IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,932

KENNETH RUCKER,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent will use the same references as Petitioner did in its initial brief. In addition, the record will be referred to as "R". Respondent agrees that Issue I of this case should travel with and be controlled by the Court's decisions in Hodges v. State, 17 FLW D787 (Fla. 1st March 24, 1992) and Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992), which have presented certified questions *to* this court.

II STATEMENT OF THE CASE AND FACTS

Respondent believes that additional facts are necessary for the court to consider his second issue in this cause. By complaint filed June 11, 1990, the Franklin County Sheriff's Department charged respondent with burglarizing and damaging three Department of Natural Resources' monitoring barges on May 20, 1990 (R 1-3), and May 23, 1990 (R 4-8). Eventually, the state attorney charged respondent with one count of burglary and one count of criminal mischief (R 27, R 54). The state's proof consisted primarily of two items of evidence: alleged statements and shoe print evidence.

A DNR employee testified that he went to a Franklin County monitoring barge on May 23, 1990 and found extensive damage. (R 106-107). Two DNR employees testified that respondent came into their office to apply for an oystering permit on the morning after the May 23 barge burglary and made statements to the effect of "he guessed he would have to tear up another monitoring barge tonight." (R 116-125, 127-128). The defense proved, however, that a radio broadcast concerning the burglaries had occurred that morning. (R 37, 185-187).

A shoe print analyst testified that three shoe tracks on a piece of Plexiglas from the burglary scene matched the shoe tread of size 11 1/2 pair of Adidas sneakers which had been obtained from respondent (R 170-174, 142-145). Two of the tracks on the Plexiglas did not match respondent's shoes (R 150, 170). There was also a fingerprint which did not match respondent's (R 157-159).

Respondent's key witness was his girlfriend, who testified that she with respondent on the morning after the barges were burglarized and heard the radio broadcast about the burglaries while riding around with him (R 196). She also stated that respondent made no statements implicating himself in the burglary at the DNR office (R 198). Further, she testified that a pair of respondent's sneakers were missing for a time off the back porch of his residence and later found in the backyard (R 191-194).

The state attempted to impeach the girlfriend on cross-examination with statements she had allegedly made to a detective and to the prosecutor in the case (R 202-205). The defense objected to the impeachment (R 202-203), but the court overruled the objection and allowed the prosecutor to question the witness about certain statements made to him and to a detective out of court implicating respondent (R 203-205). After the defense rested, the prosecutor did not call the detective in rebuttal and did not testify himself (R 208). Respondent was subsequently found guilty as charged (R 59-61, 243). The defense counsel immediately filed a motion for new trial based in part on the improper impeachment by the state attorney (R 247).

Sentencing then proceeded, and respondent was declared to be an habitual offender (R 254-261). The appeal to the First District Court of Appeal followed.

III SUMMARY OF ARGUMENT

The opinion of the First District Court of Appeal in Anderson v. State, does not conflict with any decision of this Court, or undermine any decision of this Court, particularly Eutsey v. State, 383 So.2d 219 (Fla. 1980). The opinion of the appellate court conforms with the legislative intent, and with judicial interpretation of the habitual felony offender statute, and should be confirmed by this Court.

In addition, respondent's conviction should be reversed because the trial court permitted the prosecutor to get away with blatantly improper illusory impeachment, implying through cross-examination questions that damaging statements had been made about respondent's involvement in the crime, with no subsequent proof of those statements.

IV ARGUMENT

ISSUE I

THIS COURT SHOULD RATIFY THE DISTRICT COURT'S DECISION BELOW (RESTATED).

The issue presented to this Court has arisen from an application below of long-standing statutory interpretation by this Court of the habitual offender statute. The decision below was based on sound judicial principles and reasoning, and should be affirmed by this Court.

The first significant case of this Court to address the fact-finding requirements of the habitual felony offender statute was Eutsey v. State, 383 So.2d 219 (Fla. 1980), which was primarily focused on the due process rights of an accused at sentencing. At the trial level in Eutsey, the judge made the findings as required by the statute. This court recited those facts, as follows:

> At the conclusion of the hearing, the trial court found, beyond and to the exclusion of every reasonable doubt, that Eutsey is the same person who was convicted of attempted robbery on January 23, 1976, and received a three-year sentence; that he is the same person who was convicted on July 20, 1978, of burglary in the present case: that each is a felony: and that the latter conviction was within five years of the earlier conviction, and commission of the latter crime was within nineteen or twenty days after Eutsey's release from prison on the first felony for which he was sentenced. The court further found that Eutsey had not received a pardon and that his convictions had not been set aside in post-conviction relief proceedings, The court went on to make extensive specific findings relative to its conclusion that an enhanced penalty was necessary for the protection of the public. The court then

sentenced Eutsey to twenty-five years in prison. (Id. at 223).

It appears that Eutsey's primary complaint about the trial court's findings was centered on the finding relative to the conclusion that an enhanced penalty was necessary for the protection of the public, a finding that is no longer required by statute. This Court recognized the rationale behind the requirement for the findings when it stated: "The findings of the trial court in the present case are more than sufficient to make Eutsey's appeal of his enhanced sentence meaningful." (Id. at 226) (e.s.)

This Court then held that the state did not have to prove Eutsey had not been pardoned, or prove that previous offenses had not been set aside in post-conviction proceedings "since these are affirmative defenses." (Id. at 226). This Court did not, however, excuse the trial court from making the findings.

The fact that the trial court is not excused from making the findings is highlighted by Justice England's concurring/dissenting opinion, in which he expressed his desire that the findings be in writing, to facilitate meaningful appeals from enhanced sentences. The Justice was concerned that "the appellate court will be put in a position of duplicating the sentencing function which is properly and exclusively that of the trial court" (Id. at 227).

The next significant decision regarding this issue is this Court's opinion in Walker v. State, 462 So.2d 452 (Fla. 1985). In Walker, the trial court did not specifically state the

findings upon which it based the decision to extend Walker's sentence, **and** Walker did not contemporaneously object. The First District Court of Appeal dismissed Walker's appeal, with leave to pursue post-conviction relief. This decision conflicted with one arising from the Third District Court of Appeal. This Court took the view of the Third District Court with respect to the importance of the statutory findings, and **held**

> . . . that the findings required by section **775.084** are critical to the statutory scheme and enable meaningful appellate review of these types of sentencing decisions. Without these findings, the review process would be difficult, if not impossible. It is clear that the legislature intended the trial court to make specific findings of fact when sentencing a defendant as a habitual offender. Given this mandatory statutory duty, the trial court's failure to make such findings is appealable regardless of whether such failure is objected to at trial. (Id. at **454)** (e.s.).

This Court did not pick and sort among the findings to establish which were vital and which were not. **Instead**, it recognized the clear language and intent of the legislature that all statutorily delineated findings were vital.

Had the legislature intended contrary to the decision of this Court, it has had ample time to adopt corrective legislation, but **has** chosen not to. And it cannot be said that the legislature has failed to act from inadvertence or careless oversight, because it has amended the findings requirement since Parker, but only by deleting the requirement that a judge find enhanced sentencing necessary far the protection of the

public.' As the state noted in its initial brief, re-enactment of a statute following judicial interpretation thereof is presumed to adopt and confirm that judicial treatment (IB 13).

The most recent decision of this Court addressing the findings requirement of the habitual felony offender statute is Parker v. State, 546 So.2d 727 (Fla. 1989). In Parker, this Court declined to rule that it would be a better practice to reduce the trial court's findings to writing, thus affirming its holding in Eutsey, noting in doing so that the habitual felony offender statute itself did not require that the findings be in writing. The Parker decision did not in any way minimize the duty of the trial court to make the findings required by statute.

District Courts of Appeal have relied on these decisions. Rolle v. State, 586 So.2d 1293 (Fla. 4th DCA 1991), was cited by the First District Court, together with Walker and Parker in the Anderson decision. The state has attempted to eliminate the authority of Rolle by stating in its brief that "Rolle, without setting out the facts of the case or even the year of the statute at issue, simply holds that the trial court failed to make unspecified statutorily required findings . . ." (IB 9) (e.s.). Appellant would respectfully point out that the facts

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'Section 6, Chapter 88-131, Laws of Florida, presently 775.084(3).

necessary for the decision in Rolle were indeed set forth, as follows:

> The record shows that at the sentencing hearing the state recited appellant's record of prior convictions. The trial court, however, made no findings as required by section 775.084(1)(a). (Id. at 1293).

And, appellant notes that the findings requirement has remained virtually unchanged from the inception of the statute. The Rolle decision is solid, based on the solid authority of this Court's earlier decisions in Parker, supra and Walker, supra.

It is clear from these decisions of this Court spanning a decade that judicial compliance with the requirements of the statute is vitally important to the offender, and to the appellate process. The Anderson decision of the First District Court of Appeal is solid law, grounded on the foundation of legislative mandate and confirming judicial interpretation.

The state's argument overlooks the rationale behind this Court's decisions, i.e., to provide meaningful appellate review, and prevent appellate courts from needless repetition of sentencing procedures. There is no conflict between Anderson and Eutsey, either in letter or spirit. This Court should confirm the decision of the First District Court of Appeal by answering the certified question in the negative.

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO IMPEACH THE CRITICAL DEFENSE WITNESS WITH STATEMENTS SEEMINGLY MADE TO HIMSELF AND ANOTHER WITNESS WITHOUT PRODUCING PROOF THAT SUCH DAMAGING AND PREJUDICIAL STATEMENTS HAD BEEN MADE.

As noted, the prosecutor, during cross-examination of appellant's critical defense witness, his girlfriend, began to ask her about certain prior inconsistent statements made to himself and to a detective (R 202). Defense counsel objected to the improper form of impeachment, but the trial court closed down that objection quickly (R 203). The prosecutor then continued the questioning, asking the girlfriend whether she had told him that on the night in question, she had dropped respondent and other passengers off in the area of the burglary (R 203). Defense counsel asked the court's permission to register a continuing objection to the prosecutor's line of inquiry, and the court granted that request (R 203).

The prosecutor then continued the questioning, clearly referring to an out of court conversation between himself and the girlfriend. He then proceeded to ask questions indicating that the girlfriend had told him that she had parked the car during the night of the burglary and that after a while, respondent and his companions had come back to the car (R 203). At some point during the line of inquiry, the prosecutor switched to questioning the girlfriend about an alleged conversation with the detective in which she had supposedly told him that she was "tired of lying" for respondent (R 204).

After the cross-examination, the prosecutor did not call the detective in rebuttal and did not step forward himself to testify about the out of court conversation with the girlfriend. Subsequently, during his closing argument, the prosecutor discredited the girlfriend's testimony, stating that she had changed her testimony and was not credible because "when she explained that story to Johnny and me, that didn't go with it," (R 216). Respondent contends in this appeal that his conviction should be reversed because of the prosecutor's completely improper impeachment tactics.

This case is almost identical to Marrero v. State, 478 So.2d 1155 (Fla. 3d DCA 1985), where the prosecutor sought to impeach a defense witness in a manslaughter case with statements allegedly made to the prosecutor a few days before the trial, There as here, the prosecutor implied during the cross-examination questions that an extensive out of court conversation had occurred, but did not put on a rebuttal case establishing that to be so. The court held:

> The law of evidence provides -- as it always has -- that a party may attack the credibility of a witness called by his adversary by introducing statements of the witness which are inconsistent with the witness' present testimony. See Section 90.608(1)(a), Florida Statutes (1983). The law of evidence does not provide -- and never has -- that a party may attack the credibility of a witness simply by insinuating through his questions to the witness that the witness in fact has made statements which are inconsistent with the witness' present testimony, and then treating the insinuating questions as if they were impeaching evidence. Because the prosecutor in the present case equated his

> insinuations with proof, and -- in our view -- to the defendant's undoubted -- argued them to the jury as if they were evidence, we reverse the defendant's convictions and remand the case for a new trial. Id. at 1156.

The Marrero case contains an extensive discussion of the improper impeachment tactics used here, stating that when as here the suggested witness is not actually called to give the impeaching testimony under oath, all that remains before the jury is the suggestion "from the question" that the statement was made. As the Marrero court noted:

> When that occurs, the conclusion that must be drawn is that the question was not asked in good faith, and that the attorney's purpose was to bring before the jury inadmissible and unsworn evidence in the form of his questions to a witness. Id. at 1157.

The Marrero court also noted that this type of error is particularly egregious when the prosecutor follows it up with closing argument suggesting that the insinuating questions had actually been produced as evidence. See Marrero at 1158. Tobey v. State, 486 So.2d 54 (Fla. 2d DCA 1986), review denied, 494 So.2d 1153 (1986), reaches the same conclusion.

Accordingly, based on the reasoning in Marrero and Tobey, supra, respondent respectfully requests this court to reverse his conviction. His critical witness was improperly impeached, the error was compounded by the prosecutor's closing argument, and reversal is the only appropriate remedy.

V. CONCLUSION

For the reason stated in Issue I, this court should vacate respondent's sentence as an habitual offender and remand this case to the trial court for a resentencing hearing. For the reasons stated in Issue 11, this court should reverse his conviction and remand the case for a new trial.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished by hand-delivery to Ms. Sara Baggett, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to respondent, Mr. Kenneth Rucker, DOC #568320, F-84, Baker Correctional Inst., Post Office Box 500, Olustee, Florida, 32072, on this 23rd day of July, 1992.

NANCY A. DANIELS