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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT APR 12 2013 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
CERTORARI TO THE COURT OF APPEALS, 10 CA 2252; DISTRICT COURT, PUEBLO COUNTY, CASE NO. 09 CR 1433, DIVISION D	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner v. JODDY CARBAJAL, Respondent.	▲ COURT USE ONLY ▲
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DEFENDANT'S ANSWER BRIEF

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).
Choose one:
☐It contains _____ words.
■It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

❑For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.__), not to an entire document, where the issue was raised and ruled on.

■ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Signature of attorney or party

I. ISSUE PRESENTED

The issue presented by the State is the identical issue that the State presented in its Petition for Writ of Certiorari. This Court granted the Petition as to this issue as set-forth in this Court's Order. The issue presented as set-forth in the Order is as follows:

> Whether any affirmative defense to Possession of a Weapon by a Previous Offender ("POWPO") must have, as an element, a reasonable belief of a threat of imminent harm.

The Petition did not include a request to determine whether People v. Blue, 544 P.2d 385 (Colo. 1975) and People v. Ford, 568 P.2d 26 (Colo. 1977) remain good law. The State, nonetheless, mentions such an issue in a footnote in its Opening Brief as follows:

> To the extent that Ford requires the result reached by the CCA, Ford should be overruled. See generally, Friedland v. Travelers Indem. Co., 105 P.3d 639, 644 (Colo. 2005) (discussing stare decisis).

(Opening Brief, p. 21, fn. 5). This issue was neither raised nor argued in the trial court. Thus, the issue was not properly preserved for this appeal. Mr. Carbajal, given these facts, takes the position that the validity of Blue and Ford is not in question and that the State is not raising this issue.

II. ARGUMENT

A. Standard of Review

Mr. Carbajal agrees with the State's statements concerning the standard of review and preservation for appeal as to the issue presented.

B. Argument

In the present case, the Colorado Court of Appeals ("the CCA") in People v. Carbajal, ___ P.3d___, (Colo. App. No. 10 CA 2252, March 1, 2012), held that there is an affirmative defense to the charge of possession of a weapon by a previous offender and concluded that "the trial court erred in modifying the stock instruction to include a 'threat of imminent harm.' " slip. op. ¶19.

The stock jury instruction stems from the Colorado Supreme Court in Blue and Ford holding that article II, §13 of the Colorado Constitution provides for such a defense. Specifically, article II, §13 of the Colorado Constitution provides in part as follows:

> [T]he right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called into question.

The affirmative defense to a charge of POWPO in COLJI-Crim. H:51 (2008) reads as follows:

> It is an affirmative defense to the crime of possession of weapons by a previous offender that the defendant possessed the weapon for the purpose of defending his [home] [person] [property].

The State's position in the trial court was that the language--"from what he reasonably believed to be a threat of imminent harm"--must be added to the end of the stock instruction as follows:

> It is an affirmative defense to the charge of [POWPO] that the defendant possessed a weapon for the purpose of defending his home, person, or property *from what he reasonably believed to be a threat of imminent harm.*

(Opening Brief, p. 3)(emphasis in original). This is the instruction as given by the trial court. The State approves of this instruction, but the State also now takes the position that "[t]he affirmative defense to the offense of [POWPO] should be the choice-of-evils defense set out in §18-1-702, C.R.S." (Opening Brief, p. 7). The State raises a number of arguments in support of its positions.

1. The POWPO Statute Has Been Rendered Unenforceable

The State's recurring argument is that without the added language, the POWPO statute becomes unenforceable and has been rendered unenforceable. The State explains as follows:

> Yet in this case and other recent POWPO decisions, the CCA has effectively rendered POWPO unenforceable, by reading sec. 13 and passages from another of this Court's cases to mean that a felon raises an affirmative defense to POWPO by simply pointing to evidence, no matter how incredible, that he or she intended to use the charged weapon if it ever becomes necessary, at some unspecified future time, to respond to an unspecified, imagined threat of harm.

(Opening Brief, p. 5).

> In fact, the felon's statement of purpose need not describe any specific threat, actual or potential, such that his or (sic) purpose may rest on a completely imaginary or fabricated need for protection.

(Opening Brief, p. 6).

> According to the CCA, the jury must acquit if it believes, or even has a reasonable doubt whether, the defendant had a subjective feeling that the firearm involved might be needed at some undefined future time to defend home, person, or property.

(Opening Brief, pp. 12-13).

> The practical effect of the CCA's approach is that POWPO defendants will be acquitted if they can point to any evidence that they possessed the charged weapon because they might someday feel the need to use it. Rarely, if ever, will the prosecution be able to disprove such a vague proposition, particularly when many, many ordinary jurors feel the same way.

(Opening Brief, p. 13).

> In fact, under the CCA's analysis, it appears that a felon may possess a weapon even if he intends to use it primarily for nefarious, even offensive purposes, so long as the case includes a scintilla of evidence that one of his reasons is his subjective, vague fear of future necessity.

(Opening Brief, p. 14). The State sums up this argument and requests the following from this Court:

> It is now time to clarify what Ford left open, and hold that a POWPO defendant's subjective belief that he or she might someday need to use the charged weapons against an unspecified and unlikely future threat – standing alone and without objective evidence of an imminent harm – is legally insufficient to support an affirmative defense to POWPO.

(Opening Brief, p. 21).

The State's position is not a legal argument, but rather a scare tactic and is simply not true. In the present case, Mr. Carbajal testified that he possessed the weapons for protection of his home, life and property. He did not use any weapon or carry any weapon. The weapons were inside of his home and not on his person.

In the present case, Mr. Carbajal was subject to cross examination to determine his purpose for possessing the weapons and the validity of his claim. There was no evidence that he carried a weapon or used a weapon in an offensive manner, rather than for protection of his home. There was no evidence that the purpose of the

weapons was for "nefarious, even offensive purposes" or to protect an illegal drug trade or that the number or types of weapons were inconsistent with a claim of possession for protection of the home. All of those arguments, however, were available for the State to present. There is nothing in the affirmative defense that allows the claimed purpose to be "unreasonable," and there is nothing that precludes the State from arguing that any such claim is not "reasonable."

This Court should also consider the POWPO statute as it existed when found constitutional by the Blue and Ford courts. The statute as quoted in Ford was as follows:

> Section 18-12-108, C.R.S. 1973. Possession of weapons by previous offenders. Any person previously convicted of burglary, arson, or a felony involving the use of force or violence or the use of a deadly weapon, or attempt or conspiracy to commit such offenses, under the laws of the United States of America, the state of Colorado, or another state, within the ten years next preceding or within ten years of his release from incarceration, whichever is greater, who shall possess, use, or carry upon his person a firearm or other weapon mentioned in section 18-1-901(3)(h) or sections 18-12-101 to 18-12-106 commits a class 5 felony. A second or subsequent offense under this section is a class 4 felony.

Ford, 544 P.2d at 387 (citing §18-12-108, C.R.S. (1973)). This statute limited the offense to a relatively small class of crimes and for convictions that fell within a limited time-frame. (In the present case, Mr. Carbajal would not have met either

criteria and would not have been charged under this version of the statute.) Despite these restrictions, this Court still deemed further restrictions on the statute necessary to avoid the statute running afoul of article II, §13 of the Colorado Constitution. See Ford, supra; see also People v. Trujillo, 178 Colo. 147, 497 P.2d 1, 2 (1972)(the statute found Constitutional in Trujillo was further restricted to those felons convicted "within the immediately preceding ten years, who shall use or carry concealed upon his person any firearms.").

The current POWPO statute greatly expands the class of persons and class of crimes that fall within the statute's reach. Section 18-12-108, C.R.S. (2003) provides in pertinent part as follows:

> (1) A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as described in section 18-1-901 (3) (h) or any other weapon that is subject to the provisions of this article subsequent to the person's conviction for a felony, or subsequent to the person's conviction for attempt or conspiracy to commit a felony, under Colorado or any other state's law or under federal law.
>
> (2) (a) Except as otherwise provided by paragraphs (b) and (c) of this subsection (2), a person commits a class 6 felony if the person violates subsection (1) of this section.
>
> (b) A person commits a class 5 felony, as provided by section 18-12-102, if the person violates subsection (1) of this section and the weapon is a dangerous weapon, as defined in section 18-2-102 (1).

> (c) A person commits a class 5 felony if the person violates subsection (1) of this section and the person's previous conviction was for burglary, arson, or any felony involving the use of force or the use of a deadly weapon and the violation of subsection (1) of this section occurs as follows:
>
> (I) From the date of conviction to ten years after the date of conviction, if the person was not incarcerated; or
>
> (II) From the date of conviction to ten years after the date of release from confinement, if such person was incarcerated or if subject to supervision imposed as a result of conviction, ten years after the date of release from supervision.

The better question, and one Mr. Carbajal may ask of his counsel, is whether subsection (1), permitting a POWPO conviction for passive possession subsequent to any felony conviction, committed at any time in the past, is an unconstitutional expansion of the statute. It seems ironic that we should now discuss restricting the affirmative defense available on a much more expansive statute without any concern for the constitutional limits of article II, §13 of the Colorado Constitution. It is also peculiar that a person could be prosecuted for the offense of POWPO based on an underlying conviction that occurred 20 years ago, for which the records and conviction have been sealed pursuant to §24-72-308.5, C.R.S.

The State's concern that not enough ex-felons will be charged and convicted under the current POWPO statute and stock affirmative defense is unwarranted. To say

that the present statute and present jury instruction render the offense of POWPO unenforceable is in complete disregard of Supreme Court precedence, the history of the statute, the expansive sweep of the present statute and the Colorado Constitution.

2. The Affirmative Defense Affords the Same Right of Possession to Felons and Non-Felons

The State also claims that the problem with the current affirmative defense set-forth in Ford and in the jury instruction is that it affords a felon the same right of possession that the Colorado Constitution provides to non-felons. (Opening Brief pp. 5 and 15); see also (Opening Brief, p. 14)("To say that a felon may possess a weapon simply because he or she feels more secure knowing it is available for use against some unspecific, future threat of unknown seriousness *is to say that felons have the same constitutional right to bear arms as law-abiding citizens*." (emphasis in original)).

Again, this is not a legal argument but apparently a declaration that the rights afforded a felon in Blue and Ford are in direct contravention of a generalized fear of a felon possessing a weapon. Moreover, it is ludicrous to equate this affirmative defense to "the same right of possession that sec. 13 provides non-felons."

(Opening Brief, p. 5). The affirmative defense is not the same right afforded to non-felons. None of these questions that arose with Mr. Carbajal would be asked of a non-felon. In fact, if not for a prior conviction, an individual with a weapon inside his home would not be arrested for a crime, would not be taken to jail, would not be charged with a crime, would not have to remain in jail or post a bond, and would not have to defend himself at a trial. Once at trial, a felon must then present enough evidence to raise the affirmative defense. Ultimately, a jury, that will arguably know the defendant has a prior felony conviction, will have to be convinced of the legitimate and reasonable purpose for his possession of the weapon. This is not the same right afforded non-felons.

The State is complaining that the Constitution is affording "any" right to a felon to passively possess a weapon. If this right is afforded to a felon by the Colorado Constitution, then a defendant raising the right should not cause the State such concern. The State's concern in the present case is its lack of evidence to contest Mr. Carbajal's claim that he had weapons in his home for the protection of his home and family. If Mr. Carbajal were seen armed on the street or armed in a bar, then his claim of passive possession of a weapon for those purposes would not hold water. On the other hand, unless or until Blue and Ford are overturned (which

is not at issue in the present case), there is a legal right afforded to a felon under the Colorado Constitution. The Ford court stated this as follows:

> In spite of the flat prohibition contained in section 18-12-108, C.R.S., 1973, the specific limitations of Art. II, section 13 must be superimposed on the statute's otherwise valid language. In People v. Blue, supra, we recognized that the right to bear arms is not absolute; the Colorado Constitution limits that right to the defense of one's home, person, and property. Thus, statutes enacted pursuant to the state's police power may validly restrict or regulate the right to possess arms where the purpose of such possession is not a constitutionally protected one. See also United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939); State v. Bolin, 200 Kan. 369, 436 P.2d 978 (1968); State v. Krantz, 24 Wash.2d 350, 164 P.2d 453 (1945); Jackson v. State, 37 Ala.App. 335, 68 So.2d 85 (1953).
>
> The General Assembly's power to regulate in this area, however, is subject to the clear constitutional guarantee of the right to bear arms. A defendant charged under section 18-12-108 who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property thereby raises an affirmative defense.

Ford, 568 P.2d at 28.

It is clear that as long as Ford remains good law, Mr. Carbajal retains this right. It is not the same right afforded a non-felon, but it is a right afforded to Mr. Carbajal. It is with this background that the State takes the position that the affirmative defense to the offense of POWPO should be the choice-of-evils defense.

3. Choice-of-Evils

a. The Constitutional Floor of a Choice of Evils Defense Should Suffice

The State's position is that the affirmative defense of choice-of-evils is sufficient as an affirmative defense to a POWPO charge and should take the place of the affirmative defense spelled-out in Ford and that now exists in COLJI-Crim. H:51 (2008). The State argues that this defense "accounts for the limited right felons have, under both sec. 13 and POWPO, to possess weapons." (Opening Brief, p. 9).

The State cites to Blue for this proposition, but it is difficult to square this proposition with either Blue or Ford. In Blue, this Court noted the following:

> [O]ur view does not abrogate an ex-felon's right to legitimately use self-defense. The felon with a gun statute must be read in Pari materia with section 18-1-702, C.R.S. 1973, which provides in pertinent part:
>
> ***[C]onduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury.***

Blue, 544 P.2d at 391. This reading was required by the Blue Court in order to find the POWPO statute constitutional and as much is conceded by the State in its Opening Brief. See (Opening Brief, p. 28). As the State recognizes "POWPO was constitutional because it must be read in pari materia with the choice-of-evils

reading of this language in Blue is also contrary to this Court's reading of Blue as explained in Ford as follows:

> This Court has previously held that section 18-12-108, C.R.S. 1973, the "felon with a weapon" statute, does not on its face violate Art. II, Sec. 13, People v. Blue, Colo. 554 P.2d 385 (1975). However, in that case the defendants did not contend that they were armed in order to defend their persons, homes or property. Therefore the court in Blue left unanswered the question whether such a defense, if established, would render unconstitutional the statute's application in a particular case.

Ford, 568 P.2d at 28. The Ford Court did not determine that raising the defense rendered the statute unconstitutional but then made clear that the Constitutional limits provide for an affirmative defense when properly raised. Nothing in either Blue or Ford would limit the affirmative defense to a choice-of-evils defense.

b. Statutory Defense

The State, at several points throughout its brief, argues a statutory/non-statutory distinction for limiting the defense to the already available choice-of-evils. See (Opening Brief, pp. 6, 9, 19). The State further explains this argument as follows:

> Finally, while this Court has said that sec. 13 underlies an affirmative defense to POWPO, the Court has never said that such defense must be non-statutory. On the contrary, it strongly suggested long ago that the defense ought to be our statutory choice-of-evils defense, codified in §18-1-703, C.R.S. It is now time to make that suggestion explicit. Extending the choice-of-evils defense to POWPO adds the necessary threat of imminent harm to the defense, while avoiding the

> uncomfortable specter of judicial involvement in the legislature's function of crafting crimes and defenses.

(Opening Brief, pp. 6-7). This argument contradicts itself. Given that the Constitution "underlies" this defense, the constitutional language should play some role in constructing the affirmative defense. Neither the choice-of-evils defense nor the added "threat of imminent harm" language emanates from the Constitution. As explained in Ford, "the specific limitations of Art. II, section 13 must be superimposed on the statute's otherwise valid language." Ford, 568 P.2d. at 28. If it were a statutory overlay, then statutory language may also apply. Such might be the case in a situation where a weapon is actually used in self-defense. Self-defense and/or choice-of-evils may then apply, but not to the exclusion of the clear constitutional language.

The State's argument has parallels to its reliance upon Federal and out-of-state authorities in that it misses the point. The CCA recognized this problem with the State's position as follows:

> We are not persuaded by the federal and out-of-state authorities cited by the People. Those cases pertain to statutory or common law affirmative defenses based on self-defense, jurisdiction and duress, not to a defense based on a constitutional provision like Colorado's section 13.

Carbajal, slip. op at ¶18, n. 1. The only way for the State's position to survive is if this Court overturns is own precedence in Ford.

Under the State's theory, it is actually the protections of article II, §13 of the Colorado Constitution that would be rendered unenforceable, and it is this Court's pronouncements in Ford that would be ignored. In a factual situation like the present case, a choice-of-evils defense or self-defense would never apply. Passive protection of one's home would amount to a violation of POWPO. Only at the point that your front door is kicked-in (as previously happened to Mr. Carbajal) would a felon then be allowed to go-out and possess a weapon. Any possession prior to that "imminent threat" would be a felony. Such a reading makes possession on your person or use of the weapon in the street during a brawl more defensible than possession of a weapon in your own home. It is hard to imagine that protection of one's home and protection of one's family inside the home would take a backseat to a brawl in the street.

The State is asking this Court to ignore the constitutional protections and disregard Ford. The CCA addressed this same argument as follows:

> [T]he supreme court's decision in Ford has been on the books for over thirty-four years. Our supreme court is the final arbiter of our state

> constitution, and we are bound by its precedent. See Curious Theatre Co. v. Colorado Dep't of Pub. Health & Env't, 220 P.3d 544, 551 (Colo. 2009) (supreme court is final arbiter of the meaning of the Colorado Constitution); White v. Anderson, 155 Colo. 291, 308, 394 P.2d 333, 341 (1964) (same). As an intermediate court of appeals, we must therefore adhere to Ford's description of section13 as preserving the right of even previous offenders to keep arms where the defendant's "purpose in possessing weapons was the defense of his home, person, and property." Ford, 193 Colo. at 462, 568 P.2d at 28.

Carbajal, slip. op at ¶18. Ford does require the result reached by the CCA, and the validity of Ford is not at issue. Therefore, "[a] defendant charged under section 18-12-108 who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property thereby raises an affirmative defense." Ford, 568 P.2d at 28.

III. CONCLUSION

The Court of Appeals decision in the present case should be affirmed, and Mr. Carbajal should have a new trial.

Respectfully submitted this 10th day of April, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of April, 2013, a true and correct copy of the foregoing **Answer Brief** was placed in the U.S. Mail, postage prepaid and addressed as follows:

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