

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CHRISTOPHER JUSTICE,)	
)	
Appellant,)	
)	
v.)	Case No. 2D19-4874
)	
STATE OF FLORIDA,)	
)	
Appellee.)	
_____)	

Opinion filed December 16, 2020.

Appeal from the Circuit Court for Manatee
County; Frederick P. Mercurio, Judge.

Howard L. Dimmig, II, Public Defender, and
Robert D. Rosen, Assistant Public Defender,
Bartow, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Johnny T. Salgado,
Assistant Attorney General, Tampa, for
Appellee.

KHOUZAM, Chief Judge.

Christopher Justice timely appeals his judgment and sentence for possession of a controlled substance. We agree with Mr. Justice that the trial court adjudicated him for the conviction based on the misapprehension that it was statutorily precluded from withholding adjudication. We accordingly reverse and remand for the trial court to determine, in the first instance, whether to withhold adjudication.

Mr. Justice was charged with battery (a first-degree misdemeanor) and possession of a controlled substance (a third-degree felony). At the hearing below, Mr. Justice's counsel announced that he would change his plea from not guilty to no contest, based on an agreement with the State. Under that agreement, the State would enter a nolle prosequi as to the battery charge, adjudication would be withheld as to the possession charge, and Mr. Justice would be sentenced to eighteen months of drug offender probation. The State confirmed the agreement on the record.

As Mr. Justice was being sworn in to give his plea, the court stated that it was statutorily prohibited from withholding adjudication due to the fact Mr. Justice had previously been either charged with, or convicted of, two other felonies. Mr. Justice's counsel responded that she believed the court had the discretion to withhold adjudication because the statutory prohibition the court had referred to in fact addressed defendants with prior withholds, not charges or convictions. Ultimately, counsel acquiesced in the trial court's ruling.

The court then struck the word "withhold" from the plea form, explaining that it was doing so "because of the law that does not allow me to withhold adjudication based on your prior criminal history." The court confirmed that "other than that, all the terms can remain the same." The court then accepted the plea as revised. The court adjudicated Mr. Justice, again explaining that it was prohibited from withholding, and sentenced him to eighteen months of drug offender probation.

Section 775.08435, Florida Statutes (2019), limits the trial court's discretion to withhold adjudication in certain felony cases under specified circumstances. As relevant here, it provides:

(1) Notwithstanding the provisions of s. 948.01, the court may not withhold adjudication of guilt upon the defendant for:

.....

(d) A third degree felony offense if the defendant has a prior withholding of adjudication for a felony offense that did not arise from the same transaction as the current felony offense unless:

1. The state attorney requests in writing that adjudication be withheld; or
2. The court makes written findings that the withholding of adjudication is reasonably justified based on circumstances or factors in accordance with those set forth in s. 921.0026.

Notwithstanding any provision of this section, no adjudication of guilt shall be withheld for a third degree felony offense if the defendant has two or more prior withholdings of adjudication for a felony that did not arise from the same transaction as the current felony offense.

(Emphasis added.) Under this plain language, the question of whether the court is prohibited from withholding adjudication hinges on the number of the defendant's prior withholdings of adjudication, not the defendant's prior charges or convictions. In order to establish the prohibition on withholding under this statute, the State is required to prove that the prior withholds occurred. See Braine v. State, 255 So. 3d 470, 471 (Fla. 2d DCA 2018) ("The State introduced sufficient evidence of [the defendant]'s two prior withholds. Thus, this is not a case where the State failed to prove that the defendant was ineligible for a withhold of adjudication.").

Here, the trial court was incorrect in its conclusion that it was statutorily precluded from withholding adjudication. The trial court mistakenly believed that the prohibition involves prior charges or convictions, whereas it instead expressly

addresses prior withholds of adjudication. The court made no suggestion that the adjudication was based on anything other than the stated, but inaccurate, prohibition on withholding. And the record contains no evidence that Mr. Justice has ever received a withhold of adjudication.

In light of the trial court's mistaken belief that it was statutorily prohibited from withholding adjudication, we reverse the judgment and remand for the trial court to determine, in the first instance and under the proper statutory considerations, whether to withhold adjudication pursuant to the plea agreement.

Reversed and remanded.

LUCAS and STARGEL, JJ., Concur.