offenses is a principle of long standing. *Stutts*, 821 So. 2d at 449. No issue of retroactive application of *Huss* is in question, because *Huss* did not change the law, but only interpreted the new law.

Petitioner disagrees with the Holding in *Thompson*, which held that *Huss* represented a change in the law, but the ruling is not retroactive. *Thompson*, 808 So. 2d at 284. Petitioner disagrees with the Court in *Thompson* based upon the arguments stated above, because *Huss* did not represent a change in the law, but only interpreted a new statute, and the retroactivity question of *Huss* is not an issue.

Therefore, the Court erred by not granting Petitioner's relief based upon his 3.850 motion. A plain word reading of §322.34 (2) (c), Fla. Stat. (Supp.1998) which contains the

knowledge element indicates that in order for priors convictions to be used as enhancers under the statute, the prior convictions must also contain the knowledge element which is not found in the statute prior to October 1, 1997. Therefore, any convictions prior to October 1997 cannot be used to enhance Petitioner's conviction, and Petitioner's sentence should be vacated.

CONCLUSION

Based upon the foregoing analysis, arguments, and authorities, Petitioner urges the Court to remand his case to the trial court to be disposed of as a misdemeanor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert Butterworth, Attorney General, by delivery to the Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, FL 32301, Robert Foxman and Kellie Neilan, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, and a copy has been mailed to Paul Thompson, DOC # 025474, Okeechobee Correctional Institute, 3420 N.E. 168th Street, Okeechobee, FL 34972, on this ____ day of October, 2002.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.201(a) (2).

Respectfully submitted,

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