045 w/app 12-14

IN THE SUPREME COURT OF 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

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Stanley Eugene Johnson, was the Appellant in the Second District of Appeal and the Defendant in the trial court.

STATEMENT OF THE CASE AND FACTS

On December 5, 1991, the Petitioner, STANLEY EUGENE JOHNSON, pled no contest to two counts of burglary and three misdemeanor charges (R8-18). A sentencing hearing was held on January 9, 1992, before Circuit Judge William A. Norris, Jr. (R23-49). The state previously filed a Notice of Intention to seek an Extended Prison Sentence under Section 775.084, Florida Statutes (1989) (R7). At the hearing, the state presented certified copies of prior felony convictions of the Petitioner, as well as a certificate showing no pardon had been granted for these offenses (R25-26, 57-81).

The trial court found that the Petitioner met the statutory criteria and found him to be a habitual offender (R46). The court sentenced the Petitioner to ten years in prison for each burglary count, both sentences to run consecutively, and to time served for the misdemeanor counts (R46-47, 50-54). The Petitioner filed a timely notice of appeal on January 29, 1992 (R82).

The Second District Court of Appeal affirmed the decision. Johnson v. State, case no. 92-00436 (Fla. 2d DCA Nov. 4, 1992). The court cited to Baxter v. State, 599 So.2d 721 (Fla. 2d DCA 1992).

SUMMARY OF THE ARGUMENT

The Petitioner argues that the Second District's affirmance of the Petitioner's sentence based on Baxter v. State, 599 So.2d 721 (Fla. 2d DCA 1992), expressly and directly conflicts with decisions of the First and Fourth Districts. Those decisions hold that a trial court must make the findings required by section 775.084(1)(a)1-4, Florida Statutes (1991), even if a defendant does not raise the absence of these findings as an affirmative defense. Baxter states that a defendant must raise this defense or the issue is waived.

ARGUMENT

ISSUE

THE INSTANT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THE OPINIONS OF THE FIRST AND FOURTH DISTRICT COURTS OF APPEAL.

The trial court failed to comply with the requirements of section 775.084(1)(a)1 1-4, Florida Statutes (1991). The court did not specifically find that the Petitioner was previously convicted of two or more felonies, or that one of those felonies occurred within five years of the present conviction. Nor did the court find that the prior qualifying felonies were not pardoned or set aside.

Although the Petitioner failed to raise the absence of these findings as an affirmative defense, the First and Fourth District Courts of Appeal have held that it is reversible error for the court to fail to make such findings, even absent objection. Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992); Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991); Bryant v. State, 17 Fla. L. Weekly (Fla. 4th DCA May 27, 1992). The Second District reached a contrary result in Baxter v. State, 599 So.2d 721 (Fla. 2d DCA 1992). However, in Baxter, the Second District certified conflict with Hodges and Anderson and this court has already received merit briefs on the issue. Since the Second District's decision in the instant case is based on Baxter, this court should accept jurisdiction in order to settle the conflict.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Petitioner has demonstrated that conflict does exist with the instant decision so as to invoke discretionary review of this Honorable Court.

APPENDIX

PAGE NO.

1. Decision of The District Court of Appeal of Florida, Second District, Opinion filed November 4, 1992, Case No. 92-00436 A1

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STANLEY EUGENE JOHNSON, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 92-00436

Opinion filed November 4, 1992.

Appeal from the Circuit Court for Polk County; William A. Norris, Jr., Judge.

James Marion Moorman, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and William I. Munsey, Jr., Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed. See Baxter v. State, 599 So. 2d 721 (Fla. 2d DCA 1992).

RYDER, A.C.J., HALL and THREADGILL, JJ., Concur.

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 19th day of November, 1992.

Respectfully submitted,

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