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AUG 7 1993
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. KIRK VAN BRYANT, Respondent.	CASE NO. 80,033

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and was the Appellee in the Fourth District Court of Appeal. Respondent was the defendant and appellant in the same Courts.

In the brief, the portion will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R=Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

POINT ON APPEAL

The District Court's decision should be approved. First, no conflict exists between this case and this Court's decision in Eutsey v. State, 383 So.2d 219 (Fla. 1980), as the discussion in Eutsev concerning Florida Statutes, Section 775.084 (1)(b) (3)(4) was dicta. Instead, this Court must rely on its decision in Walker v. State, 462 So.2d 452 (Fla. 1985), which interpreted Section 775.084 as requiring trial courts to make specific findings concerning the predicate facts necessary to trigger sentencing liability as a habitual violent felony offender. Neither Walker nor Section 775.084(3)(d) purport to limit this requirement to the type, number, or timing of the predicate offenses. As a result, both the Fourth DCA's decision in Van Bryant and the first DCA's holding in Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992) are correct statements of the law, do not conflict with Eutsey, Stewart v. State, 385 So.2d 1159 (Fla. 2d DCA 1980), or Myers v. State, 499 So.2d 848 (Fla. 1st DCA 1987) review denied 520 So.2d 575 (Fla. 1988), and must be approved by this Court.

ARGUMENT

POINT ON APPEAL

THE FOURTH DISTRICT COURT OF APPEALS DECISION IN VAN BRYANT V. STATE, 17 FLW D1343 (FLA., 4TH DCA, MAY 27, 1992) MUST BE APPROVED.

Petitioner first claims that Van Bryant conflicts with Eutsev v. State, 383 So.2d 219, 226 (Fla. 1980) as to Respondent's supposed burden of producing evidence that his predicate convictions, for purposes of liability for declaration as a habitual violent felony offender, See Florida Statutes, Section 775.084(1989), have resulted in executive pardons based upon innocence or have been set aside in a post-conviction relief proceeding, See Rule 3.850, Florida Rules of Criminal Procedure. However, even a cursory reading of Eutsev shows that the issue of which party bore the burden of production and/or persuasion as to these facts was not germane to Eutsey's holding, which rejected a blunderbuss assault on the 1977 version of Section 775.084 on constitutional due process grounds, 383 So.2d at 223-225. More importantly, it was clear in Eutsev that the trial judge in that case actually made the requisite factual findings on the question of pardons or post-conviction set asides of Eutsey's predicate convictions, 383 So.2d at 223. As a consequence, Eutsey's discussion of this issue was unquestionablyobiter dictum, and thus is not binding in subsequent cases, See state v. Florida State Improvement Commission, 60 So. 2d 747, 750 (Fla. 1952); See also Continental Assurance Company v. Carroll, 485 So.2d 406, 408 (Fla. 1986) (dicta cannot function as "ground-breaking precedent");

Accord Bunn v. Bunn, 311 So.2d 387 (Fla. 4th DCA 1978); Town of Lantana v. Polczvnski, 290 So.2d 566, 568 (Fla. 4th DCA 1974) affirmed 303 So.2d 326 (Fla. 1974).

It is, of course, true that Van Bryant conflicts with Stewart v. State, 385 So.2d 1159 (Fla. 2d DCA 1980) and Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1987) review denied 520 So.2d 575 (Fla. 1988) in the sense that those cases erroneously relied on Eutsey's dicta to uphold imposition of habitual felony offender sentences where a trial judge failed to find an absence of pardons or post-conviction set asides for those defendant's predicate convictions, 385 So.2d at 1160; 499 So.2d at 897-898. Nonetheless, since Eutsey provides no support for the holdings of Stewart and Mvers, no genuine conflict exists between those cases and Van Bryant, Mvers, and Stewart; instead, that conflict has been resolved by this Court's decision in Walker v. State, 462 So.2d 452 (Fla. 1985), a case involving the proper construction of Section 775.084 (3)(d), which provides as follows:

> Each of the findings required as the basis for [imposition for a habitual felony or violent felony offender] sentence shall be found by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

Walker held that the clear and unequivocal language used in Section 775.084 mandatedtrialcourts make specific findings of fact before a habitual offender sentence would be considered lawful, 462 So.2d at 454. This holding comports with the well-known rule of statutory construction that "[w]hen the language of a penal statute is clear, plain [,] and without ambiguity, effect must be given to

it accordingly," Graham v. State, 472 So.2d 464, 465 (Fla. 1985); Citizens for the State of Flarida vs. Public Service Commission, 435 So.2d 784, 786 (Fla. 1983); State v. Ross, 447 So.2d 1380, 1382-1383 (Fla. 4th DCA 1984) review denied 456 So.2d 1182 (Fla. 1984); Florida Gulf-Health Systems Aaencv, Inc. v. Commission on Ethics, 354 So.2d 932, 933 (Fla. 2d DCA 1978); Estate of Horner vs. Horner, 188 So.2d 386, 387 (Fla. 3d DCA 1966). Walker drew no distinction between the statutorily-listed factual findings, and did not relieve trial courts of the necessity of making findings on any of the facts triggering habitual offender liability, id. at 454. Therefore, since Van Bryant is faithful to the rule announced in Walker, and is not controlled by Eutsey, it must be approved.

Petitioner's fallback position on appeal to this Court is that the Eutsey dicta placing the "burden of production" on Respondent ought to be adopted as a matter of policy, placing a judicial gloss on the otherwise plain meaning of Section 775.084(3)(d). Petitioner suggests; that it would make the state's burden "easier" to require a criminal defendant to shoulder the responsibility of raising the pardon or post-conviction relief issues at sentencing, as the defendant will normally be "in the best position to know whether his prior convictions have been pardoned or set aside . . ., " Petitioner's Brief on the Merits at p. 7. Petitioner illustrates its paint by drawing a false analogy between the issue in this case and the constitutionality of placing the burden of production on a criminal defendant regarding affirmative defenses at trial, id. at pp 7-8. Needless to say, Petitioner's logic

proves too much. To take the argument to its reductio ad absurdum conclusion, if the only goal of the criminal justice system were to make the state's job easier, why not place the burden of proving factual innocence on the defendant? After all, isn't he in the best position to know whether or not he committed the charged offense? To even make that argument in a constitutional sense is to see its inappropriateness, State v. Cohen, 568 So.2d 49 (Fla. 1990) (state has burden of proving all elements of offense).

Nor is Petitioner's practicality argument sound. Petitioner laments the "unrealistic [,] . . . onerous [and] time consuming" burden of producing evidence as to pardons or post-conviction proceedings, However, it is hard to discern any consistency in Petitioner's position. On the one hand, Petitioner sub silentio acknowledges the nononerous burden of provingthe number and timing of a criminal defendant's prior convictions, even though this inevitably entails both "tracking down" the necessary records and presenting live testimony, in the form of a fingerprint expert, to identify a defendant as the same person convicted in the past. Nonetheless, Petitioner expects this Court to accept its bald assertions on "impossibility" in securing evidence on the pardon or post-conviction relief findings. Respondent would ask what precisely is the additional difficulty of which Petitioner speaks? As to pardons, since this is an executive-branch function for which records are mandated by statute, See Florida Statutes, Sections 15.01 and 940.05(1), an affidavit from the Florida Secretary of State, or testimony by that official's records custodian, would

suffice, See e.g. Parker v. State, 421 So.2d 712, 714 (Fla. 3d DCA 1982). Likewise, discovering evidence concerning any potential post-conviction relief proceedings can be obtained from the clerk of Court of the location of a defendant's prior convictions, as such proceedings represent a mere continuation of prior actions in any given case, See Rule 3.850, Florida Rules of Criminal Procedure.

What Petitioner really seeks is judicial modification of an otherwise clear statutory provision. Unfortunately for appellee, "courts cannot correct supposed errors, omissions, or defects in legislation," State ex.rel Bie v. Swope, 30 So.2d 748 (Fla. 1947); ~~see also~~ Epperson v. Dixie Insurance Company, 461 So.2d 172 (Fla. 1st DCA 1984) (Florida Courts cannot alter statute's plain meaning to avoid hardships or inequitable results). Instead, this Court's duty is to discern the legislative intent behind Section 775.084(d), Swope, supra. In Walker v. State, 462 So.2d 452, 454 (Fla. 1985), this Court found that the legislature, in enacting Section 775.084, "intended [that] trial court[s make] specific findings of fact when sentencing a defendant as a habitual offender," since "the findings . . . are critical to the statutory scheme and enable meaningful appellate review of these types of sentencing decisions," id. This desire by the legislature for strict evidentiary standards for habitual offender liability is undoubtedly a reflection of the seriousness with which it hoped the decisions would be made, given the substantially greater sanction such a sentence represents, due to the enhanced statutory maximums

allowed and loss of gain time, See Section 775.084 (4)(b)(1)-(3)(e); See also, Wesley v. State, 578 So.2d 418 (Fla. 4th DCA 1991). In any event, Petitioner is not entitled to relief from the terms of Section 778.084(3)(d) on the basis of its view of any "policy considerations," McDonald v. Ronald, 65 So.2d 12 (Fla. 1953). Instead, the Fourth DCA's decision in Van Bryant was correct, since the trial court failed to make the necessary factual finding, and since no record support concerning pardons or post-conviction set asides can exist absent the presentation of any evidence by the State, See Smith v. State, 573 So.2d 194 (Fla. 3d DCA 1991) (findings must be supported by a preponderance of the evidence).

Lastly, Petitioner's "waiver" and "harmless error" arguments fall flat. First, Petitioner incorrectly claims that Respondent's failure to contest below the existence of his prior felony convictions constitutes a waiver of any necessity to make any or all statutory findings, See Martin v. State, 592 So.2d 1219, 1220, n.1 (Fla. 1st DCA 1992). Petitioner is correct in stating that an explicit plea bargain can validly waive the necessity to make findings, See e.g. Jefferson v. State, 571 So.2d 70 (Fla. 1st DCA 1990); however, since there was no plea bargain below as to any dispositional aspect of this case, the rule in Jefferson has no application to this case whatsoever. Finally, Petitioner's harmless error analysis is foreclosed by the rationale of Walker, which noted that Section 775.084 reflected a legislative intent to mandate findings by a trial court in order to facilitate appellate

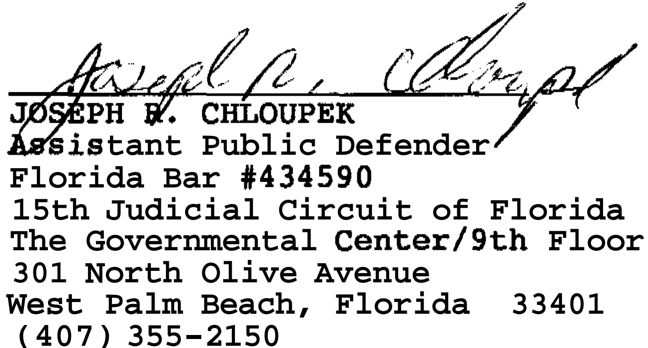
review. Failure to proffer all necessary factual findings "injuriously" affects Respondent's "substantial [right]" to appellate review of this most important decision in his life, the trial court's act of declaring him a habitual violent felony offender, and sentencing Respondent accordingly. In sum, Petitioner has shown no true conflict between this case and Eutsey, Stewart, or Mvers; instead, Walker controls, requiring this Court approve the decision of the 4th DCA in Van Bryant v. State, 17 FLW D1343 (Fla. 4th DCA, May 27, 1992).

CONCLUSION

Wherefore, based on the foregoing arguments and authorities cited therein, Respondent respectfully requests this Court approve the decision of the Fourth District Court of Appeal.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



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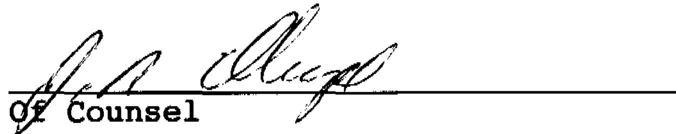
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARAH B. MAYER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 4 day of ~~July~~ August, 1992.



Of Counsel