IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,751

WILLIAM V. JONES,

Respondent.

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent, William V. Jones (hereinafter Jones), was convicted by a jury of attempted burglary, a lesser included offense, and possession of burglary tools. (R. 34)

Petitioner, State of Florida (hereinafter State), filed a written notice of its intent to seek habitual offender sentencing on January 4, 1991. (R. 11) At the sentencing hearing, held on September 4, 1991 (T. 115), the following colloquy took place:

> DEFENSE COUNSEL: Your Honor, I think this is another case where the court is first going to have to take evidence as to whether or not Mr. Jones meets the criteria or the threshold level for habitual offender. That's an issue in this case. After that's completed, then I would address the PSI.
>
> PROSECUTOR: Your Honor, the state has in its possession a certified letter stating the defendant has not received any pardons as to any of his convictions. [R. 35] Certified conviction from the Clerk of the Court in Case No. 89-1125-CF, introduction of contraband into a state facility wherein Mr. Jones received four and a half years. [R. 36-39]
>
> DEFENSE COUNSEL: I would like a chance to show those to Mr. Jones and see if he contests them.
>
> PROSECUTOR: (Hands documents to Mr. Fischer [defense counsel]).
>
> DEFENSE COUNSEL: Okay on these.
>
> PROSECUTOR: And the second offense was for burglary of a dwelling in Case No. 88-1903-CF wherein Mr. Jones received four years in the Department of Corrections. [R. 44-47]
>
> COURT: Is he contesting either of these prior --

DEFENSE COUNSEL: Neither of those two, Your Honor, is that correct, Mr. Jones?

DEFENDANT: Right.

COURT: All right. That's a sufficient factual basis for at least the state to request habitual offender, I notice that they have done that, that the notice is in the file and the PSI is couched in terms of a habitual offender.

(T. **117)**

Thereafter, a discussion ensued relating to the correctness Of the information contained in the presentence investigation (PSI) report and on the guidelines scoresheet. In addition to convictions in Case Nos. 88-1903-CF (burglary of a dwelling) and 89-1125-CF (introduction of contraband into state facility) (copies of judgments previously presented to court), the prosecutor pointed out that Jones had been convicted in Cas **No.** 88-1904 (burglary of a structure) [R. 40-431. The **following** colloquy then took **place:**

COURT: Let me have the other [certified copy of judgment of] convictions and submit those of record so there is no confusion. Do you want to look at this one, too? This would be the one--

PROSECUTOR: This is the other one.

DEFENSE COUNSEL: Your Honor, my only -- there is no dispute about this particular conviction. My own review of the records I have been provided of Mr. Jones, and his recollection, and this will be our dispute on the score sheet, show only one conviction for burglary of a dwelling, and there are three on the score sheet.

(T. 4-5)

Thereafter, Jones disputed a 1983 burglary conviction listed on the scoresheet. (T. 119-120) The trial court ultimately accepted the scoresheet based on the PSI Report and then added:

> The issue, though, is whether or not that is material to the disposition in the case, and if I treat him as a habitual offender it is not, because once I treat him as a habitual offender he's outside the guidelines and the guideline score sheet cannot bind the court. The statutory limitations bind the court. Do you want to be heard on that issue?

(T. 120) Defense counsel responded:

> Your Honor, my comment on that issue would be that it's clear that all of -- or that none of the convictions that Mr. Jones has involves crimes of violence, and that would be my comment on the issue of whether or not to utilize the habitual offender statute.

(T.)

After receiving a negative response to its inquiry whether Jones personally had anything to say, the trial court stated:

> Well, I find that under the record presented Mr. Jones is a habitual offender. He has the appropriate prior number of convictions. At least two of those convictions are for burglaries and the other for introduction of contraband into a state facility. Those are all felonies, they are timely in the sense of the way they've been presented and have not been excused by the document presented over the signature of the then governor of the state. That being the case, I will listen to you in allocution or mitigation of sentence.

(T. 7)

The trial court sentenced Jones to ten years' imprisonment (five years on each offense) as an habitual offender, which

sentence fell within the recommended sentencing guidelines range of 9 to 12 years' imprisonment. (T. 124-125; R. **48-54)**

Jones appealed from his judgment and sentence raising one issue--the trial court's failure to find that Jones' prior judgments of conviction had not been set aside. He relied on Anderson v. State, 592 So.2d 1119 (Fla. 1st **DCA** 1991), review pending, Case No. *79,535.* The State responded that (1) Jones waived his right to raise this issue by admitting that he qualified for habitual offender sentencing; (2) Anderson did not address the waiver issue; and (3) it intended to seek discretionary review of the question certified in Anderson, which had become final two weeks earlier. The First District Court of Appeal issued an en banc decision reversing Jones' sentence because the trial court did not state on the record that the prior convictions had not been set aside. It certified as a question of great public importance the following issue:

> 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?

(Slip Opinion, 8)

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, Jones 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.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?

The First District Court of Appeal reached two erroneous conclusions (one factual and one legal) to justify its decision to reverse Jones' sentence. Each will be addressed separately.

As to the factual conclusion, the First District stated:

> In this case there is no question that the trial court did not make the finding required by section 775.084(1)(a)4. The State's sole argument in opposition to appellant's argument is that appellant "admitted, at least by implication, that he qualified far sentencing as an habitual offender." In support of that argument the State refers to the following excerpt from the sentencing hearing:
>
> THE COURT: Is he contesting either of these prior --

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[1] The First District was incorrect when it stated that the State's sole argument was waiver. The State prepared the answer brief in the Jones case two weeks after the First District's opinion on rehearing in Anderson was released. The State argued in Jones that the issue was waived, that the waiver distinguished the case from Anderson, and that the State intended to seek review of the certified question in Anderson. The only thing the State did not do was repeat the argument rejected in Anderson.

[DEFENSE COUNSEL]: Neither of those two, Your Honor, is that correct, Mr. Jones?

[MR. JONES]: Right.

THE COURT: All right. That's a sufficient factual basis for at least the state to request habitual offender.[2]

In our opinion that is not an admission, even implicitly, that appellant qualified as an habitual offender. It is an admission that the appellant had two prior felony convictions. It was not an admission that those convictions had not been set aside. Under section 775.084(1) a) the trial court is required to make four separate findings. One of those findings is that appellant has two prior felony convict ons. Another separate finding is that those convictions have not been set aside.

(Slip Opinion, 4-5)

The primary function of defense counsel at sentencing is to make certain that his client's prior criminal record is accurately reflected in the PSI report, the guidelines scoresheet, and the notice seeking habitual offender sentencing. To fulfill his function, defense counsel must know whether the listed judgments of convictions belong to his client, whether any of them have been set aside, and whether his client has ever been pardoned for any prior offenses. If defense counsel refuses to

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[2] The First District did not mention in its opinion the following excerpt from the sentencing transcript that was also relied on by the State:

DEFENSE COUNSEL: ... [N]one of the convictions that Mr. Jones has involves crimes of violence, and that would be my comment on the issue of whether or not to utilize the habitual offender statute.

(T. 6 [also numbered 120]; page 2 of State's Answer Brief)

challenge a judgment of conviction, it is because that judgment is still valid. He will not hide mitigating evidence from the judge. Neither will he permit the judge to improperly habitualize his client merely because the burden is on the judge to make certain statutory findings, the absence of which will guarantee a reversal on appeal months or years later.

In the instant case, the defense admitted, implicitly if not explicitly, that Jones qualified for habitual sentencing. Both defense counsel and Jones stated that they did not contest the prior felony judgments, and defense counsel urged the judge not to habitualize his client because the prior felonies were nonviolent. These statements and argument would have been nonsense had the judgments in fact been set aside. By admitting his qualification for habitual sentencing, Jones waived his right to challenge the absence of statutory findings.

As to the legal conclusion supporting reversal of the sentencing order, the First District held that the trial court must expressly find that a judgment of conviction is still valid, even though the defense never asserted that the judgment was set aside. This issue has been thoroughly briefed in two cases currently pending for review in this court, Anderson 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.

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 suggests that the presumption of correctness accorded judgments of conviction can be used as evidence to support a factual finding that the judgment has not been set aside. To the contrary, presumptions are not evidence, but rather they are burden-shifting devices. A presumption says to a party that if you prove certain things, you will be relieved of proving other things. For example, if the State proves that a judgment of conviction was entered, it does not have to show the continuing validity of the judgment until evidence of its invalidity is admitted. This brings us right back to affirmative defenses.

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, Jones did not raise the affirmative defense that the judgments had been set aside, and 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 Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 7th day of December, 1992.

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v. CASE NO. 80,751

WILLIAM V. JONES,

Respondent.

APPENDIX

Jones v. State, Slip Opinion (Fla. 1st DCA October 14, 1992)

91-111805-TR

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

WILLIAM V. JONES, Appellant,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED
v.	)	CASE NO. 91-2961
STATE OF FLORIDA, Appellee.	)	

Opinion filed October 14, 1992.

An Appeal from the Circuit Court for Alachua County. Stan R. Moris, Judge.

Nancy A. Daniels, Public Defender, Tallahassee; Carl S. McGinnes, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee; Carolyn J. Mosley, Tallahassee, for appellee.,

EN BANC

JOANOS, C.J.

The appellant raises one issue in this appeal. Appellant complains that the trial court erred in imposing habitual felony offender sentences without finding, under section 775.084(1)(a)4., Florida Statutes (1989), that the predicate

convictions required for imposition of the habitual offender sentences had not been set aside in post-conviction proceedings. We reverse.

Appellant was convicted of attempted burglary of a dwelling and possession of burglary tools. The state sought to have appellant sentenced as an habitual offender. At the sentencing hearing the State presented evidence that appellant had two prior felony convictions, including the dates of those convictions. The State also presented evidence that appellant had not been pardoned for any of the previous convictions. The trial court made the following findings:

> [U]nder the record presented Mr. Jones is a habitual offender. He has the appropriate prior number of convictions. At least two of those convictions are far burglar[y], and the other for introduction of contraband into a state facility. Those are all felonies, they are timely in the sense of the way they've been presented and have not been excused by the document presented over the signature of the then governor of the state.

Appellant was adjudicated to be a habitual felony offender and sentenced to consecutive five year 'prison sentences.

Our analysis starts with the habitual felony offender statute. Section 775.084 provides in pertinent part:

> (1) As used in this act:
>
> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if it finds that:
>
> 1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses;

> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;
>
> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
>
> 4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any post-conviction proceeding.
>
> . . .
>
> (3) . . . The procedure shall be as follows:
>
> . . .
>
> (d) Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

As noted, appellant's sole point on appeal is that the trial court failed to make the finding required by section 775.084(1)(a)4., i.e., that his prior convictions had not been set aside in any post-conviction proceedings.

In our opinion, the mandate of section 775.084(1)(a) is unequivocal. The sentencing court must make a specific finding that the defendant meets each of the criteria of the statute. Walker v. State, 462 So.2d 452, 454 (Fla. 1985); Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), review pending, Case

No. 79,535. The failure to make such findings constitutes reversible error. Id. The supreme court's opinion in Walker is particularly instructive. The sole issue on appeal in that case was the trial court's alleged failure to "state, as required by statute, the findings upon which he based [the] decision to [impose an habitual offender sentence]." The supreme court rejected the State's argument that an objection was required stating:

> We hold 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.

Moreover, the supreme court specified that:

> 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.

In this case there is no question that the trial court did not make the finding required by section 775.084(1)(a)4. The State's sole argument in opposition to appellant's argument is that appellant "admitted, at least by implication, that he qualified for sentencing as an habitual offender." In support of that argument the State refers to the following excerpt from the sentencing hearing:

THE COURT: Is he contesting either of these **prior - -**

[DEFENSE COUNSEL]: Neither of those **two,** Your Honor, is that correct, Mr. Jones?

[MR. JONES]: Right.

THE COURT: All **right.** That's a sufficient factual **basis** for at least the state to request habitual offender.

In our opinion that is not an admission, even implicitly, that appellant qualified **as** an habitual **offender.** It is **an admission** that the appellant had two prior felony convictions. It **was** not an admission that those convictions had not been set aside. Under section 775.084(1)(a) the trial court is required to make four separate findings. One of those findings is that appellant has two prior felony convictions. Another separate finding is that those convictions have not been set aside.

The dissent argues that our decision in this case and Anderson, upon which appellant relies, are not a proper application of the statute in light of the supreme court's decision in Eutsey v. State, **383** So.2d 219, 226 (Fla. 1980). The dissent asserts that Eutsey obviates the need for the findings mandated by the statute unless the appellant (defendant) presents some evidence that the prior convictions have been set aside. In our opinion that is not a proper reading of Eutsey.

In Eutsey the defendant **was** tried and convicted of burglary of a dwelling. The trial court conducted a hearing to determine whether Eutsey qualified for sentencing as an habitual offender. The trial court, over Eutsey's general objection, admitted into

evidence a presentence investigation containing hearsay,[1] At the conclusion of the hearing, the trial court specifically found:

> . . . that Eutsey is the same person who was convicted of attempted robbery . . . that he is the same person who was convicted . . . of burglary in the present case; . . . that the latter conviction was within five years of the earlier conviction, . . . that Eutsey had not received a pardon and that his conviction had not been set aside in post-conviction relief proceedings.

Id. at 223. On appeal Eutsey argued, among other things, "that the evidence was insufficient to declare him an habitual offender" and that "the State failed to prove he had not been pardoned . . . or [the prior conviction] . . . had not been set aside in a post-conviction proceeding. . . . Id. at 226. The supreme court rejected the latter argument stating "these are affirmative defenses available to Eutsey, rather than matters required to be proved by the State." Id. at 226. While that language, without more, appears to support the dissent's argument, we believe that language must be read within the factual context of the case and as tempered by the supreme court's decision in Walker five years later, which decision did

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[1] Although the opinion is not explicit, the PSI apparently contained hearsay statements that Eutsey had a prior felony conviction (at the time of Eutsey's sentence only one prior felony conviction was required for habitual felony offender sentencing). In our experience this is not an uncommon means for the state to prove the predicate felony convictions. E.g., McClendon v. State, 17 F.L.W. D1852 (Fla. 1st DCA July 29, 1992).

not mention Eutsey.[2] In Eutsey the trial court made the required findings and the issue was whether there was evidence to support the findings. In this case the issue is not whether there is sufficient evidence to support a finding, had a finding been made by the trial court, but rather whether the lack of a finding altogether requires reversal. Walker and Whitfield unequivocally hold that it does. We do not have authority to rewrite the statute or overrule the supreme court. Were the issue a question of whether there was sufficient evidence to support such a finding, Eutsey might control.[3]

By our opinion in this case and Anderson we do not mean to suggest or require that the state jump through some useless or impossible hoop so that the court can make the required finding: In our opinion the State's burden of going forward with sufficient evidence to support the required finding is minimal. As the Supreme Court's opinion in Eutsey makes clear, hearsay evidence is sufficient. Although we are not actually faced with the issue in this case, since we are remanding this matter for resentencing we offer the following guidance to the trial court. We believe that proof of the prior convictions such as by

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[2] The supreme court reaffirmed Walker a year later in State v. Whitfield, 487 So.2d 1045, 1046 (Fla. 1986), stating that without the requisite statutory findings the sentence is illegal.

[3] The dissent also relies on Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986). We recede from Myers to the extent it holds that the findings set forth in section 775.084(1)(a) are not required or the failure to make them is harmless.

introduc ion of duly certified copies of the judgments is sufficient evidence to meet the state's burden and shift the burden of proof to defendant. See State v. Davis, 203 So.2d 160 (Fla. 1967). That case held that in proving possession of a weapon by a convicted felon, the state's burden with regard to the prior conviction is discharged when a record of the prior conviction is placed in evidence; thereafter the defendant must establish the invalidity of the conviction. Id. at 163. We believe that if Walker and Eutsey are construed together the same rule of law results. Once the state puts into evidence competent proof of the prior conviction, the trial court can presume it to still be valid, absent contrary evidence from the defendant, and that presumption is a sufficient basis for the trial court to find that the conviction has not been set aside. As in Anderson, we certify the following question to the supreme court 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 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?

We reverse appellant's habitual offender sentences and remand this matter to the trial court for further proceedings consistent with this opinion.

ERVIN, SMITH, SHIVERS, WIGGINTON, ZEHMER and MINER, JJ., CONCUR.
ALLEN, J., DISSENTS WITH OPINION IN WHICH BOOTH, BARFIELD, WOLF, KAHN and WEBSTER, JJ., CONCUR.

ALLEN, J., dissenting.

The appellant does not now assert that his conviction of a predicate offense was ever set aside and he did not make that assertion at the sentencing hearing in the trial court.' Although Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), supports the appellant's claim of error, I would recede from Anderson, affirm the appellant's sentences, and hold that when a defendant has not asserted the affirmative defense referred to in section 775.084(1)(a)4, a trial judge does not reversibly err by failing to make a finding of fact under that subparagraph before imposing a habitual felony offender sentence.

The supreme court in Parker v. State, 546 So.2d 727 (Fla. 1989), and Eutsey v. State, 383 So.2d 219, 226 (Fla. 1980), held' that the findings mandated by section 775.084 must be made on the record in a reported judicial proceeding. The court again stressed the importance of the findings in Walker v. State, 462 So.2d 452, 454 (Fla. 1985).

Interpreting Parker and Walker, we held in Anderson that a trial court committed reversible error when it failed to make the findings specified in 775.084(1)(a)3 and 4. On rehearing, the state argued that the trial court is obligated to make the section 775.084(1)(a)3 and 4 findings only where the defendant has affirmatively raised the argument that a predicate conviction has been pardoned or set aside. The state relied upon Eutsey, which held that the matters referenced in section 775.084(1)(a)3 and 4 are affirmative defenses to be raised by the defendant. We

rejected the state's rehearing motion primarily because the statute appears to require the referenced findings in mandatory terms.

In my view, Anderson is not a proper application of the statute in light of the supreme court's Eutsey decision, Simply stated, section 775.084(1)(a)3 and 4 should not be construed to require a trial judge to make findings of fact upon issues about which he has heard no testimony because the defendant never raised the matters as affirmative defenses. When a defendant asserts that a predicate offense has been pardoned or set aside, the trial judge will have the opportunity to consider evidence relevant to that assertion and he will be able to make a finding concerning whether the affirmative defense has been proved, Absent such an assertion, the record typically contains no evidence upon which the trial judge could make the findings specified in section 775.084(1)(a)3 and 4.

Walker explains that the statute requires findings of fact prior to imposition of a habitual felony offender sentence in order to "enable meaningful appellate review of these types of sentencing decisions." Walker, 462 So.2d at 454. Findings of fact allow the appellate court to determine whether the trial judge considered and decided each issue which was subject to proof at the sentencing hearing. But there is no need for findings relating to issues which were not subject to proof below. Because the appellant did not raise it, the section 775.084(1)(a)4 issue was not subject to proof in the trial court.

Therefore, a finding of fact under the subparagraph would not aid our review of the appellant's sentences.

Finally, even if the statute is construed to require a section 775.084(1)(a)4 finding under the circumstances presented here, any failure to make the finding before imposing a habitual felony offender sentence is necessarily harmless error. See Myers v. State, 499 So.2d 895 (Fla. 1st DCA 1986)("[T]he 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 by the record.") In light of the Eutsey decision and the appellant's failure to assert that a predicate conviction has been set aside, it might be said that the record in this case also provides support for a finding that the appellant's conviction has not been set aside. In any event, it is clear that a contrary finding is precluded. Under these circumstances, any error in failing to make a finding under section 775.084(1)(a)4 could not have affected the trial court proceedings.