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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 79,374

TROY CLINTON BENNETT,

Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
Petitioner, :
v. : CASE NO. 79,374
TROY CLINTON BENNETT, :
Respondent. :

RESPONDENT'S ANSWER BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This brief is filed in reply to Petitioner's Brief on the Merits. Petitioner, the State of Florida, will be referred to herein as Petitioner. Respondent, Troy Clinton Bennett, will be referred to Respondent. Petitioner's Brief on the Merits will be referred to as "PB," followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following additional facts.

Following jury trials, Respondent was convicted in Case No. 89-1609 of sale of cocaine and in Case No. 89-1477 of possession of cocaine. He was sentenced in both cases as a habitual felony offender to 30 years in prison for the sale of cocaine and to a consecutive term of 10 years in prison for the possession charge (R 178-181, 212-215), for a total sanction of 40 years. The court imposed the habitual offender sanctions based on two prior convictions of sale of a substance in lieu of a controlled substance, which convictions were entered on September 26, 1986, and were charged in Circuit Court Case No. 86-1636 (R 124, 182-183).

III SUMMARY OF THE ARGUMENT

Respondent was sentenced as a habitual felony offender based on two convictions charged in the same case and entered on the same date.

Although the question certified in the instant case has been answered in this Court's decision in State v. Barnes, 17 FLW S119 (Fla. Feb. 20, 1992), the facts of the instant case were not presented in Barnes and merit further discussion. Unlike Barnes, Respondent received a habitual offender sanction based on prior felony convictions which were not only entered on the same date but which were charged in the same case and presumably arose out of the same incident. Since it is not clear that the legislature intended to habitualize a defendant for separate crimes arising from a single incident, Barnes is not controlling. The decision below, vacating Respondent's sentences and remanding for resentencing, should be affirmed.

IV ARGUMENT

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (SUPP. 1988), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

Petitioner's brief states that the question certified by the court below regarding the necessity of sequential prior convictions for habitual offender sentencing has been "settled" by this Court in its decision in State v. Barnes, 17 FLW S119 (Fla. Feb. 20, 1992) (PB 4). However, the precise facts here were not present in or specifically addressed by the majority opinion in Barnes and merit further consideration by the Court.

Respondent was sentenced to a total enhanced term of forty years in prison as a habitual felony offender based on his two prior felony convictions of "sale of substance in lieu of controlled substance" (R 124). These two prior convictions were not only imposed on the same date; the two counts arose from the same circuit court case number and presumably arose from a single incident (R 124, 182).

In his concurring opinion in Barnes, Justice Kogan agreed with the result reached by the majority only because Barnes' prior felony convictions arose from two separate incidents, but noted that a different result would be warranted if, as is the case here, the prior convictions arose from a single incident. Justice Kogan wrote:

I do not believe the legislature intended that a defendant be habitualized for separate crimes arising from a single

incident, and I do not read the majority as so holding today. Under Florida's complex and overlapping criminal statutes, virtually any felony offense can give rise to multiple charges, depending only on the prosecutor's creativity. Thus, virtually every offense could be habitualized and enhanced accordingly. If this is what the legislature intended, it simply would have enhanced the penalties for all crimes rather than resorting to a "back-door" method of increasing prison sentences.

State v. Barnes, 17 FLW at S120 (Kogan, J., specially concurring).

Because Barnes addressed only prior convictions involving separate incidents, the situation raised in Justice Kogan's concurring opinion was not resolved by the majority opinion. The facts of the instant case involve a habitualization based on two convictions arising from a single incident and charged in a single indictment or information.

The holding in Barnes should be limited to those cases which are factually similar, i.e., those cases in which the prior convictions are for offenses which occurred in separate incidents and which were charged separately, although imposed on the same date. Since the prior offenses in the instant case were not charged separately, Barnes should not control.

This Court should, therefore, affirm the decision of the court below based on the reasoning expressed in Justice Kogan's concurring opinion. Alternatively, this Court should clarify its holding in Barnes to reflect whether a habitual felony offender sentence can be imposed based on prior convictions

which were entered on the same date and which involved a single incident.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Respondent requests that this Court affirm the decision of the First District Court of Appeal vacating his sentences and remanding the cause for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by hand delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Respondent, this 6th day of April, 1992.

Paula S. Saunders
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