IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,729

MICHAEL FULLER,

Respondent.

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Michael Fuller was charged by information filed February 20, 1990, in Okaloosa County, in no. 90-171, with grand theft, resisting arrest without violence, and possession of paraphernalia (R-1-2); February 28, no. 90-227, burglary of a structure (Center for Human Resources) (R-4), no. 90-228, burglary of a structure (Long John Silver's Restaurant) (R-5); May 15, no. 90-599, burglary of a structure (Maru Budget, Inc.) (R-6), no. 90-598, burglary of a structure, (Pruitt Sharpe Construction) (R-8), no. 90-602, possession of cocaine (R-10), no. 90-601, burglary of a structure (Publisher's Service Unlimited) (R-12), no. 90-600, burglary of a structure (Beaver's Enterprises) (R-14); and May 21, no. 90-658, burglary of a structure (Radio Shack) (R-16).

The state filed notice of intention to seek sentence enhancement in all cases (R-18-25).

June 7, appellant pleaded no contest as charged on all counts, with the understanding that the state was seeking 'habitual offender sentencing, but with the agreement the state would not recommend a sehtence greater than 15 years (R-103). Appellant signed a written acknowledgment of his rights under plea of nolo contendere (R-26-27).

July 26, Judge G. Robert Barron sentenced appellant to a total of 15 years in prison as an habitual offender (10 years in no. 90-227; concurrent 10-year sentences in nos. 90-228, 90-598, 90-599, 90-600, 90-601, 90-602, 90-658; 5 years as an habitual

offender in no. 90-171, count I, consecutive to no. 90-227, concurrent 1-year sentences, no habitual offender, in counts II and III) (R-54-99). The predicate convictions introduced by the state were in no. 85-170, burglary of a dwelling (R-28-29), nos. 85-922, 85-923, and 85-925, one count each of dealing in stolen property (R-33-34,38-39,43-44). Sentence was imposed on the four predicate offenses on January 3, 1986 (R-29,34,39,44). Defense counsel objected to the imposition of an habitual offender sentence because all of the prior convictions were on the same day (R-110). His presumptive guidelines sentence was 7 - 9 years (R-114).

Notice of appeal was timely filed August 3, 1990 (R-49). Fuller appealed on four issues. The First District Court of Appeal affirmed on the fourth issue and did not consider issues two and three because they were rendered moot when the court reversed on the first issue, quashing Fuller's sentence and holding that he did not qualify for sentencing under the Habitual Felony Offender Statue, Section 775.084, Florida Statues (1989), because the predicate prior felony convictions relied on therefore occurred on the same date. Nevertheless, the District Court certified the following question to the supreme court as one of great public importance:

> WHETHER SECTION 775.084(1)(A)1, FLORIDA STATUTES (1989), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF ANY COMBINATION OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

The Florida Supreme Court, in Florida v. Fuller, No. 77,907 (Fla. Feb. 20, 1992) quashed the district court's decision on the authority of State v. Barnes, No. 77,751 (Fla. Feb. 20, 1992) and remanded for further proceedings consistent with the decision in Barnes.

The second time around, the district court affirmed on the first issue, based upon Barnes, reaffirmed on the fourth issue and also affirmed on the third issue, although it certified a question on issue three regarding the constitutionality of the habitual offender statue, which this court answered in Merriweather v. State, No. 79,572 (Fla. Nov. 25, 1992). However, the court concluded that reversal and remand was required on the second issue of Fuller's brief, which was whether the trial court had failed to make the necessary statutory findings for habitual felony offender sentencing. The district court had previously found that the failure to make such findings constituted reversible error, even in the absence of an objection, in Anderson v. State, 529 So.2d 1119, 1120 (Fla. 1st DCA 1991), petition for review filed, No. 79,535 (Fla. Mar. 16, 1991), and Hodges v. State, 596 So.2d 481, 482 (Fla. 1st DCA 1992). Nevertheless, in accordance with Anderson and Hodges, the court certified the following question as one of great public importance:

> 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, **383 So.2d 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?

This is the question now before this court, and the State acknowledges that its answer will control the instant case.

SUMMARY OF ARGUMENT

The trial court is under no obligation to make a finding of fact on an affirmative defense that is not raised and supported with evidence. Invalidation of a judgment is an affirmative defense under the habitual offender statute. In the instant case, Fuller did not raise this defense. Therefore, the trial court had no duty to make a finding of fact unsupported by evidence.

ARGUMENT

ISSUE (CERTIFIED QUESTION)

DOES THE HOLDING IN EUTSEY V. STATE, 383 So.2 D 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?

The First District has repeatedly held that, to support a habitual felony offender sentence, the trial court must expressly find that a judgment of conviction is still valid, even if the defense does not assert that the judgment was set aside. This issue has been thoroughly briefed in two cases currently pending for review in this court, Anderson v. State, 529 So.2d 1119, (Fla. 1st DCA 1991), and Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), review pending, Case No. 79,728, and the outcome in those cases will control the outcome here.

The State will briefly focus on the rationale advanced by the First District to support its decision. The First District relied on the language of the statute and the trial court's obligation to follow the law. The State agrees that the statute authorizes the trial court to habitualize a defendant if it finds, inter alia, that the predicate judgments of conviction have not been set aside. The State also agrees that the trial court is bound to follow the law as set forth by the legislature.

The dispute is over the effect of the following holding in Eutsey v. State, 383 So.2d 219, 226 (Fla. 1980) on the trial court's statutory duty:

> We also reject [the defendant's] contention that the State failed to prove that he had not been pardoned of the previous offense or that it had not been set aside in a post-conviction proceeding since these are affirmative defenses available to Eutsey rather than matters required to be proved by the State.

Id., at 226. The First District construes Eutsey as having no effect at all, whereas the State construes it as having substantial effect.

Trial courts logically need evidence in order to make a finding of fact. Under the habitual offender statute, the State presents evidence to show that the defendant has previously committed certain types of offenses within a specified period of time. Based on this evidence, the trial court makes certain findings of fact, the correctness of which is subject to appellate review. However, when the finding of fact relates to an affirmative defense, it will not be made until the defense is raised and supported with evidence.

The First District has ruled that a certified judgment of conviction presented at sentencing is presumed to be correct. Thus, it can be presented as evidence that the judgment has not been set aside. However, presumptions are not evidence; they are simply burden-shifting devices. A presumption says that if a party proves certain things, that party will be relieved of

proving other things. Thus, for example, if the State proves that a judgment of conviction was entered, it should not have to show the continuing validity of the judgment until evidence of its invalidity is admitted. Therefore, where there is evidence in the record that a judgment of conviction has been entered against a defendant, the burden should properly be on the defendant, as an affirmative defense, to prove that his conviction has not been set aside.

Moreover, findings of fact without supporting evidence do not facilitate appellate review. An appellate court cannot determine the correctness of a factual finding unsupported by evidence. In the instant case, the state introduced certified judgments of conviction for each crime for which Fuller was being sentenced (R 108-9), and the trial court found that he qualified for habitual felony offender sentencing. Because Fuller did not raise the affirmative defense that the judgments had been set aside, any finding by the trial court on this issue would have been meaningless.

CONCLUSION

The certified question should be answered affirmatively and the First District's decision reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy *of* the foregoing merits brief has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 7th day of December, 1992.

RICHARD PARKER
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,729

MICHAEL FULLER,

Respondent.

_____/

APPENDIX

Fuller v. State, Slip Opinion (Fla. 1st DCA May 3, 1992).

State v. Fuller, Slip Opinion (Fla. Feb. 20, 1992).

Fuller v. State, Opinion OR Remand (Fla. 1st BCA October 9, 1992).

40-111364
N Closed

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHAEL FULLER,)
Appellant,)
vs.)
STATE OF FLORIDA,)
Appellee.)

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 90-2421

Opinion filed May 3, 1991.

An Appeal from the Circuit Court for Okaloosa County.
G. Robert Barron, Judge.

Barbara M. Linthicum, Public Defender; Kathleen Stover, Assistant Public Defender, for Appellant.

Robert A. Butterworth, Attorney General: and Edward C. Hill, Jr., Assistant Attorney General, for Appellee.

ERVIN, J.,

Appellant, Michael Fuller, challenges his sentences as a habitual felony offender under the 1989 statute. We agree with appellant that he was improperly sentenced as such and therefore reverse.

Appellant, as part of a plea agreement, agreed to plead no contest to certain criminal charges, including grand theft, possession of drug paraphernalia, possession of cocaine, resisting

arrest without violence, and numerous burglary counts.[1] The plea was made with the understanding that the state was seeking habitual offender sentencing, but would *not* recommend a sentence greater than fifteen years.[2] The plea was accepted and appellant was subsequently sentenced as a habitual felony offender in accordance with the plea agreement.

Appellant contends that the trial court erred by sentencing him as a habitual offender, because the predicate prior felony convictions relied on therefor occurred on the same date. Joyner v. State, 158 Fla. 806, 30 So.2d 304 (1947); Shead v. State, 367 So.2d 264 (Fla. 3d DCA 1979). The state counters, arguing that an amendment to the statute effective October 1, 1989, clearly permits a defendant to be habitualized under the statute regardless of whether the qualifying convictions were entered simultaneously. Specifically, the state argues that whereas the 1988 version of Section 775.084(1), Florida Statutes, defined a habitual felony offender as including a defendant who had "previously been convicted of two or more felonies in this state," which this court in Barnes v. State, 16 F.L.W. D562 (Fla. 1st DCA Feb. 22, 1991), interpreted as requiring sequential convictions, the 1989 definition includes a defendant who has

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[1] All crimes charged, with the exception of the resisting arrest and paraphernalia charges which are misdemeanors, were third degree felonies.

[2] Appellant's presumptive guidelines sentence was seven-to-ten years.

"previously been convicted of any combination of two or more felonies in this state or other qualified offenses[.]" (Emphasis added.) This "any combination" language, the state argues, overrules prior constructions of the statute requiring sequential convictions for habitualization purposes.

We cannot agree with the state's position. The sequential conviction requirement is one of long standing. Nothing in the 1989 amendment addresses the timing of the qualified offenses. If the legislature intended to overrule the sequential conviction requirement, it was obligated to do so in unmistakable language. Barnes, 16 F.L.W. at D563. See also State ex rel. Housing Auth. of Plant City v. Kirk, 23J. So.2d 522, 524 (Fla. 1970). Moreover, it appears that the sole intent of the 1989 amendment was to expand the definition of "qualified offenses" to include out-of-state offenses with elements and penalties similar to offenses in this state. See §§ 775.084(1)(a)1, .084(1)(c), Fla. Stat. (1989); Ch. 89-280, § 1, Laws of Fla.; Staff of Fla. H.R. Comm. on Crim. Just., S.B. 582 1989 Staff Analysis 2 (final). Absent any express language or clear legislative intent to overrule the sequential conviction requirement, we hold that habitualization must be supported by sequential convictions under the 1989 version of section 775.084. Consequently, because all of appellant's previous convictions occurred on the same day, appellant does not qualify as a habitual offender and his enhanced sentences therefor must be reversed. Nevertheless, in accordance with Razz v. State, 16 F.L.W. D852 Fla. 1st DCA Mar.

26, 1991), we certify the following question to the supreme court as one of great public importance:

> WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (1989), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF ANY COMBINATION OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSE?

Alternatively, the state argues that appellant's habitual felony offender sentences should be affirmed, because he received the sentences for which he bargained. The fact that the sentences were entered in accordance with the terms of a plea agreement does not, however, compel affirmance for the reason that once appellant's status as a habitual felony offender is vacated, the sentences for certain of the underlying predicate offenses exceed the statutory maximum. For example, the third degree felony convictions carry a statutory maximum punishment of five years,[3] yet appellant received ten-year sentences therefor. Consequently, these sentences must be reversed, even though based on a plea bargain. Bernard v. State, 571 So.2d 560, 561 (Fla. 5th DCA 1990). This is so because defendant cannot confer on a court the authority to impose an illegal sentence. Larson v. State, 572 So.2d 1368, 1371 (Fla. 1991); Williams v. State, 500 So.2d 501, 503 (Fla. 1986), clarified in Quarterman v. State, 527 So.2d 1380 (Fla. 1988); State v. Rhoden, 448 So.2d 1013, 1016

[3] § 775.082(3)(d), Fla. Stat. (1989).

(Fla. 1984); Poppell v. State, 509 So.2d 390, 390 (Fla. 1st DCA 1987).

Because we have determined that appellant cannot be sentenced as a habitual offender, the second and third issues appellant raised regarding the trial court's failure to make the requisite habitual offender findings and the constitutionality of the habitual offender statute are moot and require no discussion.

Finally, appellant complains that the trial court erroneously substituted his written plea acknowledgment for the oral sentencing colloquy required by Florida Rule of Criminal Procedure 3.172(c). Appellant concedes, however, that he was not prejudiced by the trial court's action, In the absence of an allegation of prejudice or manifest injustice to the defendant, the trial court's failure to adhere to rule 3.172 is an insufficient basis for reversal. Fitzpatrick v. State, 414 So.2d 1121 (Fla. 1st DCA 1982).

The sentences imposed are quashed and the case remanded For further proceedings consistent with this opinion. On remand, the parties will stand released from their plea bargain.

Convictions AFFIRMED; sentences VACATED and REMANDED for further proceedings.

MINER, J., CONCURS. JOANOS, J., CONCURS IN RESULTS ONLY WITHOUT WRITTEN OPINION.

Supreme Court of Florida

91-111071-TZR
N

No. 77,907

STATE OF FLORIDA, Petitioner,

vs.

MICHAEL FULLER, Respondent.

[February 20, 19921

OVERTON, J.

We quash the decision of the district court in Fuller v. State, 578 So. 2d 887 (Fla. 1st DCA 1991), on the authority of State v. Barnes, No. 77,751 (Fla. Feb. 20, 1992),[1] and remand for further proceedings consistent with our decision in Barnes.

[1] The 1989 amendment to section 775.084(1)(a)1, Florida Statutes (Supp. 1988), did not change the plain meaning of the statute.

It is so ordered.

SHAW, C.J. and McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

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

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 90-2421

(Okaloosa County)

Robert A. Butterworth, Attorney General and Charles T. Faircloth, Jr., Assistant Attorney General, Tallahassee, Florida,

for Petitioner

Nancy A. Daniels, Public Defender and Kathleen Stover, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Respondent

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

MICHAEL FULLER,)

Appellant,)

vs.)

STATE OF FLORIDA,)

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 90-2421

Opinion filed October 9, 1992.

An Appeal from the Circuit Court for Okaloosa County.
G. Robert Barron, Judge.

Barbara M. Linthicum, Public Defender; Kathleen Stover, Assistant Public Defender, for Appellant.

Robert A. Butterworth, Attorney General; and Edward C. Hill, Jr., Assistant Attorney General, for Appellee.

OPINION ON REMAND

ERVIN, J.

On appeal to this court, appellant, Michael Fuller, asserted the following four errors: (1) That the trial court erroneously sentenced him as a habitual felony offender, because the two predicate convictions had been entered on the same date; (2) that the trial court had improperly sentenced him as a habitual felony offender without making the requisite statutory findings: (3) that Florida's habitual felony offender statute, Section 775.084, Florida Statutes (1989), was violative of the constitutional

provisions regarding due process, equal protection, and separation of powers, and because it was arbitrary, vague, and standardless; and (4) that the trial court erred by failing to conduct an oral plea colloquy. In Fuller v. State, 578 So.2d 887 (Fla. 1st DCA 1991), we reversed appellant's habitual felony offender sentence for lack of sequential convictions and certified the question to the supreme court, declined to consider issues two and three on mootness grounds, and affirmed as to the fourth issue. Our supreme court has now quashed our decision on the first issue, and remanded to this court for further proceedings consistent with the decision in State v. Barnes, 595 So.2d 22 (Fla. 1992). *See* State v. Fuller, 595 So.2d 20 (Fla. 1991).

Based upon Barnes, we now affirm appellant's first issue on the basis that sequential convictions are not required for imposition of a habitual felony offender sentence under section 775.084.

We conclude, however, that reversal and remand is required as to appellant's second issue, because the trial judge failed to make the necessary statutory findings for habitual felony offender sentencing. Section 775.084(3)(d) requires that "[e]ach of the findings required as the basis for such [habitual felony offender] sentence shall be found to exist by a preponderance of the evidence." Those findings, which are set out in section 775.084(1)(a), include, among other things, that the defendant has not received a pardon or postconviction relief concerning the

predicate convictions. §§ 775.084(1)(a)(3) & (4), Fla. Stat. (1989). In the instant case, the court made no findings that the predicate convictions had not been pardoned or set aside through any postconviction relief proceeding. This court has previously found the failure to make such findings reversible error, even in the absence of an objection. Anderson v. State, 592 So.2d 1119, 1120 (Fla. 1st DCA 1991), petition for review filed, No. 79,535 (Fla. Mar. 16, 1991); Hodges v. State, 596 So.2d 481, 482 (Fla. 1st DCA 1992). Nevertheless, in accordance with Anderson and Hodges, we certify the following question as one of great public importance:

> 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, 383 So.2d 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?

Turning to appellant's third issue, we affirm because this court has previously considered the arguments raised by appellant and concluded that section 775.084 is constitutional. See Perkins v. State, 583 So.2d 1103 (Fla. 1st DCA 1991), petition for review filed, No. 78,613 (Fla. Sept. 17, 1991); Merriweather v. State, 593 So.2d 1218 (Fla. 1st DCA 1992), petition for review filed, No. 79,572 (Fla. Mar. 25, 1992); Garcia v. State, 594 So.2d 806 (Fla. 1st DCA 1992); Anderson v. State, 592 So.2d 1119

(Fla. 1st DCA 1991). And see Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), review denied, 576 So.2d 284 (Fla. 1990); Pittman v. State, 570 So.2d 1045 (Fla. 1st DCA 1990), review denied, 581 So.2d 166 (Fla. 1991). However, in accordance with Merriweather and Anderson, and because Perkins, Merriweather and Anderson are presently pending before our supreme court, we also certify the following as a question of great public importance:

> DOES SECTION 775.084, FLORIDA STATUTES (1989), DENY EITHER DUE PROCESS OR EQUAL PROTECTION OF THE LAW UNDER EITHER THE FLORIDA OR THE UNITED STATUES CONSTITUTIONS OR VIOLATE THE DOCTRINE OF SEPARATION OF POWERS, AS SET FORTH IN THE FLORIDA CONSTITUTION?

As for appellant's fourth issue, we adopt our previous ruling that in the absence of an allegation of prejudice or manifest injustice to appellant; the trial court's failure to strictly adhere to Florida Rule of Criminal Procedure 3.172(c) does not require reversal. Fitzpatrick v. State, 414 So.2d 1121 (Fla. 1982).

AFFIRMED in part, REVERSED in part, and REMANDED for resentencing.[1]

JOANOS, C.J., and MINER, J., CONCURS.

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[1]On remand, the trial court may resentence appellant as an habitual felony offender, provided the requisite statutory findings are made by the court and supported by evidence. Anderson, 592 So.2d at 1120.