



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. MARCEL BARRY THOMAS  
CR-08-0051-PR**

**PARTIES AND COUNSEL:**

*Petitioner:* The State of Arizona, represented by Assistant Attorney General Diane L. Hunt.

*Respondent:* Marcel Barry Thomas, represented by Deputy Mohave County Public Defender Jill L. Evans.

**FACTS:**

The drug-related charges on which Thomas was sentenced arose from a search of his apartment that occurred on December 18, 2002. Based on the evidence found during the search and Thomas's statements to the police, a grand jury indicted Thomas on four drug-related charges in June 2004. Thomas was eventually tried and convicted on these charges in June 2005.

In January 2003, approximately one month after the police searched Thomas's apartment and found the drugs and paraphernalia for which he was subsequently indicted, Thomas committed acts that resulted in charges being brought against him for aggravated assault, unlawful imprisonment, and hindering prosecution. Thomas was tried and convicted of these crimes in July 2004, almost a year before he was tried on the drug-related charges. After Thomas was convicted of these offenses and prior to his trial on the drug-related charges, the State submitted an addendum to the indictment on the December 2002 drug-related offenses seeking to allege each of the 2004 convictions as historical prior felony convictions.

Thomas objected because the January 2003 offenses underlying the 2004 convictions occurred after the December 2002 drug-related offenses and thus could not constitute historical prior felony convictions. After a hearing, the trial court determined that to constitute a "prior historical felony conviction," a class two, three, four or five felony must normally be committed prior to the commission of the offense on which the State seeks to enhance the sentence. Nevertheless, the court also concluded that, pursuant to the statutory definition, certain felony charges, regardless of their class, could constitute historical prior felony convictions even if they were committed after the offense for which the defendant was charged.

Therefore, in this case, the trial court determined that the unlawful imprisonment and the hindering prosecution charges could not constitute historical prior felony convictions pursuant to A.R.S. § 13-604(W)(2)(b), (c) (Supp. 2007) because the offenses occurred *after* the acts on which the drug-related charges were based. But it also determined that the aggravated assault charge, even though it also occurred after the drug-related offenses, could nevertheless constitute an historical prior felony conviction pursuant to A.R.S. § 13-604(W)(2)(a)(i) because it carried with it a term of

mandatory imprisonment.<sup>1</sup> Thus, pursuant to § 13-604, the court sentenced Thomas to enhanced, presumptive concurrent sentences on all four drug counts as follows: 9.25 years for possession of dangerous drugs for sale, 4.5 years for possession of narcotics, 1.75 years for possession of drug paraphernalia, and 1.75 years for possession of marijuana.

Thomas timely appealed. In an opinion amended by order filed February 26, 2008, a majority of the court of appeals' panel affirmed Thomas's convictions but vacated his sentences and remanded for resentencing. The majority held that Thomas's prior felony conviction for aggravated assault could not be used to enhance his sentences for the present offenses under A.R.S. § 13-604(W)(2)(a)(i) because the offense underlying the prior felony conviction was committed after the present offenses. Judge Barker dissented based upon the plain language of A.R.S. § 13-604(W)(2)(a), which he believes allows a conviction to qualify as an historical prior felony conviction based solely upon the date of the conviction "if the felony conviction falls within one of six specified categories under § 13-604(W)(2)(a)."

On March 7, 2008, the State filed its petition for review in this Court.

**ISSUE:**

Did the court of appeals violate the plain language of A.R.S. § 13-604(W)(2)(a) and controlling Arizona Supreme Court authority by holding that a conviction qualifies as an historical prior felony conviction under subsection (a) only if the date that the defendant committed the prior offense precedes the date that the defendant committed the present offense?

***This Summary was prepared by the Arizona Supreme Court Staff Attorney's Office solely for educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum or other pleading filed in this case.***

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<sup>1</sup> The parties do not dispute that the conviction for aggravated assault, a dangerous offense, carried with it a term of mandatory imprisonment. See A.R.S. § 13-604(I).