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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STANLEY EUGENE JOHNSON,

Petitioner,

vs.

CASE NO. 80,808

STATE OF FLORIDA,

Respondent.

_____ /

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

PAGE NO.

SUMMARY OF THE ARGUMENT.....1

ARGUMENT

ISSUE I.....2 - 5

THE TRIAL COURT FAILED TO MAKE THE FINDINGS
REQUIRED BY SECTION 775.084(1)(a)1-4, FLORIDA
STATUTES (1989).

CONCLUSION.....6

CERTIFICATE OF SERVICE.....6

TABLE OF CITATIONS

PAGE NO.

Anderson v. State,
592 So. 2d 1119 (Fla. 1st DCA 1991).....3

Baxter v. State,
599 So. 2d 721 (Fla. 2d DCA 1992).....1, 3

Baxter v. State,
Fla. No. 79,993
(Opinion filed April 1, 1993).....1, 2, 3, 4

Coleman v. Thompson,
501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).....3

Hodges v. State,
596 So. 2d 481 (Fla. 1st DCA 1992).....1, 3

State v. Rucker,
18 Fla. L. Weekly S93 (Fla. No. 79,932)
(Opinion filed Feb. 4, 1993).....1, 2, 4

Wainwright v. Sykes,
433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).....3

OTHER AUTHORITIES:

§775.084, Florida Statutes (1989).....2

§775.084(1)(a)1-4, Florida Statutes (1989).....1

§775.084(1)(a)1-4, Florida Statutes (1991).....2

SUMMARY OF THE ARGUMENT

The Second District affirmed the sentence of Stanley Eugene Johnson on the basis of Baxter v. State, 599 So. 2d 721 (Fla. 2d DCA 1992). Conflict had been certified within Baxter; and, this Court accepted jurisdiction. This Court has now filed its opinion in Baxter v. State, Fla. No. 79,993 (Opinion filed April 1, 1993). There was no objection to the habitualization papers; and, the findings required under §775.084(1)(a)1-4, Florida Statutes (1989) are ministerial under State v. Rucker, 18 Fla. L. Weekly S93 (Fla. No. 79,932)(Opinion filed Feb. 4, 1993). This Court's opinion in Baxter incorporates State v. Rucker, *supra* where the conflict with Hodges v. State, 596 So. 2d 481 (Fla. 1st DCA 1992) is resolved consistent with the holding in Baxter v. State, 599 So. 2d 721 (Fla. 2d DCA 1992).

The record before this Court establishes harmless error. Thus, Respondent would request this Court to approve the decision below as conflict has been resolved consistent with the holding below.

ARGUMENT

ISSUE I

THE TRIAL COURT FAILED TO MAKE THE FINDINGS
REQUIRED BY SECTION 775.084(1)(A)1-4, FLORIDA
STATUTES (1989).

(As Stated By Mr. Johnson)

This Court has rendered an opinion in Baxter v. State, Fla. No. 79,993 (Opinion filed April 1, 1993). In Baxter, this Court incorporates its opinion filed in State v. Rucker, 18 Fla. L. Weekly S93 (Fla. No. 79,932)(Opinion filed Feb. 4, 1993). In Rucker, this Court holds that where the prosecution has introduced un rebutted evidence (such as certified copies) of the defendant's prior convictions, a court may infer that there has been no pardon or that the prior convictions have not been set aside. This Court held these trial court findings to be ministerial; and, that a failure to make these ministerial findings is subject to the harmless error doctrine. Additionally, this court noted that the harmless error doctrine is applicable to convictions under both the habitual felony offender and habitual violent felony offender sections. See, State v. Rucker, supra at S94, fn 2.

Petitioner argues that the trial court failed to comply with §775.084(1)(a)1-4, Florida Statutes (1991). Respondent now establishes harmless error. At sentencing, Petitioner was on notice that the prosecution was seeking an enhanced penalty pursuant to §775.084, Florida Statutes (1989). (R 7) When

Petitioner entered his plea, he was aware that the "State" would seek habitualization. (R 15-16) After the plea was accepted, Petitioner's trial court indicated that he intended to present evidence in mitigation at sentencing. (R 16-17) Subsequently, Petitioner filed a motion in opposition to habitualization. (R 19-22)

At sentencing, the following transpired:

MR. PERRIN: Yes, sir. Your Honor, The State of Florida has filed Notice of Intent to Seek Habitual Sanctions, and at this time I will present the Court a packet of documentation the State of Florida would rely on in asking that Mr. Johnson be sentenced as an habitual felony offender.

You will find in that documentation certified copies of the convictions for felony offenses that are laid out in the presentence investigations. Those felony offenses being a sufficient number and timing to support to qualify him as an habitual felony offender.

There is an affidavit from the Clerk of our Court certifying that Mr. Johnson has never received a 3.850 post-conviction relief as to those convictions, as well as an affidavit from the Governor of the State of Florida certifying that Mr. Johnson has never been pardoned on those convictions upon which the State relies.

Prior to Court this morning I provided Ms. Williamson that packet of documentation so she could review it in preparation for sentencing.

THE COURT: All right. I will -- are there matters which the defense wishes to call to my attention insofar as the packet of documents are concerned?

MS. WILLIAMSON: No, sir, there is not.

THE COURT: All right. Let them be received in evidence. All right. Sir?

(R 25, L 21 through R 26, L 24)

These documents, without objection, were received into evidence (R 26) and these documents are part of the record on appeal before this Court. (R 57-81). The trial court has rendered a lawful sentence. There is no prejudice.

Under the facts of this case, the claim is subject to a harmless error analysis. Petitioner knew he was to be habitualized. Petitioner has never made a direct or collateral attack on the authenticity of the prior convictions. And, by not objecting, has not Petitioner waived this claim? (R 26) See, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)[a state judgment rests on independent and adequate state procedural grounds]. And, there is no prejudice. See, Coleman v. Thompson, 501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Procedurally, the opinion below is controlled by Baxter v. State, 599 So. 2d 721, 722 (Fla. 2d DCA 1992) where the Second District certified conflict with Hodges v. State, 596 So. 2d 481 (Fla. 1st DCA 1992) and Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991). This Court has decided Baxter v. State, Fla. No. 79,993 (Opinion filed April 1, 1993). This Court has resolved the conflict with Hodges consistent with the Second District's opinion in Baxter. Thus, on the basis of this record, the

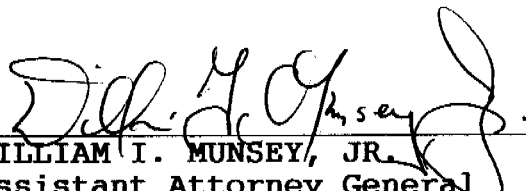
failure of Judge Norris to make these ministerial findings is subject to a harmless error analysis. As Petitioner has failed to establish prejudice either below or here, this Court must apply the principles of law announced in both State v. Rucker, 18 Fla. L. Weekly S93 (Fla. No. 79,932)(Opinion filed Feb. 4, 1993) and Baxter v. State, No. 79,993 (Opinion filed April 1, 1993). Respondent requests this Court to approve the decision below.

CONCLUSION

WHEREFORE, based upon the foregoing facts, arguments and authorities, Respondent requests this Court to approve the decision below on the basis of Baxter v. State, Fla. No. 79,993 (Opinion filed April 1, 1993).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert D. Rosen, Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, FL 33830 on this 15th day of April, 1993.


COUNSEL FOR APPELLEE