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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2011-2012

CR-08-1062

Edward Brewster Gomillion

v.

State of Alabama

Appeal from Calhoun Circuit Court
(CC-07-1815; CC-07-1817)

On Return to Remand

JOINER, Judge.

Edward Brewster Gomillion was convicted of third-degree burglary, § 13A-7-7, Ala. Code 1975, and first-degree burglary, § 13A-7-5, Ala. Code 1975.

On appeal, Gomillion does not challenge his convictions; therefore, a detailed recitation of the facts supporting his convictions is unnecessary. The relevant procedural facts, however, are as follows. On February 9, 2006, Gomillion appeared before the Etowah Circuit Court and entered pleas of guilty to three counts of first-degree robbery. At that proceeding, however, Gomillion was not formally adjudicated or sentenced. On August 12, 2007, Gomillion was arrested in Calhoun County for new offenses of first-degree burglary and third-degree burglary--the offenses at issue in this case. On December 12, 2008, Gomillion appeared again before the Etowah Circuit Court and entered pleas of guilty on the same charges to which he had entered pleas in February 2006 and was then sentenced on each count. On January 28, 2009, Gomillion was convicted in the Calhoun Circuit Court for the first-degree burglary and third-degree burglary offenses. On February 25, 2009, the Calhoun Circuit Court conducted a sentencing hearing in which the following occurred:

"[Prosecutor]: Your Honor, the [S]tate would offer at this time exemplified copies of the bench sheets from the Circuit Court of Etowah County wherein the defendant pleaded guilty to three counts or three different charges of robbery in the first degree on or about February the 10th, 2006[,] which

predates the date of the incidents in question for which Mr. Gomillion was convicted. So the [S]tate would offer these exemplified copies at this time.

". . . .

"[The Court]: Any matters to be presented on behalf of the defendant?

"[Gomillion's counsel]: Yes, Your Honor. . . . [T]hese two crimes for which Mr. Gomillion was convicted here occurred prior to his being sentenced in those Class A felonies, so I would argue that the Habitual Offender Statute doesn't apply

". . . .

"[The Court]: Any response by the [S]tate?

"[Prosecutor]: Yes, Your Honor, briefly. As for [Gomillion's counsel's] first argument, we can say with confidence that where the defendant enters a plea of guilty but has not been sentenced and then commits another felony a conviction exists which can then be used against him for sentence enhancement purposes and that is Congo [v.] State [,] 477 So. 2d 511 [(Ala. Crim. App. 1985)].

"Secondly, Your Honor, we have pulled the transcript of the hearing during which Mr. Gomillion entered his three pleas of guilty on the robbery first charges in Etowah County. There was an adjudication of guilt in each case."

(R. 494-500.) (Emphasis added.) The Calhoun Circuit Court then found that Gomillion had "previously been convicted of three Class A felonies, robbery in the first degree, in Etowah County" and sentenced Gomillion, as an habitual felony

offender, to 40 years' imprisonment on the third-degree-burglary conviction and to life without the possibility of parole on the first-degree-burglary conviction, the sentences to be served concurrently. (R. 501.) Additionally, the circuit court ordered Gomillion to pay a \$5,000 fine, a \$50 crime-victims-compensation assessment, and court costs on each conviction. Gomillion filed posttrial motions, which were denied, and this appeal followed.

On appeal, Gomillion contends that it is unclear whether he had been adjudicated guilty of the three counts of first-degree robbery before the commission of the burglary offenses for which he was convicted in this case.¹ Gomillion, therefore, contends that the Calhoun Circuit Court erred when it found that he had "previously been convicted of three Class A felonies, robbery in the first degree, in Etowah County" and

¹Gomillion also contends (1) that the circuit court failed to consider the voluntary sentencing guidelines ("the guidelines") when it sentenced him because, he says, the State informed the circuit court that the State had to consent to the use of the guidelines; and (2) that the circuit court's sentence to life imprisonment without the possibility of parole on the first-degree burglary conviction amounts to "cruel and excessive punishment." In light of this Court's holding, however, it is unnecessary to address these arguments.

CR-08-1062

enhanced his sentences pursuant to the Habitual Felony Offender Act ("the HFOA"). We agree.

Section 13A-5-9(c), Ala. Code 1975, a part of the HFOA, provides:

"(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he or she must be punished as follows:

"(1) On conviction of a Class C felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.

"(2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or any term of not less than 20 years.

"(3) On conviction of a Class A felony, where the defendant has no prior convictions for any Class A felony, he or she must be punished by imprisonment for life or life without the possibility of parole, in the discretion of the trial court.

"(4) On conviction of a Class A felony, where the defendant has one or more prior convictions for any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole."

(Emphasis added.)

"[T]he provisions of the [HFOA] are mandatory and not discretionary," because "the act specifies that a criminal defendant who has been previously convicted of ... three felonies 'must be punished as follows...'" and "[t]he word, 'must,' as it is used in [§] 13A-5-9, leaves no discretion with the court as to whether a repeat offender is to be punished under the statute." Watson v. State, 392 So. 2d 1274, 1276 (Ala. Crim. App. 1980) (emphasis omitted). The HFOA, however, applies only when an offender has been "previously convicted" of a felony. Thus, application of the HFOA turns on the meaning of the phrase "previously convicted."

This Court noted in Carroll v. State, 599 So. 2d 1253, 1262 (Ala. Crim. App. 1992), that "'[t]he meaning of the term "'conviction' varies according to the context in which it appears and the purpose to which it relates.'" This Court then noted:

"In connection with the [HFOA], a conviction means an adjudication of guilt. This Court has held, 'in firm adherence to Watson v. State, [392 So. 2d 1274 (Ala. Cr. App. 1980), cert. denied, 392 So. 2d 1280 (Ala. 1981)], and Burgess v. State, [412 So. 2d 298 (Ala. Cr. App. 1982)], that a previous "adjudication" of guilt of a felony constitutes a previous "conviction" of a felony whenever the term

"previous conviction" of a felony, or its equivalent, is used in the [HFOA].' Summerhill v. State, 436 So. 2d 2, 5 (Ala. Cr. App. 1983)."

Carroll, 599 So. 2d at 1266. In other words, the HFOA applies only when an offender has been previously adjudicated of a felony. See Craig v. State, 893 So. 2d 1250, 1258 (Ala. Crim. App. 2004); Morgan v. State, 733 So. 2d 940, 943 (Ala. Crim. App. 1999); Stanton v. State, 648 So. 2d 638, 647 (Ala. Crim. App. 1994); Connolly v. State, 602 So. 2d 452, 457 (Ala. Crim. App. 1992); Congo v. State, 477 So. 2d 511, 516 (Ala. Crim. App. 1985); Prock v. State, 471 So. 2d 519, 521 (Ala. Crim. App. 1985); Summerhill v. State, 436 So. 2d 2, 5 (Ala. Crim. App. 1983).

It is not always clear, however, whether an adjudication has, in fact, occurred for purposes of the HFOA. This is especially true in cases in which the circuit court fails to use formal words of adjudication.² Although no formal words of adjudication are necessary to "satisfy the requirements of the HFOA" that there be an adjudication of guilt, when a

²It is also true in cases in which the circuit court, as discussed below, fails to use formal words of adjudication and does not sentence the defendant until after he or she commits a new offense.

circuit court fails to use formal words of adjudication we must look to the record to determine whether it clearly shows that the circuit court intended to adjudicate the defendant guilty. Morgan, 733 So. 2d at 943.

In Morgan, the defendant argued that the HFOA was improperly applied in sentencing him because, he said, "the forms supporting two of the three alleged convictions ... did not include language specifically stating that he had been adjudicated guilty of these prior felonies." 733 So. 2d at 942. This Court found that, although the circuit court did not formally adjudicate the defendant on his prior offenses, the record clearly established that the defendant had pleaded guilty and that a sentence had been imposed for those prior convictions. This Court then held that "[b]ecause the record ... clearly show[ed] that the appellant was adjudicated guilty, although that exact term was not used, ... the State properly proved these prior convictions." Morgan, 733 So. 2d at 944. In other words, Morgan creates an "implied adjudication" in the HFOA context. An "implied adjudication" occurs when the record clearly shows that the defendant has entered a guilty plea and has been sentenced before he commits

a new offense. "[T]he reasoning being that a judgment of guilt is implied from the sentence." Rule 26.1, Ala. R. Crim. P., Committee Comments; see also Ex parte Eason, 929 So. 2d 992 (Ala. 2005). Morgan does not, however, hold that an "implied adjudication" occurs in cases, like here, where a defendant enters a guilty plea, is not formally adjudicated, commits a new offense, and thereafter reenters his guilty plea and is sentenced for the prior offense.

Here, the State contends that in those situations detailed above, the first guilty plea is an adjudication because, it says, a "'plea of guilty is a conviction itself'" --regardless of the second guilty plea and sentence. (State's brief, p. 22 (quoting Stanton, 648 So. 2d at 646)). Similarly, the Calhoun Circuit Court stated in its order on return to remand that a guilty plea and an adjudication are inseparable and "[t]o separate a formal guilty plea from adjudication would be nonsensical."³ (Record on Return to Remand, C. 4.) The Calhoun Circuit Court, therefore,

³In making his findings on return to remand, Judge Street reviewed transcripts and materials from the Etowah Circuit Court relating to Gomillion's offenses there, and those same transcripts and materials are before us in this appeal.

concluded that the first guilty pleas constitute prior convictions under the HFOA. To adopt the positions of the State and the Calhoun Circuit Court, however, would conflate the concepts of "guilty plea" and "adjudication" and would be contrary to the law. There are, for example, circumstances in which a circuit court is given explicit authority to accept a guilty plea but withhold adjudication. See, e.g., § 12-23A-2(7)a., b., and d., Ala. Code 1975 (defining "drug court" and the terms "pre-adjudication," "post-adjudication," and "combination program" in the Alabama Drug Offender Accountability Act).⁴ The Alabama Rules of Criminal Procedure also provide that a "guilty plea" and an "adjudication" are separate and distinct concepts. Rule 26.1(a), Ala. R. Crim. P., provides:

"(1) 'Judgment' means the adjudication of the court based upon a plea of guilty by the defendant, upon the verdict of the jury, or upon its own finding following a nonjury trial, that the defendant is guilty or not guilty.

⁴To adopt the State's argument would invalidate the legislatively authorized operating procedures of many of the drug-court programs throughout the State. Many drug-court programs, for example, are instituted post-plea but pre-adjudication; that is, the defendant enters a guilty plea, but the circuit court withholds adjudication, and the defendant then enters the program.

"(2) 'Sentence' means the pronouncement by the court of the penalty imposed upon the defendant after a judgment of guilty.

"(3) 'Determination of guilt' means a verdict of guilty by a jury, a finding of guilty by a court following a nonjury trial, or the acceptance by the court of a plea of guilty."

(Emphasis added.) Furthermore, we have noted in the context of the HFOA that a guilty plea and an adjudication are separate and distinct concepts. See Craig, 893 So. 2d 1250.

In Craig, the defendant argued that two of his prior felony convictions should not have been used to enhance his sentence because, at the time he committed the new offense, he had not yet been adjudicated guilty on the two felonies. This Court held:

"The crime in this case was committed on July 9, 2001, between the day Craig entered his plea and the day he was adjudicated guilty and sentenced. Although in most cases that come before this Court the trial court adjudicates the defendant guilty at the time he or she enters a plea of guilty, this is not always the case, and 'each case must be evaluated on its facts to determine whether an adjudication of guilt was proved.' Morgan v. State, 733 So. 2d 940, 943 n.2 (Ala. Crim. App. 1999). According to the record before us, Craig was not adjudicated guilty on the two trafficking convictions until he was sentenced for those crimes, that is, after he had already committed the crime for which he is charged here; therefore, he was not convicted of the two trafficking convictions until after he had committed the crime in this case.

CR-08-1062

Accordingly, the two trafficking convictions are not 'prior' convictions in terms of the present felony conviction and should not have been used to enhance his sentence in this case."

893 So. 2d at 1258-59 (emphasis added).

The record in this case, like the record in Craig, indicates that Gomillion was not adjudicated guilty in the Etowah Circuit Court until after he committed the burglary offenses at issue in this case.

The record establishes that, on February 9, 2006, Gomillion appeared, with counsel, in the Etowah Circuit Court, and during that proceeding the court indicated the following:

"THE COURT: All right. For today's purposes, it will be a plea only and I'll have some questions for you. If you don't understand any of the questions that I ask, we'll stop and you can consult with your lawyer."

(Record on Return to Remand, C. 13 (emphasis added).) After conducting the guilty-plea colloquy, the trial court accepted Gomillion's pleas of guilty. On August 12, 2007, Gomillion was arrested in Calhoun County for the offenses of first-degree burglary and third-degree burglary--the offenses at issue in this case.

The record further establishes that, on December 11, 2008--over two years after Gomillion first entered his pleas

CR-08-1062

of guilty in the Etowah Circuit Court, Gomillion again appeared in the Etowah Circuit Court on the same charges to which he had entered pleas of guilty in February 2006. During that proceeding the following occurred:

"[The Court:] All right. Now, I'm going to show you these forms and ask you to confirm that you've reviewed them and your signature appears on them. All right. First is the Explanation of Rights and Plea of Guilty. Do you recognize that form?

"[Gomillion:] Yes, sir.

"[The Court:] It's dated February 9, 2006. Does your signature appear on it?

"[Gomillion:] Yes, sir.

"[The Court] Did you sign it of your own free will?

"[Gomillion:] Yes, sir.

"[The Court:] Do you understand the contents of the form or is any part of it you wish to have [your counsel] explain?

"[Gomillion:] I understand.

"[The Court:] Next is the plea agreement dated February 9, 2006. Do you recognize that form?

"[Gomillion:] Yes, sir.

"[The Court:] Does your signature appear, on the form?

"[Gomillion:] Yes, sir.

"[The Court:] Did you sign it of your own free will?

"[Gomillion:] Yes, sir.

"[The Court:] Do you understand the contents of the form?

"[Gomillion:] Yes, sir.

"[The Court:] Any part of it you wish to have [your counsel] explain?

"[Gomillion:] No, sir.

"[The Court:] Do you particularly understand the section that's been filled in in paragraph three where it starts out 'prosecutor recommends a sentence'?

"[Gomillion:] Yes, sir.

"[The Court:] All right. Now, you understand that if you tell me you're guilty and I accept your plea, that I will impose a sentence upon you?

"[Gomillion:] Yes, sir.

"[The Court:] You understand that sentence will be in the range of what we discussed--

"[Gomillion:] Yes, sir.

"[The Court:]--for a class A felony?

". . . .

"[The Court:] Well, please state to the Court your plea to the crimes you're charged with in the indictments, three counts of robbery in the first degree.

"[Gomillion:] State it?

"[The Court:] Yes, Your plea?

"[Gomillion:] Guilty.

". . . .

"[The Court:] All right. Now, [Gomillion's counsel], have you had a chance to speak with Mr. Gomillion to your satisfaction on his rights in these cases?

"[Gomillion's counsel:] Yes, sir.

"[The Court:] Do you recommend the Court accept his plea?

"[Gomillion's counsel:] I do.

"[The Court:] Does the State recommend the Court accept the plea based on the conditions you discussed?

"[Prosecutor:] Yes, sir."

(Record on Return to Remand, C. 28-35.) (Emphasis added.)

After accepting Gomillion's pleas of guilty, the circuit court sentenced Gomillion.⁵

⁵The State was represented by the same assistant district attorney at both the February 9, 2006, proceeding and the December 11, 2008, proceeding. At the December 11, 2008, proceeding the assistant district attorney neither opposed the circuit court's conducting a second guilty-plea colloquy with Gomillion, nor did he inform the circuit court that Gomillion had already pleaded guilty. He also did not contend that Gomillion had already been adjudicated guilty.

Here, unlike in Morgan, we cannot imply adjudication because Gomillion was not sentenced until after he committed the burglary offenses in Calhoun County. Furthermore, the record does not clearly support the conclusion that Gomillion was adjudicated guilty on the three counts of first-degree robbery in February 2006. Rather, the record demonstrates that the Etowah Circuit Court did not intend to adjudicate Gomillion until it conducted a second guilty-plea colloquy and sentenced him, which occurred after he had committed the underlying burglary offenses in this case. If the Etowah Circuit Court had, in fact, intended to adjudicate Gomillion during the first guilty-plea colloquy, a second guilty-plea colloquy would have been unnecessary.

Because "'each case must be evaluated on its facts to determine whether an adjudication of guilt was proved,'" Craig, 893 So. 2d at 1259 (quoting Morgan, 733 So. 2d at 943 n.2), we must conclude that the record does not clearly indicate that the Etowah Circuit Court intended to adjudicate Gomillion in February 2006. We, therefore, hold that the Calhoun Circuit Court erred when it found that Gomillion's

CR-08-1062

February 2006 guilty pleas were "previous convictions" under the HFOA.

Accordingly, Gomillion's convictions for first-degree burglary and third-degree burglary are due to be affirmed; for the foregoing reasons, his sentences, however, are reversed, and the case is remanded for resentencing.

AFFIRMED AS TO CONVICTIONS; REVERSED AS TO SENTENCES; AND REMANDED WITH INSTRUCTIONS.

Windom and Burke, JJ., concur. Welch, P.J., and Kellum, J., concur in part and dissent in part, with writing by Kellum, J., joined by Welch, P.J.

CR-08-1062

KELLUM, Judge, concurring in part and dissenting in part.

Because I believe that the Etowah Circuit Court intended to adjudicate Edward Brewster Gomillion guilty of three counts of first-degree robbery following the February 2006 guilty-plea colloquy, I respectfully dissent from that part of the majority's decision reversing the sentences imposed by the Calhoun Circuit Court in the instant case.

The record indicates that the State gave notice to Gomillion of its intent to proceed under the Habitual Felony Offender Act ("HFOA") and referenced Gomillion's February 10, 2006, guilty pleas to three separate charges of robbery in the first degree in Etowah County. At the sentencing hearing in the instant case, the State submitted certified copies of Gomillion's three prior felony convictions for first-degree robbery. The case-action summaries of those convictions indicated that Gomillion pleaded guilty on February 10, 2006, while the sentencing orders in those same cases indicated that Gomillion withdrew his plea of not guilty and entered a plea of guilt in those cases on December 11, 2008. Gomillion committed the burglary offenses for which he was charged in the instant case in August 2007.

On March 3, 2010, this Court, by order, remanded this case to the Calhoun Circuit Court pursuant to Rule 29, Ala. R. Crim. P., for that court to reconcile the discrepancy in the record. The circuit court complied with our instructions and on December 30, 2010, entered an order finding that Gomillion had pleaded guilty to the three first-degree robbery convictions in February 2006; that Gomillion had three prior felony convictions at the time he committed the August 2007 burglary offenses; and that Gomillion had been properly sentenced under the HFOA. Specifically, the Calhoun Circuit Court stated in its order, in pertinent part:

"The trial court utilized exhibits presented by the State which indicated to the Court that [Gomillion's] prior three conviction in Etowah County Circuit Court for robbery in the first degree occurred before the commission of the present offenses ... for which he was tried in Calhoun County. The difficulty in resolving the date of [Gomillion's] Etowah County convictions arises from the Case Action Summary Sheet which reflects 'explanation of rights and plea of guilty filed' on February 10, 2006, with Circuit Judge Shaun Malone presiding. The Case Action Summary Sheet then reflects that the cases were continued for sentencing until a later date. A later sentencing order in these cases by Circuit Judge David A. Kimberly (who replaced Judge Malone after an election) reflects that Gomillion [pleaded] guilty to the three robbery first convictions on December 11, 2008, when Judge Kimberly then sentenced the defendant.

"This Court has received a copy of the Court proceedings conducted by Judge Malone on February 9, 2006, wherein Judge Malone accepted the guilty pleas of Edward Brewster Gomillion to the three first degree robberies. That transcript reflects that after guilty pleas were entered the matters were continued to see if Gomillion would be called upon by the State of Alabama to testify to the involvement of Gomillion's brother, Marcus Gomillion, in the same three robberies. Apparently, Edward Brewster Gomillion did not testify against his brother, but Marcus Gomillion ultimately entered guilty pleas in his robbery cases as well.

"When Judge Malone accepted [Gomillion's] guilty pleas on February 9, 2006, after a substantial colloquy in which he finds [Gomillion] to be acting knowingly, intelligently and voluntarily, the Judge does not then use formal words of adjudication of guilt.

"The issue before the Court is: 'When was Edward Brewster Gomillion convicted in the three Etowah County cases?'

". . . .

"After full review of the 2006 [transcript of the guilty plea before Judge Malone] and the 2008 [transcript of the sentencing hearing before Judge Kimberly] . . . , the Court finds that [Gomillion] entered his guilty plea and was, in effect, adjudicated guilty of three first degree robberies on February 9, 2006, before Judge Shaun Malone. Therefore, the Court's sentence of life without parole under the Habitual Felony Offender Act in CC-07-1817 was mandatory with three prior Class A convictions.

"The fact that the latter trial Judge (Kimberly), who assumed office after [Judge] Malone

left the office, went back through a complete colloquy again accepting [Gomillion's] guilty pleas and now sentencing him in December 2008 does not indicate that [Gomillion] was not adjudicated guilty in 2006. Judge Kimberly's actions are reflective of safe and conservative action by a new judge who has some records that a guilty plea has been entered but has an open case with an unsentenced defendant."

(Record on Return to Remand, C. 2-4.) (Emphasis added.)

The record on return to remand supports the Calhoun Circuit Court's conclusion that Gomillion was adjudicated guilty of three counts of first-degree robbery in February 2006 when Gomillion entered his plea of guilt as to those charges. "A 'plea of guilt is a conviction itself.'" Congo v. State, 477 So. 2d 511, 516 (Ala. Crim. App. 1985) (quoting Jones v. State, 431 So. 2d 1367, 1372 (Ala. Crim. App. 1983)). The record on return to remand indicates that the Etowah Circuit Court conducted a detailed guilty-plea colloquy in February 2006 during which Gomillion pleaded guilty to three counts of first-degree robbery. At the conclusion of the February 2006 guilty-plea colloquy, the Etowah Circuit Court stated:

"The Court concludes the defendant knowingly and voluntarily enters his plea of guilt and ascertained in open court the defendant fully understands his constitutional rights and nature of the crime charged against him in the indictment and the

consequences of this guilty plea and that the defendant knowingly and voluntarily pleads guilty and waives his constitutional rights, it is hereby ordered the defendant's plea of guilty and waiver be accepted and entered into the record."

(Record on Return to Remand, R. 17.) Although, as noted by the Calhoun Circuit Court on remand, formal words of adjudication of guilt were not used at the conclusion of the February 2006 guilty-plea colloquy, the Etowah Circuit Court accepted Gomillion's plea of guilt in the three first-degree-robbery cases and ordered his plea entered into the record.

This Court has previously addressed the requirement that a circuit court use exact terminology when determining whether there has been an adjudication of guilt in the context of the application of the HFOA. In Morgan v. State, 733 So. 2d 940 (Ala. Crim. App. 1999), Morgan was sentenced as a habitual felony offender to concurrent terms of life imprisonment for a first-degree-assault conviction and to 20 years' imprisonment for a second-degree-theft conviction. Morgan argued on appeal that he had been improperly sentenced under the HFOA because "the forms supporting two of the three alleged convictions relied upon by the State did not include language specifically stating that he had been adjudicated

CR-08-1062

guilty of [the] prior felonies." Morgan, 733 So. 2d at 942.

The case-action-summary sheets submitted by the State contained the following language:

"Comes now the defendant before this Court with his/her attorney of record. The defendant changes his/her plea of not guilty to a plea of guilty. Sentencing Order filed."

Morgan, 733 So. 2d at 942. Although the circuit court did not explicitly state in the case-action summary that Morgan had been adjudicated guilty, this Court held that Morgan had, in fact, been adjudicated guilty. In so holding, we explained:

"The requirement that there has been an 'adjudication of guilt' does not require exact and specific terminology in order to satisfy the requirements of the HFOA. Giving [the HFOA] its practical application, where the record shows that the appellant pleaded guilty in court in the presence of his attorney and a sentencing order was then filed, as acknowledged by the circuit court,² this must be construed as an adjudication of guilt in order 'to prevent absurdity, hardship, or injustice, and to favor public convenience.' Baker v. State, 483 N.E.2d 772, 774 (Ind. App. 1985).

"²These legal procedures are noted because they reflect the facts of the instant case, but each case must be evaluated on its facts to determine whether an adjudication of guilt was proved."

Morgan, 733 So. 2d at 943. See also Eason v. State, 929 So. 2d 992, 995 (Ala. 2005) (recognizing that a judgment of

conviction does not have to be phrased in formal language or include particular words of adjudication when the record shows that the intent of the trial court was to adjudicate the defendant guilty).

The exception to a circuit court's explicit adjudication of guilt in the context of the HFOA is no less applicable when a circuit court adjudicates the defendant guilty but does not sentence the defendant immediately and sentences him or her later. "Sentencing ... is not necessary to make a guilty plea, which includes an adjudication of guilt, a prior felony conviction for purposes of the HFOA." Craig v. State, 893 So. 2d 1250, 1258 (Ala. Crim. App. 2004). Therefore, the first-degree-robbery convictions for which Gomillion was adjudicated guilty in February 2006 but for which he was not sentenced until December 2008, could still be used as prior convictions to enhance Gomillion's sentence for offenses that occurred following the entry of the guilty plea. See Stanton v. State, 648 So. 2d 638 (Ala. Crim. App. 1994) (holding that the trial court could consider two convictions in applying the HFOA when sentencing the defendant despite the fact that the defendant was not sentenced for those two convictions until after the

CR-08-1062

commission of the instant offense); Summerhill v. State, 436 So. 2d 2 (Ala. Crim. App. 1983) (same).

In the instant case, the record indicates that the Etowah Circuit Court intended to adjudicate Gomillion guilty of three counts of first-degree robbery in February 2006. I am not persuaded by the conclusion reached by the majority -- that the second guilty-plea colloquy in 2008 necessarily indicated that the first guilty-plea colloquy in 2006 was not a formal adjudication of guilt. The unique facts and circumstances of this case indicate that Judge Malone conducted a detailed guilty-plea colloquy in February 2006, during which Gomillion pleaded guilty to three counts of first-degree robbery. Gomillion was not immediately sentenced because there was some question whether he would be called to testify as a State's witness against his brother. After Gomillion pleaded guilty but before he was sentenced, Judge Malone left the bench and Gomillion's case was reassigned to Judge Kimberly, who, unfamiliar with the case, conducted a guilty-plea colloquy in 2008. Thus, I do not believe that the decision by Judge Kimberly to conduct a second plea colloquy rendered the first guilty-plea colloquy a nullity.

CR-08-1062

Given the particular facts and circumstances of this case, I do not believe that the circuit court erred in applying Gomillion's three prior first-degree-robbery convictions to enhance his present sentence under the HFOA. Accordingly, I would affirm both the convictions and sentences in the instant case.

Welch, P.J., concurs.