

**IN THE CIRCUIT COURT IN AND FOR THE TWELFTH JUDICIAL COURT
SARASOTA COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO.: 2014 TR 15144 NC

JOHN BANDY,

Defendant.

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FINAL ORDER WITHHOLDING ADJUDICATION¹

THIS CAUSE came before the Court for final hearing on August 7, 2014, at 9:00 A.M. The Defendant changed his plea from not guilty to guilty, thereby waiving his right to trial. The Court considered the Defendant's driving record, the nature of the citation, and argument of counsel, accepted the plea of guilty and imposed a fine of \$166.00 and waived the court costs for a total due of \$166.00, which was due on or before October 8, 2014. The Court also withheld adjudication of guilt. The Order dated August 7, 2014, is hereby sua sponte amended to explain why adjudication was withheld for the Defendant who holds a commercial driver's license ("CDL"), in light of a recent DHSMV memorandum that was provided to the Court by the Clerk of Court at the final hearing.

On January 8, 2014, a memorandum was sent from DHSMV to the Clerks of Court and law enforcement agencies. The Clerk interpreted the memorandum to mean that a traffic court order withholding adjudication is a case involving a Defendant who holds a CSL "will be sent back to the Clerk of Court through TCATS as an error." A copy for the memorandum is attached hereto as Exhibit "1". "TCATS" stands for the "Traffic Citation Accounting Transmission System." The DHSMV has prepared a TCATS Manual as a guideline for law enforcement

¹ The Court is adopting in its entirety the Order from State v. Cosme A. Sarmlento 50 2013-TR-250877 from Palm Beach County. Steven D. Rubin, Traffic Hearing Office.

agencies on how to prepare and file a UTC, and for Clerks of Court on how to transmit UTC dispositions to the DHSMV. The DHSMV's authority for the TCATS system is derived from F.S. Sec. 43.41 and 318.14(7), according to the TCATS Manual. The memorandum actually states that "if an Adjudication Withheld on a Commercial Driver's License (CDL) driver comes in for 318.14 (9) F.S. School Election option or 318.14 (11) Judge ordered Adjudication Withheld, it will be sent back to the Clerk of Court through TCATS as an error." (emphasis added). It is unclear whether what "comes in" or "it" refers to the court order itself or just the reporting of the disposition by the Clerk through the TCATS System.

The Court has been advised by the Clerk that several such "withhold orders" in other CDL civil traffic cases, and in this case, may be returned to the Clerk by DHSMV as "TCATS errors" (if in fact the memorandum meant "orders", not the Clerk's TCATS reporting of dispositions). The ultimate disposition of any returned orders is uncertain, but in any event, if orders are returned to the Clerk, the DHSMV may effectively nullify the Court's rulings in those cases; the returned orders will not appear on the Defendants' driving records and the Defendants might be excused from complying with the orders because they might wait in legal limbo for further, as yet undetermined disposition. This Court has personal jurisdiction over the parties and subject matter jurisdiction to hear the case. The DHSMV, on the other hand is not a party to the case and cannot appeal the final order. It is also noted that the TCATS Manual does not contain an error code for an order withholding adjudication for a CDL driver (but perhaps the memorandum is the precursor to an AXXXMB amendment to the TCATS manual).

If the DHSMV returns orders to the Clerk, for whatever reason, the DHSMV's actions may constitute the violation of the constitutional mandate of separation of powers. See Article II, Section 3, of the Florida Constitution. The legislative branch enacts the law (See Article III, Section 1, Fla. Const.) The executive branch carries out the laws (See Article IV, Section 1, Fla.

Const.) The judicial branch interprets the laws “subject to review only by superior courts...and having achieved finality...a judicial decision becomes the last word of the judicial department with regard to a particular case or contingency.” See Plant v. Spendthrift Farm, Inc. 54 U.S. 211 227 (1995), as cited in Bush v. Schiavo, 885 So2d 321, 330 (Fla. 2004). “The judicial branch cannot be subject in any manner to oversight by the executive branch.” Schiavo, supra, at p. 330-331. See also Article V, Section 1, Fla. Const. The DHSMV’s return of the Court’s final orders to the Clerk would amount to improper oversight of the Court by the executive branch.

In addition, neither the executive branch nor the judicial branch can enact laws. That is the exclusive province of the legislative branch. F.S. §318.14(9) prohibits a CDL driver from electing driving school. That enactment was well within the legislature’s province. Significantly, the legislature could have, but did not, amend F.S. §318.14 (11), Florida Statutes, regarding CDL drivers and withholding adjudication. The legislature could have, but did not amend Chapter 318.14 (11) to state, for example, that “withholding adjudication of guilt by the judge or official for a driver who holds a commercial driver’s license is prohibited, and the judge or official is required to adjudicate as guilty every case in which the CDL Defendant enters a plea of nolo contendere. The failure of the legislature to amend F.S. §318.14 (11) to prohibit a judge or official from withholding adjudication is a CDL case, but enacting F.S. Sec. 318.14 (9) to prohibit the CDL driver’s election of driving school to obtain a clerk’s withhold of adjudication, is an expression of the legislature’s intent to allow a withhold of adjudication for a CDL driver who enters plea nolo contendere for the court’s determination of the disposition of the case. See e.g., Olmstead v. Federal Trade Commission, 44 So3d 76 (Fla. 2010)(“where the legislature has inserted a provision in only one of the two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent”). This Court will not usurp the legislative branch’s exclusive power to

enact legislation, and it will interpret the Florida Statutes as written: a Court may withhold adjudication in a CDL driver case.

The DHSMV is rightly concerned that the State of Florida must not run afoul of the mandates contained in the Commercial Motor Vehicle Safety Act (CMVSA). The CMVSA requires, in pertinent part, that CDL drivers must be subject to uniform national sanctions for unsafe driving practices (See 49 C.F.R. § i383.51). If a state does not comply with CMVSA's mandate, it may lose federal highway funds. To ensure that the national standards will apply in a uniform manner, a state must not "mask" the unsafe driving record of a CDL driver. The masking prohibition is found in 49 C.F.F. §384.226, which provided in pertinent part:

"The State must not mask, defer imposition of judgment or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except parking violations) from appearing on the driver's records, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State." (emphasis added)

As stated by Judge Toni Boone, a faculty member of the National Judicial College, if a CDL driver's traffic violations are not contained on the driving record ("masking"), it will lead to "diversion program abuse, eliminate deterrents effect, and eviscerate the justice system's ability to impact highway safety." CMV & CDL Law for Florida Civil Traffic Infraction Hearing Officers, the National Judicial College, June 18, 2012, at p. 2, divider 3. Masking occurs only when the sanction or disposition in a court order entered in a case involving a CDL driver does not appear on the driving record. See e.g. Metropolitan Government of Nashville and Davidson County v. Stark, WL276005 (Tenn. App. 2008) (masking occurs if Court enters an order allowing a CDL driver to attend driving school, which if successfully completed, would result in the dismissal of the citation which will not appear on the driving record). If a CDL citation does not appear on the driving record even though a penalty or sanction is imposed by the Court, the

Federal Motor Carrier Safety Administration (“FMCSA”) would never know the CDL driver had been cited and had been ordered to pay a fine or costs to attend driving school, or to comply with any other court imposed sanction. In Florida, if a citation is dismissed or the Defendant is found not guilty, the citation will not appear on the driving record. Thus, masking will occur if a Florida Court imposes a penalty or sanction, but citation will be dismissed if the CDL driver pays the fines and costs, or otherwise satisfies the sanctions (e.g., attend driving school).

If a Florida Court withholds adjudication and imposes a fine, costs or other sanctions, and the order does not provide that the citation will be dismissed if the Defendant complies with the order, the withhold of adjudication will appear on the CDL driver’s driving record, and thus the nolo contendere plea will not be “masked”. Pursuant to 49 C.F.R. §383.5, a Florida Court’s withholding adjudication may be treated as a conviction for the CDL driver as required by the CMVSA because 49 C.F.R § 385.5 provides, in pertinent part, that a “conviction” means “...a plea...of nolo contendere accepted by the Court...whether or not the penalty is rebated, suspended or probated.” The DHSMV’s TCATS Manual states that a driving record will reflect an “adjudication withhold”. See Section 6, Paragraph (1)(e). There is no reason why the DHSMV cannot include a withholding adjudication on the driving record of the CDL driver to enable the FMCSA to consider that the withhold is a conviction under the CMVSA. Indeed, the TCATS Manual directs the DHSMV to report it on the driving record. 49 C.F.R. § 383.5 expressly contemplates a Court’s acceptance of a nolo contendere plea, albeit, it may constitute a conviction for CMVSA purposes.

Ironically, if the DHSMV sends back an order to the Clerk containing a CDL driver withhold of adjudication, the rejection of the order itself may result in federally prohibited masking. Because there is no Florida statute, rule or law which governs what happens to a “rejected” order when it has been returned to the Clerk, it may float in legal limbo and may never

appear on the CDL driver's driving record. The DHSMV's extra judicial action may ultimately be the cause of the loss of federal highway funding for the State of Florida. The DHSMV may have misinterpreted Florida Statutes Sections 318.14(9), 318.14(11) and 322.01(11) as prohibiting the entry of a court order withholding adjudication in a case involving a CDL driver, if the memorandum refers to the prohibition of a court from entering a withhold, and not just the Clerk's reporting of the disposition of the case. F.S. §318.14(11) is express authority for a Court to withhold, and there is not CDL driver prohibition contained therein.

In summary, the Court's withhold disposition will appear on the Florida CDL driver's driving record (unless the DHSMV improperly rejects the order). Present Florida law does not prohibit a Court from withholding adjudication for a CDL driver who enters a plea of nolo contendere. Provided the citation is not dismissed if the CDL driver complies with the Order, the FMCSA can review the Florida CDL driving record and thus it will be advised of the disposition and imposition of fines, costs or other sanctions. The Florida Court's "withhold" may constitute a conviction for federal law purposes, but it will not constitute prohibited masking.

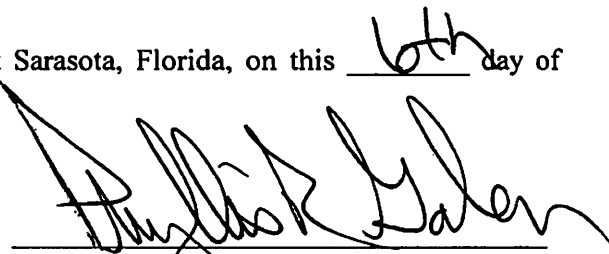
That said, the Court's withholding adjudication may be to no avail for the CDL driver. As cited by the DSMV, F.S. §322.01(11)(b) adopts the CMSVA's definition of "conviction" in 49 C.F.R. 383.5 for purposes of Chapter 322, Florida Statutes, notwithstanding anything to the contrary contained in FS. §318.14. Thus, pursuant to F.S. §322.01 (11)(a) and (b), the DHSMV itself may use or report a Court's withholding adjudication as a conviction. The definitions section of Chapter 322 expressly states those definitions apply to Chapter 322, however, it does not state that the Chapter 322 definitions apply to Chapter 318, or to F.S. Sec. 318.14(11) in particular.

So even though the Court may withhold adjudication, the legislature has probably given the DHSMV the statutory authority to report a withhold on a Court accepted plea of nolo

contendere as a conviction, just as the FMCSA can probably do under the federal act. While the DSHMV should not advise the Court that it may not enter a withhold for a CDL driver, the DHSMV nonetheless can probably use the withhold as a conviction in administering Chapter 322. The DHSMV is incorrect if it has concluded that 318.14(11), Florida Statutes does not allow for a Court adjudication withhold for a CDL driver. But the DHSMV may be correct if all it meant in the memorandum was that the DHSMV, in its administration of Chapter 322 and the TCATS system, can consider a withhold adjudication in a CDL driver case as a conviction. Perhaps this is a distinction without a difference for the CDL driver, but it is an important distinction with regard to either the Clerk's or the DHSMV's purported direction to the Court that it cannot enter a withholding adjudication order in a CDL driver case.

Finally, because neither the Clerk nor the DHSMV are parties to this case, and neither of the parties to this case raised or litigated the masking and withhold issues, the Court's explanatory portion of this opinion is merely advisory and not binding.

DONE AND ORDERED in Chambers at Sarasota, Florida, on this 6th day of
March, 2015.



PHYLLIS R. GALEN
County Court Judge

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