IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,411

STATE OF FLORIDA,

Petitioner,

vs.

MARTY DARRISAW,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the Appellee in the Fourth District Court of Appeal. The Respondent, **MARTY DARRISAW**, was the Appellant in the Fourth District Court of Appeal. The parties will be referred to as they stand before this Court.

STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and Facts set forth in its initial brief on the merits.

SUMMARY OF ARGUMENT

An escalating pattern of criminal conduct is proven under section 921.001(8), Florida Statutes, by the commission of two offenses, the current offense and the prior offense, of increasing seriousness, as construed and defined in Barfield v. State, 594 So. 2d 259 (Fla. 1992). This Court should answer the certified question in the affirmative, and reverse the Fourth District's decision, based upon the clear language of section 921.001(8), Florida Statutes, and this Court's decision and reasoning in Barfield v. State, 594 So. 2d 259 (Fla. 1992), which clearly defined, interpreted, and/or construed the "escalating pattern of criminal conduct" provision of section 921.001(8).

In its opinion below, see Darrisaw v. State, 19 Fla. L. Weekly D1870 (Fla. 4th DCA Sept. 9, 1994) (on motion for rehearing), the Fourth District basically "split" the "escalating pattern of criminal conduct" provision of section 921.001(8) in half, and held that there is a separate "pattern of criminal conduct" factor in said provision which can only be satisfied where there is (1) temporal proximity of offenses; and (2) similarity of offenses. The Fourth District's holding, however, has no foundation in the law and is in fact contrary to the clear language of both Barfield and section 921.001(8).

The Fourth District has "invented" the "similarity of offenses" factor even though this Court and the legislature, through section 921.001(8), have never recognized or suggested the existence of such a factor. The only authority apparently relied upon by the Fourth District was the existence of the

particular facts in Barfield and Taylor v. State, 601 So. 2d 540 (Fla. 1992), where the prior offenses were less serious than, but similar to, the current offenses for which the respective defendants had been sentenced. However, this Court's definition, interpretation, and/or construction of section 921.001(8) in Barfield, and reaffirmed in Taylor, contravenes the Fourth District's splitting of the "escalating pattern of criminal conduct" provision and its "invention" of the heretofore non-existent factor of similarity of offenses. Barfield and Taylor, as well as section 921.001(8) itself, make clear that the existence of a "similarity of offenses" factor within the "escalating pattern of criminal conduct" provision of section 921.001(8) was never contemplated by this Court or the legislature.

ISSUE

AN ESCALATING PATTERN OF CRIMINAL CONDUCT IS PROVEN UNDER SECTION 921.001(8), FLORIDA STATUTES, BY THE COMMISSION OF TWO OFFENSES, THE CURRENT OFFENSE AND THE PRIOR OFFENSE, OF INCREASING SERIOUSNESS, AS CONSTRUED AND DEFINED IN BARFIELD V. STATE, 594 SO. 2D 259 (FLA. 1992).

Respondent's argument is innovative, yet incorrect, and it misconstrues the clear language of both section 921.001(8), Florida Statutes, and Barfield v. State, 594 So. 2d 259 (Fla. 1992). As noted in Petitioner's initial brief, section 921.001(8) clearly provides as follows:

> A trial court may impose a sentence outside the guidelines when credible facts proven by a preponderance of the evidence demonstrate that the defendant's prior record, including offenses for which adjudication was withheld, and the current offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent crimes to violent crimes or a progression of increasingly violent crimes.

(emphasis added).

Barfield v. State, supra, clearly states as follows:

> We recognize that section 921.001(8), Florida Statutes (1987), authorizes departure

> from the sentencing guidelines "when credible facts... demonstrate that the defendant's prior record... and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct." Section 921.001(8) also provides that this escalating pattern may be evidenced by a "progression from nonviolent to violent crimes or a progression of increasingly violent crimes." However, this Court has construed this provision as not necessarily requiring a violent progression. Departure is permissible when "the defendant has shown a pattern of engaging in serious criminal activity." Williams v. State, 581 So. 2d 144, 146 (Fla. 1991). Consequently, the "escalating pattern" recognized by section 921.001(8) as a valid basis for departure can be demonstrated in three ways: 1) a progression from nonviolent to violent crimes; 2) a progression of increasingly violent crimes; or 3) a pattern of increasingly serious criminal activity. Under this third category, "increasingly serious criminal activity" is indicated when the current charge involves an increase in either the degree of crime or the sentence which may be imposed, when compared with the defendant's previous offenses.

(emphasis added). Id. at 261.

Barfield is clear. This Court specifically defined "escalating pattern of criminal conduct," and neither temporal proximity nor similarity of offenses were part of said definition. An escalating pattern of criminal conduct can be

demonstrated in three ways: (1) a progression from nonviolent to violent crimes (this Court did not state "a progression from nonviolent to **similar and temporally proximate** violent crimes"); (2) a progression of increasingly violent crimes (this Court did not state "a progression of increasingly **similar and temporally proximate** violent crimes"); and (3) a pattern of increasingly serious criminal activity (this Court did state "a pattern of increasingly serious **similar and temporally proximate** criminal activity").[1]

Petitioner notes cases from the First, Second, and Fourth District Courts of Appeal which involve the same issue as the instant case, and which correctly do not interpret Barfield as requiring a "similarity of offenses" factor or a "temporal proximity" factor to establish an escalating pattern of criminal conduct. In Mills v. State, 19 Fla. L. Weekly D1591 (Fla. 4th DCA July 27, 1994) (en banc), the defendant's current offense was second-degree murder, but his previous offenses were aggravated assault and grand theft. In Williams v. State, 602 So. 2d 562 (Fla. 2d DCA 1992), the defendant's current offenses were aggravated battery and third- degree murder, but his previous offenses were trespassing and battery, sale and delivery of cocaine and possession of cocaine, delivery and possession of marijuana, loitering and prowling, disorderly conduct, petit

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[1] Under category 3, Barfield clearly states that "increasingly serious criminal activity" is indicated when the current charge involves an increase in either the degree of crime or the sentence which may be imposed, when compared with the defendant's previous offenses (this Court did not state "when compared with the defendant's previous **similar and temporally proximate** offenses").

theft, profanity, shoplifting and petit theft, possession of stolen property, possession of marijuana, resisting an officer, profanity, careless driving, and no driver's license, and contempt of court, no driver's license, and no inspection sticker; all these prior offenses, save for one, were committed 3-16 years prior to the current offenses. According to the Second District, the chronology of the defendant's offenses "shows an escalation from misdemeanor offenses to the violent felony offenses currently before this court..." Id. at 563. In Cave v. State, 19 Fla. L. Weekly D1606 (Fla. 1st DCA July 25, 1994), the defendant's current offenses were burglary of an occupied dwelling while armed, a first-degree felony punishable by life, robbery with a deadly weapon, also a first-degree felony punishable by life, and aggravated battery, a second-degree felony, but his previous offenses were an unspecified third-degree felony and four misdemeanors.

The fallacy of Respondent's argument, and the untenable consequences of the Fourth District's opinion in Darrisaw v. State, 19 Fla. L. Weekly D1870 (Fla. 4th DCA Sept. 9, 1994) (on motion for rehearing), can best be illustrated by the following example: Defendants A and B, co-defendants, are convicted of sexual battery on a 12-year old child in violation of section 794.011(3), Florida Statutes (1993), which is a life felony. Defendant A has a prior record of three offenses: (1) unnatural and lascivious act, in violation of section 800.02, Florida Statutes (1993), which is a second-degree misdemeanor; (2) exposure of sexual organs, in violation of section 800.03,

Florida Statutes (1993), which is a first-degree misdemeanor; and (3) lewd and lascivious act in the presence of a child, in violation of section 800.04, Florida Statutes (1993), which is a second-degree felony. Defendant B also has a prior record of three offenses: (1) aggravated battery, in violation of section 784.045, Florida Statutes (1993), which is a second-degree felony; (2) arson, in violation of section 806.01, Florida Statutes (1993), which is a first-degree felony; and (3) carjacking, in violation of section 812.133, Florida Statutes (1993), which is a first-degree felony.

Under the Fourth District's analysis in Darrisaw, neither Defendant A nor Defendant B could receive an upward departure sentence if there was no temporal proximity between the prior offenses and the current offenses; furthermore, under the Fourth District's Darrisaw analysis, Defendant A could receive an upward departure sentence if his prior offenses were temporally proximate to his current offenses, because both the Fourth District's "similarity of offenses" factor (i.e. sexual offenses) and its "temporal proximity" factor would be satisfied, but Defendant B could not receive an upward departure sentence even if his prior offenses were temporally proximate to his current offense because, even though he was the more serious criminal offender, his crimes do not satisfy the Fourth District's "similarity of offenses" factor. Under the clear language of Barfield (as well as the clear language of section 921.001(8)), however, a trial court could impose upward departure sentences upon both Defendants A and B, no matter how many years separated

the prior offenses from the current offenses. Defendant B's record, although not indicating similarity in offenses, clearly evidences an escalating pattern of criminal conduct, as defined by this Court in Barfield, by falling within Barfield's category 2 (a progression of increasingly violent crimes) or category 3 (a pattern of increasingly serious criminal activity).

Petitioner thus submits that this Court's definition, interpretation, and/or construction of section 921.001(8), in Barfield, did not include either a "similarity of offenses" factor or a "temporal proximity" factor, and this Court never referred to, mentioned, suggested, or included such factors when precisely defining the term "escalating pattern of criminal conduct." Therefore, this Court should answer the certified question in the affirmative.[2]

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[2] The cases cited and relied upon by Respondent on pages 12-13 of his reply brief are inapplicable to the instant case. The State submits that in Bogan v. State, 528 So. 2d 1341 (Fla. 2d DCA 1988), the four-year time period was not the dispositive fact, the court instead stating that it did not find that the defendant's behavior presented an escalating pattern within Keys v. State, 500 So. 2d 134 (Fla. 1986). Cox v. State, 508 So. 2d 1318 (Fla. 1st DCA 1987), was not determined on any "similarity of offenses" factor. Douglas v. State, 605 So. 2d 1346 (Fla. 2d DCA 1992), involved four successive probation violations, and the court held that it was not evident from the order or from the violations themselves that the defendant's activities escalated in any degree.

CONCLUSION

WHEREFORE, based upon the foregoing points and authorities, Petitioner respectfully requests that this Court answer the certified question in the affirmative, reverse the Fourth District's ruling, and remand for the reinstatement of Respondent's original departure sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** has been furnished by U.S. Mail to: **NELSON E. BAILEY, ESQUIRE,** Counsel for Respondent, Commerce Center, Suite 300, 324 Datura Street, West Palm Beach, Florida, 33401, this 16th day of November, 1994.

William A. Spillias
Assistant Attorney General