IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,081

STATE OF FLORIDA,

Petitioner,

vs.

RONALD HERBERT HILL,

Respondent.

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PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of appeal; Respondent was the Defendant and Petitioner was the prosecution in the criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

In this brief, the symbol "R" will be used to denote the record on appeal.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was convicted by jury of attempted burglary of a dwelling (R 360, 385). At trial, the owner and an occupant of the dwelling at 801 S.W. 4th Street in Ft. Lauderdale both testified that they saw Respondent pass through a closed fence surrounding the dwelling on March 20, 1991 (R 51-52, 54-55, 94-95, 101, 103). The occupant, Maria Muns, saw Respondent trying to open a kitchen door by grabbing the door knob and lock (R 55, 60).

Prior to trial, the Petitioner filed a notice of intent to seek sentencing for Respondent as a habitual felony offender. Sentencing was conducted on August 8, 1991. Defense counsel did not object to the certified copies of Respondent's convictions (R 363, 364). In fact, the Respondent recognized that the judgments were his but explained that these were crimes that occurred while he was on drugs (R 364, 366). The trial judge noted that according ta the certified copies that the Respondent was "given the opportunity to get himself some help if he wanted it" (R 365-369). The trial judge then sentenced Respondent to six years in prison as a habitual offender (R 371, 419).

On appeal the Fourth District reversed Respondent's sentence as a habitual felony offender because the trial court failed to find that Respondent's prior conviction had not been pardoned or set aside. Hill v. State, 17 F.L.W. D1511 (Fla. 4th DCA June 17, 1991). The court rejected the State's argument that Respondent's failure to raise these arguments in the trial court

obviated the duty of the State to prove these two elements of the habitual offender statute as did the First District in Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992). The court also rejected the argument that by conceding that the convictions and judgements were his the Respondent was also conceding that the convictions had not been pardoned or set aside. The court adopted and certified as a question of great public importance the same question as was certified in Anderson, supra:

> Does the holding in Eutsey v. State, 383 So.2d 219 (Fla. 1980) that the state has no burden of proof as to whether the convictions necessary for habitual felony offender sentencing have been pardoned or set aside, in that they are "affirmative defenses available to [a defendant]," Eutsey at 226, relieve the trial court of its statutory obligation to make findings regarding those factors, if the defendant does not affirmatively raise, as a defense, that the qualifying convictions provided by the state have been pardoned or set aside?

SUMMARY OF THE ARGUMENT

This Court should answer the certified question in the affirmative and reverse the Fourth District's opinion in this case because this decision conflicts with this Court's holding in Eutsey as well as with decisions of other District Court's of appeal which hold that the defendant has the burden of showing that his prior/predicate convictions have been pardoned or set aside, as these are affirmative defenses, and the trial court's failure to make express findings about the status of a defendant's prior/predicate convictions can be harmless.

ARGUMENT

IN IMPOSING HABITUAL FELONY OFFENDER SENTENCES, THE STATE SHOULD NOT BE REQUIRED TO PROVE, NOR SHOULD THE TRIAL COURT BE REQUIRED TO FIND THAT A DEFENDANT'S PREDICATE CONVICTIONS HAVE NOT BEEN PARDONED OR SET ASIDE WHERE THE DEFENDANT FAILS TO AFFIRMATIVELY CHALLENGE THE CONVICTIONS.

The State submits that the trial court's decision below is inconsistent with both the rationale and the express holding of this Court's decision in Eutsey v. State, 383 So.2d 219 (Fla. 1980). In rejecting Eutsey's claim that there was no evidence to support the trial court's finding that his prior convictions had not been pardoned or set aside, not only did this Court clearly hold that in habitual offender sentencing proceedings the burden is on a defendant to show that his predicate felony offenses were no longer valid, this Court also determined that the full panoply of due process rights, required in the guilt phase of trial, was not required in the sentencing phase. This Court held that the State was not required to prove all the information used in the sentencing process beyond a reasonable doubt; rather, the State may rely on presentence investigation reports and other hearsay in showing that a defendant should be sentenced as a habitual offender. This Court placed the burden on the defendant to come forth with specific challenges to the accuracy of the hearsay as well as to come forward with evidence and witnesses as appropriate. This principle has become well-established in decisional law of courts of this State, including cases from the Fourth District. See: Johnson v. State, 564 So.2d 1174 (Fla. 4th DCA 1990) (where

the defendant did not dispute any of the prior convictions and his attorney admitted the convictions were shown by certified copies of prior convictions, as well as by the P.S.I., he was properly sentenced as a habitual felony offender); Robinson v. State, 551 So.2d 1240 (Fla. 1st DCA 1989) (where the State's failure to corroborate a defendant's 1986 conviction was held harmless as he did not dispute the accuracy of his 1984 conviction which satisfied the statutory requirement for habitualization); Lewis v. State, 514 So.2d 389 (Fla. 4th DCA 1987) (where the defendant failed to attack the truth of the documents relied upon to establish his prior convictions, he was properly sentenced as a habitual offender); Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1987), jurisdiction discharged, 520 So.2d 575 (Fla. 1988), (where the defendant did not dispute the truth of sentencing hearsay adduced against him, the trial court was not required to order the State to produce corroborating evidence); Wright v. State, 476 So.2d 325 (Fla. 2nd DCA 1985) (where the defendant did not dispute the truth of the listed convictions, the State was not required to come forward with corroborating evidence).

Indeed, who is in a better position than a defendant bring forth evidence on affirmative defenses? The defendant is certainly in the best position to know whether his prior convictions have been pardoned or set aside or that his crime was committed in self defense, or that he has an alibi, or that he was intoxicated or insane or coerced. Courts of this state have repeatedly held that it is proper to place the burden of proving an affirmative defense

on the defendant. See: State v. Cohen, 568 So.2d 49 (Fla. 1990); Strickland v. State, 588 So.2d 269 (Fla. 4th DCA 1991); Gonzalez v. State, 571 So.2d 1346 (Fla. 3rd DCA 1990), review denied 584 So.2d 998 (Fla. 1991). Further, the circumstances wherein affirmative defenses may be used represent the exception to the norm; for instance, most crimes are not committed in self defense, nor by insane persons, nor is the defense of alibi raised with frequency. As affirmative defenses are so rarely at issue, allowing or requiring evidence showing that no affirmative defenses are available to a defendant in each case would be irrelevant, confusing, unnecessarily time consuming, and if such evidence became a feature of a trial, possibly even erroneous. Such a practice is equivalent to requiring the State to prove a negative; as stated by the United States Supreme Court, "Proof of the nonexistence of all affirmative defenses has never been constitutionally required...". Patterson v. New York, 432 U.S. 197, 211, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281, 292 (1977).

Practically speaking, a requirement that the State prove that a defendant's predicate convictions have not been pardoned is unrealistic and unnecessary. Pardons are not only very rare, it is virtually impossible that a crime which has been pardoned could serve as a predicate for habitualization. Under the Rules for Executive Clemency, Section 5.A, a person may not even apply for a pardon unless the sentence for that conviction has been expired for 10 years. In contrast, a conviction which may be used to support a habitual offender sentence must have occurred not more than 5

years from the date of the offense for which the defendant is now being sentenced. Thus, any conviction which qualifies for use in habitual offender sentencing is not "ripe" for purposes of a pardon.

Although this "impossibility" argument does not apply with equal force to convictions which are set aside, the State submits that the defendant is still the best person upon whom to place the burden of establishing that a conviction has been set aside. Again post conviction reversal of actual convictions are rare. Particularly where a defendant has convictions from jurisdictions outside the State of Florida, the State's task in tracking down each such conviction and determining the result of every state and federal post conviction proceeding involving that conviction would be onerous, time consuming and could well result in sentencing delays. As the only convictions which are at issue are those which have been committed within 5 years of the offense for which the defendant is currently being sentenced, the burden placed on the defendant is merely that he come forward with evidence which is clearly within his knowledge and recent memory.

The Eutsey decision also reaffirms the settled presumption of validity accorded to final judgements and sentences. Stevens v. State, 409 So.2d 1051 (Fla. 1982). Recently, this Court in State v. Beach, 592 So.2d 237 (Fla. 1992), held that a defendant's affidavit, alleging that he had neither been provided nor offered counsel, was insufficient to shift the burden to the State or overcome the presumption that his prior convictions were valid and

had been entered after he had been afforded the appropriate constitutional protections. The State submits that the same principle should apply here. There is no rational reason to require the State to reprove the continued validity of prior convictions every time they are used in sentencing. To hold otherwise is to suggest that the State must also prove the current validity of every conviction appearing in a P.S.I. or on a sentencing guidelines scoresheet. Particularly where, as here, the Respondent did not contest the information contained in the certified judgments, did not contest the convictions scored on his guidelines scoresheet, and admitted his prior record (R 363-364, 366), requiring him, rather than the State, to come forward with evidence that his prior convictions have been set aside is neither illogical nor unreasonable.

Under the provisions of the habitual offender statute, the State is required to give a defendant advance notice of the State's intent to seek a habitual offender sentence. The purpose of this notice is to give the defendant an opportunity to prepare his challenge to imposition of such a sentence, either by showing that he did not commit the predicate convictions, or that they are too remote, or that they have been pardoned or set aside. By providing the defendant advance notice of the State's intention to seek a habitual offender sentence and an opportunity to prepare and present a challenge to the imposition of such a sentence, even though the burden of proof is placed on him, the State submits that a defendant's due process rights are preserved and protected.

As acknowledged by the Fourth District, its opinion in this case, that the trial court is required to make findings that a defendant's convictions had not been pardoned or set aside, conflicts with the decision of the Second District in Stewart v. State, 385 So.2d 1159 (Fla. 2nd DCA 1980). There, the trial court made findings that the defendant had previously committed a felony for which he had been released within 5 years of the current offense and that habitual offender sentencing was necessary for protection of the public. Stewart contended that the trial court erred in not finding that he had not been pardoned or his sentences set aside. Relying on Eutsey, the Second District rejected the argument:

> The evidence that Stewart had been released from prison less than five years prior to the instant conviction was unrebutted. The record would amply support findings that Stewart had not been pardoned and that his conviction had not been set aside. Since the findings required by the statute are fully supported on the face of the record, the mere failure to recite a specific finding in the sentencing order to that effect is harmless error, if error at all, and therefore, the judge properly imposed the extended sentence. Cf., McClain v. State, 356 So.2d 1256 (Fla. 2nd DCA 1978).

Stewart at 1160.

Similarly, in Myers v. State, supra, the defendant challenged the trial court's acceptance of a P.S.I., an affidavit, and copies of judgments as hearsay, thus he contended the trial court erred in failing to make a finding regarding the status of his prior convictions. The First District rejected this hearsay and absence of findings because, "as settled by Stewart v. State, [citations

omitted], the trial court committed harmless error, if any error at all, in failing to recite the specific finding that Myers had not been pardoned or received post-conviction relief from his last felony conviction since this finding was fully supported from the face of the record." Id. at 898. Likewise, in Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979) (relied on by this Court in Eutsev), the First District held:

> Turning to the facts of this case, we see that the sentencing judge found Adams was previously convicted of armed robbery and was released less than five years before committing the felonies for which he was to be sentenced, all of which was admitted or properly proved by competent evidence, including a witness who was subject to cross-examination. Adams was thus shown to be an habitual felony offender within the meaning of section 775.084(1)(a).

Id. at 58. Section 775.084(1)(a) which was referred to in Adams, included the pardon and set aside provisions at issue here.[1]

Finally, in Likely v. State, 583 So.2d 414 (Fla. 1st DCA 1991), Caristi v. State, 578 So.2d 769 (Fla. 1st DCA 1991), and Jefferson v. State, 571 So.2d 70 (Fla. 1st DCA 1990), the First District held that a defendant could waive any or all of the findings and hearings prerequisite to habitual offender sentencing

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[1] It should be noted that Eutsev was decided in 1980. Although there have been numerous changes to the statute over the years, none have changed the relevant provisions which were interpreted by Eutsev. *See:* Hodges V. State 17 F.L.W. D787 (Fla. 1st DCA March 24, 1992). Thus, the subsequent legislative amendments and reenactments are presumed to approve the holding of Eutsev. Burdick v. State, 594 So.2d 267, 271 (Fla. 1992) ("It is a well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment.").

as part of a plea bargain. The State submits that Respondent below also knowingly waived the right to challenge the absence of these habitual offender findings, by appearing in open court, accepting the validity of all hearsay information showing the predicate felony convictions, and offering no legal reason why he should not be sentenced.

Section 924.33 Florida Statutes (1970), provides that an appellate court may not reverse a judgment, even where error occurs, unless that error "injuriously affected the substantial rights of the appellant." As applied here, an appellate court may not reverse a habitual felony offender sentence unless the defendant makes a colorable showing that he has suffered an injury from the claimed error. See: Beach, supra. Respondent has never made a claim or showing that of an actual injury here, and the State suggests that he cannot in good faith allege that his predicate felonies have been pardoned or set aside. Indeed, below Respondent did not contest the information contained in the P.S.I., did not contest the convictions scored on his guidelines scoresheet, and admitted his prior record (R 363-364, 366). Thus Respondent clearly cannot show that he suffered any injury as a result of the trial court's failure to find that his prior convictions had not been pardoned or set aside and the Fourth District's decision reversing Respondent's sentence is incorrect and must be reversed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court REVERSE the decision of the Fourth District Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Petitioner" has been furnished by Courier to: JOSEPH CHLOUPEK, Assistant Public Defender, Governmental Center/9th Floor, 301 N. Olive Street, West Palm Beach, FL 33401, this 27th day of July, 1992.

Of Counsel

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1992

RONALD HERBERT MILL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-2426.

Opinion filed June 17, 1992

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County; J. Leonard Fleet, Judge.

Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterwcrth, Attorney General, Tallahassee, and Carol Cobourn Asbury, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We reverse appellant's sentence as a habitual offender because the trial court failed to make the requisite findings pursuant to section 775.084(1)(a), Florida Statutes (1989). See Rolle v. State, 586 So.2d 1293 (Fla. 4th DCA 1991); Simon v. State, 589 So.2d 381 (Fla. 4th DCA 1991); Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992). We also adopt the question certified by the First District Court of Appeal in Anderson, and certify it as one of great public importance as restated in Banes v. State, No. 91-0441 (Fla. 4th DCA May 13, 1992).

On remand, the trial court may again sentence appellant as a habitual offender provided it makes findings, supported by evidence, as required by section 775.084(1)(a). See Meehan v. State, 526 So.2d 1083 (Fla. 4th DCA 1988).

GLICKSTEIN, C.J., DELL and WARNER, JJ., concur.