

IN THE SUPREME COURT OF FLORIDA

MICHAEL L. HERRIN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CASE NO. 75,523

FILED

SID J. WHITE

FEB 23 1990

CLERK, SUPREME COURT

By

Deputy Clerk

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813)272-2670

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent adopts the statement of the case and facts as presented by Petitioner and published in the opinion below. (Pet.App. A1) Because the record proper below is short (consisting of **33** pages), Respondent does annex the entire record proper as Respondent's Appendix **1-33** to this brief. Resolution of the Petition is on facts; and, the record proper itself establishes the harmony between the holding below and the conflict of holding asserted. Respondent would point out that Petitioner has failed to file a Motion to Stay Mandate in the Second District. Rather, Petitioner applies to this Court for that relief. The Motion was filed here on or about February 1, 1990. Your Respondent filed an Opposition on or about February 6, 1990. The Second District issued its Mandate on or about February 6, 1990. As the Mandate has issued and Petitioner has not sought relief below, Respondent continues to oppose the Mandate of the Second District being recalled by this Court. However, on Friday, February 16, 1990, this Court rendered an Order staying the proceedings below.

SUMMARY

Petitioner has failed to establish conflict of holdings. This Court must decline to invoke its jurisdiction to review the holding below pursuant to Art. V, §3(b) (3), Fla. Const.

ISSUE

WHETHER THE OPINION BELOW ESTABLISHED
DIRECT CONFLICT OF HOLDING WITH THIS
COURT'S OPINION IN BARBERA V. STATE,
505 SO.2D 413 (FLA. 1987?)

Petitioner string cites some fourteen Florida district courts of appeal decisions in an attempt to create conflict of holdings where there is no conflict. The seminal case relied on by Petitioner and addressed by the Court below is Barbera v. State, 505 So.2d 413 (Fla. 1987). There is no conflict between Barbera and the case at bar. In the former there was proof of dysfunctional behavior as a direct result of alcohol intoxication. Although this Court quashed the opinion in State v. Barbera, 487 So.2d 1184 (Fla. 4th DCA 1986), the facts as found in the West Palm Beach trial court are not disturbed. There, James Patrick Barbera pled guilty to the attempted murder of his estranged wife. Mr. Barbera stabbed the "soon to be" former Mrs. Barbera after consuming a case of beer. His defense introduced at trial was he stabbed the former Mrs. Barbera while in an intoxicated condition. His defense counsel introduced before the trial court a psychological report establishing that Mr. Barbera had an alcoholic personality and destructive behavioral traits common to alcoholics. In fact, the diagnosis contained in the report opined that Mr. Barbera had suffered a "brief reactive psychosis" which led to the stabbing of the former Mrs. Barbera. Evidence was also offered by the Director for the Comprehensive Alcoholic Rehabilitation Program in West

Palm Beach [where Washington, D.C. Mayor Marion Barry has sought sanctuary in light of his eight-count perjury and drug indictment]. As Judge Letts pointed out, "Distilled to its essence, the defendant's argument is that he was too drunk at the time of the attack to know what he was doing, having just on the day of the stabbing received his divorce papers." This Court found such proof constituted a good and sufficient reason for a downward departure and thus quashed the opinion of Judge Letts.

In Herrin v. State, —So.2d—, 15 FLW 231, 1990 WL 3239 (Fla. 2d DCA Case No. 89-01389, Opinion filed January 19, 1990)(Pet App A-1), the majority and concurring opinion are in harmony with Barbera. Judge Lehan does specially concur and he publishes his reasons for the decision. There is a factual distinction between an alcohol/narcotic dependent personality and an individual who is under the influence of alcohol and/or narcotics. Because Herrin is resolved on its facts, your Respondent has attached the entire record proper as Appendix to this brief.(Resp.App. 1-33). There was a complete failure of proof below to have Barbera apply to Herrin's sentencing. When Petitioner purchased his "crack" at the school yard, there was no evidence that he was under the influence of any controlled and/or non-controlled substance. (Resp.App. 7). This Court has never held that obsessive-compulsive desires constitute grounds for a downward departure. Judge Lehan does distill Herrin to its essence, pointing out: "There is as much of a difference between being a drug addict and being intoxicated by drugs as there is between being an alcoholic and being intoxicated by alcohol."

(Pet.App. A9). This Court's opinion in Barbera is sensitive to free-will and self-determination. The opinion below is sensitive to free-will and self-determination. The behavior of Michael Herrin is classic. Should all substance abusers have an entitlement to a downward departure when engaged in an act of their own free will? In other words, is Petitioner to be rewarded for his failed attempt at drug rehabilitation (Resp.App. 7) by invoking the Barbera entitlement to a downward departure? For example, in the English policeman's handbook (Moriarty's Police Law, 28th Ed.) it is stated on page 5 that "When a person of his own free will does an act he is said to do it 'willfully'." See, Gardner & Manian, Criminal Law (2nd Ed., West), n.47. Chief Justice Burger, concurring in the judgment, as reported in United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 at 282 (1978) writes:

"In the history of ideas many thinkers have maintained with persuasion that there is no such thing as 'free will,' in the sense that the term implies the independent ability of an actor to regulate his or her conduct. Others have steadfastly maintained opposite, arguing the human personality is one innately free to chose among alternatives. Still a third group would deny that the very term 'freewill' has coherent meaning."

(text of 55 L.Ed.2d at 280).

Chief Justice Burger continues:

"As one philosopher has aptly stated the matter, '[t]he freedom of the will consists in the impossibility of knowing actions that still lie in the future." L. Wittgenstein, Tractatus Logico-Philosophicus Par. 5.1362 (Pears & McGuinness translation 1961).

(text of 55 L.Ed.2d at 282).

This is where Barbera and Herrin are in harmony. James Patrick Barbera, in his intoxicated fit of fatal attraction and/or passionate obsession, had no capacity to know the consequences of his stabbing the "soon to be" former Mrs. Barbera; however, Michael L. Herrin, in his sober state of desire, knew full well the consequences of purchasing crack cocaine. The jurisdiction of this crime was Polk County, Florida; not, Amersterdam, Netherlands. In Polk County; Florida; and, the United Sates of America there is a War on Drugs. Many countries have surrendered. The People of Florida have not! There is still a national declaration of war in the United States; Florida; and, Polk County!

As to the jurisdictional issue, this Court may accept review only if the decision of the district court of appeal expressly and directly conflicts with a decision of another district court of appeal or a decision of the Supreme Court. The Herrin panel was well aware of this Court's precedent in Barbera; and, the court below declined to certify that its decision is in "direct conflict" with a decision of either a sister court or this Court. See, Art. V §3(b)(4), Fla.Const.; and, State v. Perez, 449 So.2d 818 (Fla. 1984). In Jenkins v. State, 385 So.2d 1356 (Fla. 1980), the Court defined the term "expressly" by its ordinary dictionary meaning: "in an express manner." The dictionary meaning of the term "express" as set forth in the Jenkins opinion is: "to represent in words" or "to give expression to." Also see, The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988) for an analysis of discretionary jurisdiction.

Petitioner casts the opinion below as one being in conflict. It is not. The opinion merely explains and distinguishes on the facts, the ratio decidendi and/or the point in Barbera which determined the result. In Barbera there was proof established to support a downward departure; and, in Herrin there was a complete failure of proof to support a downward departure.


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CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, Respondent prays that this Court will make and render an Order declining jurisdiction in this cause.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL


WILLIAM I. MUNSEY, JR.
Assistant Attorney General
Florida Bar No. 152141
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert D. Rosen, Esq., Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, on this 20⁴ day of February, 1990.


OF COUNSEL FOR RESPONDENT