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SID J. WHITE
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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 79,535

WILLIE LEE ANDERSON,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The state relies on the original statement in its initial brief.

SUMMARY OF ARGUMENT

The decision below, as highlighted by the district court's subsequent interpretation in Hodges, supra, conflicts with this Court's decision in Eutsey, supra. It also conflicts with Baxter and Bonner, supra.

ARGUMENT

ISSUE I

SHOULD THIS COURT RATIFY THE DISTRICT COURT DECISION BELOW WHICH OVERRULES EUTSEY V. STATE, 383 So.2d 219 (FLA. 1980) BY HOLDING THAT THE STATE HAS THE BURDEN OF PROOF FOR SHOWING, AND THE TRIAL COURT MUST FIND, THAT PREDICATE FELONIES NECESSARY FOR HABITUAL FELON SENTENCES HAVE NOT BEEN PARDONED OR SET ASIDE?

In Anderson v. State, 592 So.2d 1119 (Fla. 1992), the district court below originally held that a trial court was required to make explicit findings that the predicate felonies for habitual felon sentencing had not been pardoned or set aside in collateral proceedings even though these affirmative defenses had not been raised by defendant Anderson. Although the state had relied on the contrary holding of this Court in Eutsey v. State, 383 So.2d 219 (Fla. 1980), the district court neither cited nor distinguished Eutsey. Subsequently, when this error was pointed out on petition for rehearing, the court adhered to its ruling but tacitly acknowledged the conflict by certifying a question of great public importance of whether trial courts were required to find that unraised affirmative defenses were not present even though neither party had raised the question and the state had no burden of proof, pursuant to Eutsey. A subsequent panel of the Court eviscerated the certified question by holding that Anderson necessarily required the state to assume the burden of proof, thereby creating unmistakable direct and express conflict with Eutsey. Hodges v. State, 596 So.2d 481 (Fla. 1st

DCA 1992). Contrast, Eutsey, 383 So.2d at 226, pardons or set asides "are affirmative defenses available to Eutsey rather than matters required to be proved by the State" with Hodges, 596 So.2d at 482, "the burden rests on the state to present evidence sufficient to enable the trial court to make such findings." In view of this explicit conflict, it is hard to understand how Anderson can argue that there is no direct and express conflict. See, also, Baxter v. State, 17 F.L.W. D1369 (Fla. 2d DCA May 27, 1992) and Bonner v. State, 17 F.L.W. D1421 (Fla. 2d DCA June 5, 1992), where the court examined and followed Eutsey and certified conflict with Anderson/Hodges. But, see, Banes v. State, 17 F.L.W. D1217 (Fla. 4th DCA May 13, 1992), where the court, without analysis, followed Anderson and certified the Anderson question. The court did not cite or recognize Hodges.

Anderson also relies on Walker v. State, 462 So.2d 452 (Fla. 1985), Parker v. State, 546 So.2d 727 (Fla. 1989) and Rolle v. State, 586 So.2d 1293 (Fla. 4th DCA 1991). None of these three cases involve the question of whether the trial court must find, and the state must prove, that the affirmative defenses of pardon and set aside are not present. Instead, all three cases involve the unrelated question of whether the trial court must find that habitual felony sentencing "is necessary for the protection of the public from further criminal activity by the defendant." §775.084(4)(a), Fla. Stat. (1987). As the Court is aware, this requirement, which was not an affirmative defense and was contained in a different statutory subsection than that at issue here, was repealed by Chapter 88-131, section 6, Laws of Florida.

In Walker, the issue was whether a trial court's failure to find that habitual felon sentencing was necessary to protect the public could be raised on direct appeal when no abjection was entered below. (The statute at issue was from 1981, prior to the repeal above.) In Walker v. State, 442 So.2d 977 (Fla. 1st DCA 19831, the First District Court of Appeal said no. In Brown v. State, 435 So.2d 940 (Fla. 3d DCA 1983), the Third District Court of Appeal said yes. This Court said *yes*, agreeing with the Third District Court of Appeal but citing in support Weston v. State, 452 So.2d 95 (Fla. 1st DCA 1984) where, again, the issue was the necessity to protect the public finding.

Anderson's reliance on Parker is similarly misplaced. The statute at issue was again 1987 or earlier. The First District Court of Appeal below, Parker v. State, 538 So.2d 978 (Fla. 1st DCA 19891, had held that the findings could be stated at a reported hearing and need not be separately written. The district court certified direct conflict with Hoefert v. State, 509 So.2d 1090 (Fla. 2d DCA 1987) where that court held that the 1983 statute required the trial court to enter written findings that an extended term of imprisonment was necessary for the protection of the public. Relying on Eutsey, this Court held that the findings at issue, i.e., need to protect the public, could be recited into the record and did not require separate written findings. Again, Parker furnishes no support to Anderson's position. It should also be noted that Anderson's reliance on Justice England's dissenting in part opinion is similarly misplaced. Justice England simply expressed a preference for separate written rather than recited findings.

Finally, Anderson's reliance on Rolle is also misplaced. In Rolle, the Fourth District Court of Appeal neglected to cite the year of the statute but relied on this Court's decisions in Parker and Walker which, as shown above, address the repealed necessity to protect the public from the 1987 and earlier statutes. The Fourth District Court of Appeal also cited its own case, Meehan v. State, 526 So.2d 1083 (Fla. 4th DCA 1988) where the stated issue was the finding of "necessary for the protection of the public." Note that the court relied on Hopkins v. State, 463 So.2d 521 (Fla. 3d DCA 1985) where the issue was the pre-1988 perennial of whether "the extended term of imprisonment is necessary for the protection of the public."

Misuse and misapplication of selected words and sentences from cases outside their factual context and contrary to their actual meaning is a form of misquoting which usually arises from inexperience or careless and optimistic reading. It creates direct and express conflict, Gibson v. Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980). Here, the state pointed out the factual inappositeness of the cases in its petition for rehearing below and in its initial brief here. Pp. 9-10 of Initial Brief. Continued reliance on the misquotes in Anderson's answer brief without challenge, or reference, to the state's argument that they are factually inapposite is inexplicable, at best. The state notes that these factually inapposite cases were abandoned in opposing counsel's answer brief of the companion case of Hodges v. State, Case No. 78,728.

Anderson's arguments are irrelevant to the affirmative defense issue. Except for hyperbolic figures of speech, "near-hysterical," "smoke and mirrors horror story", in the final paragraph of the argument, Anderson's answer brief does not even challenge, let alone refute, the state's arguments.

CONCLUSION

The district court below should be reversed and Eutsey reaffirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Carol Ann Turner, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Tallahassee, Florida 32301, this 20th day of July, 1992.

JAMES W. ROGERS