IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-368

DALE JOHNSON,
Petitioner,

- versus -

STATE OF FLORIDA,
Respondent.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

BILL McCOLLUM
Attorney General
Tallahassee, Florida

CELIA TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
SUE-ELLEN KENNY
Assistant Attorney General
Florida Bar No. 961183
1515 North Flagler Drive , Suite 900
West Palm Beach, FL 33401
Telephone: (561) 837-5000

DCAFilings.4th@myfloridalegal.com and
SueEllen.Kenny@myfloridalegal.com

Counsel for Respondent

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Preliminary Statement

Petitioner was the Defendant in the trial court and the Appellant in the Fourth District Court of Appeal, and will be referred to herein as "Petitioner" and "Johnson." Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the Fourth District Court of Appeal and will be referred to herein as "Respondent" or "the State."

In this brief, the following symbols will be used:

"R" to denote the record on appeal in 4th DCA Case No. 4D05-1585;

"T" to denote the transcript, (T 1-69) are contained in the record on appeal and reflect the March 21, 2005, *voir dire* proceedings and (T 71-185) are contained in the supplemental record on appeal and reflect the March 22, 2005, trial, sentencing and change of plea hearing. As the transcript comprising the supplemental record on appeal was numbered consecutively to the transcript comprising the record on appeal, reference to both transcripts will be the same; and

Reference to Petitioner's Initial Brief shall be (IB), followed by the appropriate page number.

All emphasis in this brief is supplied by Appellant unless otherwise indicated.

Statement Of The Case and Facts

Appellee cannot entirely accept Appellant's statement of the case and facts as it contains argument, inaccuracies and omissions and provides the following additions, corrections, and/or clarifications contained herein and throughout the argument:

On September 1, 2004, Appellant was charged by a 2 count Information with: Count 1 - Felony D.U.I. in violation of Fla. §§ 316.193(1) and 316.193(2)(b)3 and Count 2 - Refusal to Submit to Testing in violation of Fla. § 316.1939. (R 4-5).

Prior to the commencement of trial, the prosecutor announced,

> The State will be introducing the driver's license record.
>
> I have redacted it. If Your Honor wants to look at it. I believe that is no objection by Defense.

(T 71). To which Appellant responded, "It is reflected sufficiently." (T 71). Without objection, Appellant's redacted driver's license record was introduced into evidence as Court's Exhibit No. 1. (R 72).

On March 22, 2005, Appellant entered an open plea to the court, changing his plea to *nolo contendere* to the misdemeanor charged in Count 2 of the Information. (R 15-16). On March 22, 2005, the jury returned its verdict finding Appellant guilty as charged in Count 1 of the Information. (R 30, T 169-170).

After the jury had returned its verdict of guilty as charged and been polled (T 169-170), the jurors were excused with the thanks of the court. (T 172). The trial court next inquired,

> THE COURT: Okay. You have previously agreed that the Court could decide whether or not Mr. Johnson has previously been convicted of a DUI; it that correct?
>
> MS. BANDELL:[1] Yes.
>
> MR. EARLY:[2] Yes.

(T 172). The prosecutor then noted that Appellant's driver's license record had already been made part of the court file. (T 172). The prosecutor continued,

> As Your Honor can tell by looking at that driver's license record, the defendant has been convicted of DUI three prior times. There was a conviction of September 22nd, 1986, in Broward County, Florida; August 19, 1988, in Broward County, Florida; July 23, 1999, Broward County, Florida. They are all reflected on the defendant's driver's license record.

(T 172). The prosecutor further advised that the 1999 conviction was a felony. (T 173). The trial court then asked Appellant's counsel, "is there anything you wish to present?" (T 173). Appellant's counsel responded, "No, Judge." (T 173). The court then asked,

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[1] Ms. Lannie Bandell was the Assistant State Attorney prosecuting the case.

[2] Mr. Benjamin Early, Assistant Public Defender, was Appellant's trial counsel.

> Does your client wish to testify as to this issue? Is there anything, just as to this issue?

(T 173). Appellant requested clarification and the trial court responded,

> Well, right now, I mean the jury found, what we agreed, the procedure we agreed to follow is that the jury would only be presented the issue of DUI. At that point, I would have to make the decision as to whether or not you had previously been convicted. Both sides stipulate and agree?

(T 173). To which Mr. Early responded, "That's correct." (T 173). The trial court then stated,

> Under those circumstances, I have to make the finding. The State has presented the Florida Department of Highway Safety and Motor Vehicle Division of Driver's Licenses Transcript of Driver Record. It's been marked for identification.
>
> At this time, the Court will receive it in evidence as a court exhibit.
>
> It indicates you have previously been convicted three times. **If that is inaccurate, now is the time for someone to tell me.**

(T 173-174). Appellant did not lodge an objection to his driver's record transcript being entered into evidence or considered by the court. (T 173-174). Appellant himself responded, "No, sir." (T 174). The trial court then found,

> that Mr. Johnson has been previously convicted of DUI three times. And at this time, based upon the verdict of the jury and the evidence presented before the Court, the

> Court adjudicates you guilty of felony driving while under the influence as charged in the information.

(T 174). On April 20. 2005, Appellant filed his notice of appeal. (R 44).

Johnson argued to the appellate court his right a jury trial had been violated. Johnson v. State, 944 So. 2d 474, 475 (Fla. 4th DCA 2006). Johnson claimed this violation occurred when the judge and not the jury determined he had 3 prior DUI convictions. Id. The Fourth District Court of Appeal held, "that the trial court did not err in determining Johnson's prior DUI convictions without a jury, because Johnson waived his right to a second phase jury determination." Id., at 476. Further, the court, acknowledging a waiver colloquy was not conducted, held

> Johnson's counsel had previously stipulated to a second phase bench trial and affirmed this stipulation at trial, in Johnson's presence, per the court's request. We therefore hold that the stipulation of Johnson's counsel affected a valid waiver of Johnson's right to a second phase jury determination of his prior DUI convictions, and affirm on this issue.

Id., at 476-477.

Summary of the Argument

Petitioner stipulated to allowing the trial court to determine the second element of felony DUI at the second phase of the trial. At the very beginning of that proceeding, Petitioner allowed his prior DUI offenses to be admitted as substantive evidence **without objection.** In fact, Petitioner conceded the accuracy of this evidence by **twice** declining the court's invitation to present any evidence to contest the accuracy of his prior driving record. That being the case, the trial court found the evidence sufficient and convicted Petitioner of felony DUI. Petitioner's stipulation and concession of facts were tantamount to a valid waiver of his right to have a jury determine the second element of felony DUI. In essence, Petitioner's actions obviated the need for any fact finder to weigh and assess conflicting evidence. Alternatively, if error occurred, it was harmless as the judge did not resolve any disputed fact. Finally, the parties and court proceeded in reliance upon agreement and stipulation. (T 172-173). It was only upon appeal to the district court that Petitioner first indicated any problem with his stipulation. Such tactics should not be countenanced by this Court. Therefore, the Fourth District Court of Appeal's determination that Johnson had waived his right to a second phase jury should be affirmed by this Court.

Argument

PETITIONER WAIVED HIS RIGHT TO A SECOND PHASE JURY AS HE STIPULATED TO THE TRIAL COURT MAKING THE DETERMINATION OF HIS PRIOR D.U.I. CONVICTIONS AND BASED UPON HIS EVIDENTIARY STIPULATION NO SECOND PHASE DETERMINATION WAS REQUIRED; ALTERNATIVELY IF ERROR OCCURRED IT WAS HARMLESS AS THE TRIAL COURT'S DETERMINATION WAS BASED UPON UNCONTESTED EVIDENCE OF PETITIONER'S PRIOR D.U.I. CONVICTIONS. (Restated).

Respondent believes this Court has improvidently accepted jurisdiction over this matter. Petitioner alleged the decision below directly conflicts with Tucker v. State, 559 So. 2d 218 (Fla. 1990) and State v. Upton, 658 So. 2d 86 (Fla. 1995). No conflict exists. The Fourth District Court of Appeal acknowledged, the case at bar is governed by State v. Harbaugh, 754 So. 2d 691 (Fla. 2000). Johnson v. State, 944 So. 2d 474, 476 (Fla. 4th DCA 2006). In Harbaugh, this Court determined any waiver deficiencies were subject to a harmless error analysis. Harbaugh, at 694. Diametrically opposed to Harbaugh, in both Tucker and Upton, this Court reiterated that waiver deficiencies constitute *per se* reversible error. The harmless error and the reversible error determinations are mutually exclusive. This Court was well aware of its previous holdings in Tucker and Upton, when it

rendered its opinion in Harbaugh. This Court implicitly distinguished the proceedings at bar from those involved in Tucker and Upton. This Court found where the trial court's determination is based upon **uncontested** facts, any error with regard to a jury waiver is harmless. Harbaugh, at 694. As such, this Court has previously acknowledged no conflict exists due to the divergent legal principles which were applied as the basis for the decisions. See Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). It follows that the lower court's decision does not expressly and directly conflict with this court's decisions in Tucker and Upton.

It is submitted the Fourth District Court of Appeal's decision finding that Petitioner waived his right to a second phase jury trial is correct. In 2000, this Court amended the bifurcated felony D.U.I. proceedings set forth in State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) to comport with the holding of United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Harbaugh. This Court explained the scope of the second phase of this bifurcated proceeding, holding,

> based on our recent decision in Brown v. State, 719 So.2d 882 (Fla.1998), the State and the trial court should accept a defendant's stipulation to three prior misdemeanor DUI convictions. As in Brown, where a defendant stipulates to the three prior DUI convictions, the State's burden of proof for that element is satisfied. Id. We likewise make clear that the defendant may not

> collaterally attack the prior convictions in the second phase of these trials.

Harbaugh, at 694. Thus, the only matter at issue is whether the defendant is the same individual convicted of the 3 prior D.U.I. offenses offered by the State.

Further, when the State's evidence of a defendant's prior convictions is received without objection or by stipulation, the State is relieved of the burden of proof as to this element. Brown; Peterka v. State, 890 So. 2d 219, 246 (Fla. 2004); Agan v. State, 503 So. 2d 1254, 1256 (Fla. 1987). The stipulation "satisfies the prosecution's burden of proof for that element of the crime." Brown, at 889. In fact, "the judge may thereafter instruct the jury that **it can consider the convicted felon status element of the crime as proven** by agreement of the parties." Id., at 889. (e.s.). Therefore, in a bifurcated felony D.U.I. proceeding when the defendant does not contest the State's evidence of prior convictions, in fact stipulating to the admission of such evidence, this element of the crime is proven. As the Fourth District Court of Appeal correctly found, in such circumstances, the defendant's stipulation has acted as waiver of the second phase of the proceedings as there is no need for a determination, by jury or judge, of the defendant's prior convictions.

This Court, recognizing the particular nature of these proceedings held,

> in accord with Neder v. United States, 527 U.S. 1, 119

S.Ct. 1827, 144 L.Ed.2d 35 (1999), that a Gaudin error is subject to harmless error review. As stated in Neder:

> In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.
>
> ...
>
> ....[A] court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflec[t] a denigration of the constitutional rights involved." [Rose v. Clark, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)].

Harbaugh, at 694. As previously addressed, this Court has distinguished the proceedings at bar from those involved in Tucker and Upton because at bar the trial court's determination was based upon **uncontested** facts thus, any error with regard to a jury waiver is harmless. Harbaugh, at 694.

In both Tucker and Upton, the trial court was required to act as the finder of facts. The judge, rather than the jury, was to determine whether the respective defendants were guilty of the criminal offenses charged. These determinations

required the trial courts to evaluate contested matters of fact and the credibility of witnesses. In such situations where the trial court is required to be the final arbiter of guilt based upon contested facts, failure to secure a written waiver or oral waiver with a colloquy on the record, mandates reversal. Conversely, this Court found any error regarding a waiver as to the second phase of the bifurcated felony D.U.I. proceeding where the defendant did not or could not contest the State's evidence of prior convictions was subject to a harmless error analysis. Harbaugh, at 694.

The Fourth District Court of Appeal's opinion in Johnson v. State, 944 So. 2d 474 (Fla. 4th DCA 2006), comports with this Court's holding in Harbaugh and should be affirmed. Prior to the commencement of trial Petitioner acknowledged the sufficiency of his driver's license record which resulted in its admission **without objection.** (T 71-72). Petitioner **never** lodged an objection to the trial court's consideration of this record. (T 173-174). Indeed, the trial court specifically inquired twice whether Petitioner had anything to present in rebuttal which would demonstrate the inaccuracy of the evidence. (T 173). Petitioner conceded that he did not possess any such evidence and his driving record was again received into evidence **without** objection. (T 173-174). In fact, Petitioner confirmed that the record introduced accurately reflected his 3 prior convictions.

(T 174). Petitioner's actions of previously reviewing the driving record, agreeing to its admission without objection and acknowledging its sufficiency (T 71-72, 173-174) amounted to a stipulation.

Practically speaking, where a defendant stipulates to the fact he has the predicate D.U.I. convictions in a felony D.U.I. bifurcated proceeding, there is nothing left to be determined in the second phase, whether by judge or jury. Thus, the evidentiary stipulation acts as a waiver of the second phase in these particular bifurcated proceedings. Reconvening the jury is pointless in this situation when the jury will then be instructed to consider the 3 prior D.U.I. offenses proven by agreement. Brown, at 889. Neither the jury, nor the judge renders a determination under these circumstances. Indeed, the Eleventh Circuit Court of Appeals has acknowledged a defendant's stipulation to the quantity of drugs, "serves to waive the right to a jury trial on that issue." U.S. v. Sanchez, 269 F. 3d 1250, 1272 fn. 40 (11th Cir. 2001) (en banc).

At bar, Petitioner stipulated to admission and accuracy of his driving record demonstrating the prerequisite D.U.I. offenses. Thus, there was nothing for either the trial court or a jury to determine during the second phase of these proceedings. Further, although Petitioner was afforded the opportunity to present evidence, he did not. Thus, the evidence of Petitioner's prior D.U.I. convictions was

uncontested. Whether the jury or the judge heard this uncontested evidence is of no consequence. Any error regarding Petitioner's waiver of a jury determination as to this element is harmless beyond doubt. Harbaugh, at 694; Sanchez.

Finally, Petitioner had waived review of this issue. "**Where a defendant requests** that a jury determine the occurrence of the prior convictions, Gaudin[3] requires that element of the crime to be submitted to the jury." Harbaugh v. State, 711 So.2d 77, 83 (Fla. 4th DCA 1998), approved 754 So. 2d 691 (Fla. 2000). (e.s.). Absent such a request, Petitioner waives appellate review of this issue. Ward v. State, 807 So.2d 808, 810 (Fla. 4th DCA 2002). At bar, Petitioner never requested a jury determination of this issue. Not only did Petitioner fail to request a jury determination but he agreed and stipulated to the judge's determination of this issue. (T 172-173). Therefore this issue is not subject to review. Id. To allow review at bar based upon Petitioner's representations and actions below would perpetuate the "gotcha" school of litigation so roundly condemned by the courts of this state. *See*, G.H. v. State, 414 So.2d 1135 (Fla. 1st DCA 1982); Stang v. State, 403 So.2d 542 (Fla. 4th DCA 1981); State v. Thomas, 659 So.2d 1322 (Fla. 3d DCA 1995); Achin v. State, 436 So.2d 30 (Fla. 1992); McKinnon v. State, 547 So.2d 1254 (Fla. 4th DCA 1989)(Garrett, J., concurring in part, dissenting in part);

[3] United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444

Van Den Borre v. State, 596 So.2d 687 (Fla. 4th DCA 1992)(Letts, J., concur.).

In G.H., the defendant entered a negotiated plea of no contest to leaving the scene of an accident with property damage. Id. at 1136. After accepting the plea, the trial court ordered, *inter alia*, that the defendant pay restitution. Id. The defendant argued that restitution could not be ordered because such an order is inappropriate for this crime. Id. The prosecutor responded by arguing that, although the defendant's argument was true, the defendant nonetheless agreed, as part of the negotiated plea agreement, that he would pay restitution. Id. On appeal, the District Court agreed with the defendant that restitution generally cannot be ordered for this particular offense. Id. However, the Court remanded the case to determine whether defendant had in fact agreed to pay restitution and, if so, his argument would be no more than an impermissible "gotcha" maneuver which would require him to pay the restitution per his agreement. Id. at 1136-1137.

In Thomas, the defendant filed a demand for speedy trial pursuant to Fla. R. Crim. P. 3.191. Id. at 1323. At the hearing on the demand, the trial court, without any objection by the defendant, set the trial date fifteen days after the demand was filed, which was beyond the rule's ten-day limitation period. Id. On the day of his trial, the defendant moved for discharge arguing that this trial date exceeded the date

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(1995).

permitted by the rule. Id. On appeal, the Court affirmed the trial court's order granting the defendant's motion, Id. at 1323. Although constrained by "existing precedent," Judge Cope, in a concurring opinion, found the defendant's actions to be a classic "gotcha" maneuver:

> Were it not for existing precedent, however, we should reverse because there was no defense objection to the setting of the trial on November 14, 1994. This is a classic 'gotcha' litigation tactic... The purpose of the speedy trial rule is to assure a speedy trial, not a speedy discharge. If the defendant disagreed with the calculation of the window period in this case, the defendant was obliged to make a contemporaneous objection. Had he done so, obviously the trial would have been set on November 10, not November 14, and the defendant would have received the speedy trial he says he desired. There is no reason, much less a good reason, to relieve the defendant of an obligation to make a contemporaneous objection in this context, just as we require a defendant to make a contemporaneous objection to virtually ever other trial error...
>
> It is precisely this defendant's fault that he was not brought to trial within the window period: he failed to object to the trial date at a time when the trial court could have done something about it....

Id. at 1323-4 (Cope, J., concur.)(citations omitted).

In this case, had Petitioner, like Thomas, asserted his right to have the jury preside over the second phase of his trial before the trial court discharged the jury, or objected to the trial court's discharging same, "the trial court could have done

something about it." Instead, Petitioner, fully aware of his right to a jury determination under Harbaugh, chose to waive that determination when he affirmatively stipulated to the allowing the judge alone to make the finding of his prior convictions. Following that stipulation, Petitioner sat approvingly while the trial court dismissed the jury and moved forward with the second phase. (T 171-172). His affirmative actions precluded any complaint on appeal. As the then-Chief Judge Letts stated:

> Justice may be blind, but Judges should not be blinded. It is apparent that the defendant knew all along with what crime he was charged and on what date it was committed. Nonetheless he chose to wait in ambush, secure in the thought that he could defeat the prosecution by exposing a scrivener's error of which he was only too well aware...
>
> I need search for no citation in support of the basic premise that our function is to see that justice is done, not done in....

Stang, supra., 403 So.2d at 544-45. Thus, like G.H. and Thomas, Petitioner's actions are clearly tantamount to an improper "gotcha," and, as such, should not be countenanced by this Court.

Likewise, Petitioner's tactics of injecting an attack regarding the use of his driver's license record smacks of this same "gotcha" school of litigation. (IB 3-4, fn 4). Prior to the commencement of trial Petitioner acknowledged the sufficiency

of his driver's license record and lodged no objection to its introduction into evidence. (T 71-72). Petitioner failed to lodge an objection to the trial court's consideration of this record. (T 173-174). Furthermore, at no time did Petitioner challenge the sufficiency of the evidence with regard to his prior convictions. In fact, Petitioner again confirmed that the record introduced accurately reflected his 3 prior convictions. (T 174).

Petitioner's reliance upon Tucker v. State, 559 So. 2d 218 (Fla. 1990); State v. Upton, 658 So. 2d 86 (Fla. 1995); Sinkfield v. State, 681 So. 2d 838 (Fla. 4th DCA 1996); and Babb v. State, 736 So.2d 35 (Fla. 4th DCA 1999) is misplaced. (IB 10-12). In each of the cases cited, the waivers of jury trial resulted in the court as the fact finder, resolving contested factual matters. At bar, the Petitioner's waiver of jury trial did not result in the judge determining any factual matters. Based upon undisputed facts, the judge found Petitioner guilty of felony D.U.I.

The distinction this Court has recognized between these situations is whether the judge was required to determine guilt upon contested or uncontested factual matters. Illustrative is the fact that in Upton, this Court approved the District Court's opinion in Upton v. State, 644 So.2d 181 (Fla. 1st DCA 1994), which remanded for new trial based upon a technical deficiency with the written waiver. Relying upon Upton, the Fourth District Court of Appeal held mere failure to object

did not constitute a valid waiver to allow the judge to sit as the fact-finder. Kelly v. State, 797 So. 2d 1278 (Fla. 4th DCA 2001). In stark contrast, this Court has specifically held that any waiver deficiencies concerning the second phase of a bifurcated D.U.I. proceeding when the existence of the prerequisite D.U.I. offenses is uncontested, are "subject to harmless error review." Harbaugh, at 694.

Based upon the foregoing, Petitioner effectively waived his right to have a jury determine the second phase of his felony D.U.I. trial. Evidence of Petitioner's prior D.U.I. offenses was received by the trial court without objection. Further, Petitioner acknowledged the accuracy of this information. Therefore proof of Petitioner's previous D.U.I. convictions was entered by agreement or stipulation. That being the case, nothing remained to be determined in the second phase of the proceedings. Alternatively, if error occurred, it was harmless as the judge did not resolve any disputed fact. In addition, the parties and court proceeded in reliance upon agreement and stipulation. (T 172-173). It was only upon appeal to the district court that Petitioner first indicated any problem with his stipulation. Such tactics should not be countenanced by this Court. Therefore, this Court should affirm the underlying decision of the Fourth District Court of Appeal.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court affirm the Fourth District Court of Appeal's opinion below.

Respectfully submitted,
BILL McCOLLUM

Attorney General
Tallahassee, Florida

_/s/_____

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879
1515 N. Flagler Dr., Suite 900
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099
Counsel for Respondent

_/s/_____

SUE-ELLEN KENNY
Assistant Attorney General
Florida Bar No. 961183
1515 N. Flagler Dr., Suite 900
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Respondent

Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to DAVID JOHN McPHERRIN, ESQUIRE at 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401 and electronically transmitted to Appeals@pd15.state.fl.us, this **28th** day of August, 2007.

_/s/_____
SUE-ELLEN KENNY
Assistant Attorney General

Certificate of Font Compliance

I HEREBY CERTIFY that this document, in accordance with Rule 9.210 of the Florida Rules of Appellate Procedure, has been prepared with Times New Roman 14-point font.

_/s/_____
SUE-ELLEN KENNY
Assistant Attorney General