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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,835

LEROY TOOMBS,

Respondent.

______________________/

JURISDICTIONAL BRIEF OF PETITIONER

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JURISDICTIONAL STATEMENT

Article V, section 3(b)(3) of the Florida Constitution states, in pertinent part, the following:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

STATEMENT OF THE CASE AND FACTS

This case involves an interpretation of the habitual offender statute with respect to the trial court's duty, if any, to make a factual finding on an affirmative defense never raised nor supported with evidence. The respondent, Leroy Toombs, was convicted of sale of cocaine and sentenced as an habitual offender. The trial court made no finding that the judgments of conviction had not been set aside, or that the defendant had never been pardoned for the prior offenses. The First District Court of Appeal reversed the sentence because of the absence of these findings.

SUMMARY OF ARGUMENT

The decision of the First District Court of Appeal in the instant case directly and expressly conflicts with a decision of the Second District Court of Appeal on the same question of law. The Second District held that the trial court had no duty to make findings on unraised affirmative defenses (executive pardon and invalidation of judgment). The First District held to the contrary.

ARGUMENT

ISSUE

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN BONNER V. STATE, 599 SO. 2D 599 (FLA. 2D DCA 1992) ON THE SAME QUESTION OF LAW.

In Eutsey v. State, 383 So.2d 219, 226 (Fla. 1980), this Court held:

> 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. In Bonner v. State, 599 So.2d 768 (Fla. 2d DCA 1992), the Second District held that the trial court had no duty to make findings of fact on these affirmative defenses until they were raised and supported with evidence. In the instant case, without citing Eutsey or Bonner, the First District held that the trial court must make the statutory findings.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument. This issue has been thoroughly briefed in two cases currently pending for review in this court, Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991), review pending, Case No. 79,535 and Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), review pending, Case No. 79,728, and the State has just filed its merits brief in a third case, Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA October 14, 1992), review pending, Case No. 80,751. The outcome in those cases will control the outcome here.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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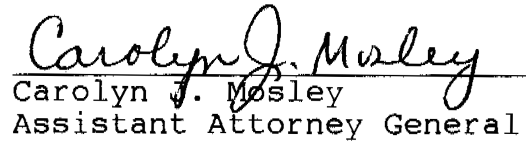
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. Mail to John R. Dixon, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida, 32301 this 8th day of December, 1992.



Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,835

LEROY TOOMBS,

Respondent.

_______________________/

APPENDIX

Toombs v. State, Slip Opinion (Fla. 1st DCA September 30, 1992); motion for rehearing, etc.; response to rehearing motion; order denying motion. 1-10

Bonner v. State, 599 So. 2d 768 (Fla. 2d DCA 1992) 11

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

92-110313-TLR

F

LEROY TOOMBS,	)
Appellant,	)
v.	)
STATE OF FLORIDA,	)
Appellee.	)

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

CASE NO. 92-479

Docketed 10-2-92 Florida Attorney General

OCT 01 1992

Opinion filed September 30, 1992.

An Appeal from the Circuit Court for Duval County. John Southwood, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and James W. Rogers, Asst. Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Leroy Toombs has appealed an habitual offender sentence imposed after his conviction by jury of the sale of cocaine. The habitual offender statute requires that certain findings be made before the enhanced penalties afforded by that statute may be applied. § 775.084(3)(d), Fla. Stat. (1989). See Walker v. State, 462 So.2d 452 (Fla. 1985); Knickerbocker v. State, 17

F.L.W. D1976 (Fla. 1st DCA August 21, 1992); Rome v. State, Case No. 91-3106 (Fla. 1st DCA September 2, 1992). Because the trial court herein failed to make the required findings, Toombs' sentence is reversed, and the case is remanded for resentencing.

JOANOS, C.J., ALLEN and WOLF, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

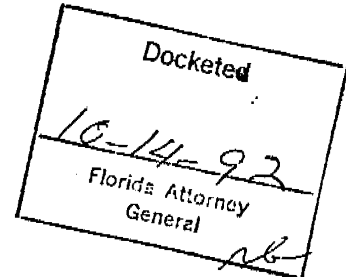
LEROY TOOMBS,

Appellant,

vs. CASE NO. 92-479

STATE OF FLORIDA,

Appellee.



MOTION FOR REHEARING AND/OR CLARIFICATION,
CERTIFICATION AND MOTION FOR REHEARING EN BANC

The appellee state respectfully moves the court for rehearing and/or clarification and certification pursuant to Fla.R.App.P. 9.330, and for rehearing en banc pursuant to Fla.R.App.P. 9.331, and shows the court as follows:

I

MOTION FOR REHEARING AND/OR CLARIFICATION

The sole issue on appeal here is whether it is reversible error if the state fails to show, and the trial court to find, that the predicate felonies to an habitual felony sentence have not been pardoned or set aside. On 30 September 1992, the panel entered a decision reversing the habitual felon sentence and remanding for resentencing on the imprecise or nonspecific ground that "certain findings" had not been made. The lead case cited as authority was Walker v. State, 462 So.2d 452 (Fla. 1985) where the sole finding at issue "was that the trial court erred in failing to state the underlying facts and circumstances upon which it relied in finding that an extended sentence was

necessary for the protection of the public from further criminal activity by him." Walker v. State, 442 So.2d 977, 978 (Fla. 1st DCA 1983).

In rendering the decision and opinion here, the panel apparently overlooked that the statute at issue in Walker, section 775.084, Florida Statutes (1981), was subsequently amended by the Florida Legislature, Ch. 88-131, §6, Laws of Florida, to delete the requirement that the trial court specifically find that the extended sentence was necessary for the protection of the public. Presumably, this rejection of Walker reflected a decision by the Florida Legislature that trial courts have more important tasks to perform than making, and appellate courts reviewing, rote findings. Moreover, even if the required finding in Walker was still the law, and it isn't, Walker would still have no relevance to the issue of whether the state must prove, and the trial court find, that affirmative defenses do not exist. Eutsey v. State, 383 So.2d 219, 226 (Fla 1980) ("We also reject his 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." (e.s.)).

Appellant's initial brief relied on Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992). The state's answer brief acknowledged that Anderson and Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992) were onpoint but argued that they had been erroneously decided. Both Anderson and Hodges certify the

question to the Florida Supreme Court as one of great public importance. Both are still pending in the Supreme Court. Here, the state also asked the Court to certify the Anderson question. Moreover, both Anderson and Hodges are in direct and express conflict with Baxter v. State, 599 So.2d 721 (Fla. 2d DCA 1992) and Bonner v. State, 599 So.2d 768 (Fla. 2d DCA 1992). Under these circumstances, it is misleading to rest the decision on an inapposite case, when apposite cases have been argued, and to use such vague phraseology that the actual issue and decision cannot be determined without recourse to the briefs and the record on appeal.

It should be further noted that the issue here on which the panel rules has been taken en banc by order of the Court and, so far as is known to the state, is still pending en banc. See, order of 16 July 1992 in the case of Jones v. State, case no. 91-2961. Moreover, the issue here has also been presented in forty or more recent or pending cases.

It appears that the panel has overlooked that (1) Walker is inapposite, (2) Anderson and Hodges are apposite, (3) the issue is pending en banc and panel decisions should be withheld until the Court speaks en banc, (4) there is direct and express conflict with another district court, (5) the panel should certify the Anderson/Hodges question, (6) the panel should certify direct and express conflict with Eutsey, and (7) the panel should certify conflict with Baxter and Bonner. Accordingly, the state moves for rehearing and/or clarification.

MOTION FOR CERTIFICATION

For the reasons set forth above, the state also moves for certification of the following:

> 1. the question certified in Anderson/Hodges re Eutsey.
> 2. direct and express conflict with Eutsey, Baxter, and Bonner.

MOTION FOR REHEARING EN BANC

The issue here is the same as that taken en banc by the Court in Jones v. State, no. 91-2961, still pending. It is also the issue in some forty or so other cases still pending which are presumably contingent on the en banc decision in Jones. It is also the same as that addressed and certified to the Florida Supreme Court in Anderson/Hodges which conflict with Eutsey, Baxter, and Bonner. Resolution en banc is necessary not only in order to maintain decisional uniformity but because the issue presented is one of exceptional importance. The Court's disposition of the issue here and in Anderson/Hodges renders illegal all habitual sentences imposed in the district since Eutsey issued in 1980. Accordingly,

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance, and
>
> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decision in this court: Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1992), Jones v. State, no.

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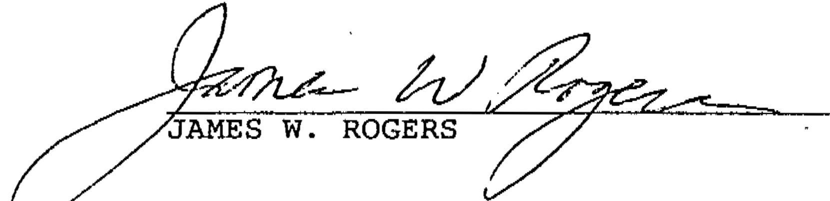
91-2961, pending en banc, Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1980), Jefferson v. State, 571 So.2d 70 (Fla. 1st DCA 1990), Likely v. State, 583 So.2d 414 (Fla. 1st DCA 1991), Caristi v. State, 578 So.2d 769 (Fla. 1st DCA 1991).

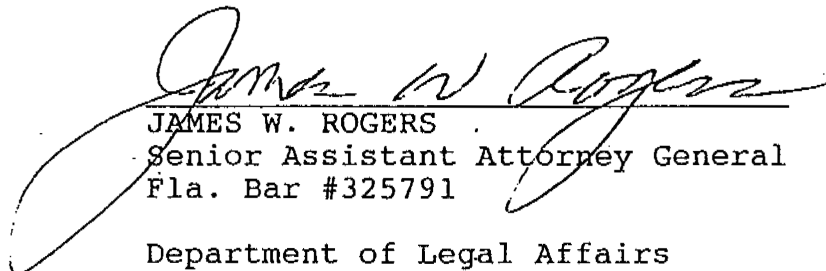


JAMES W. ROGERS

Wherefore, appellee requests the Court to grant rehearing, certification, and rehearing en banc as set forth above.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



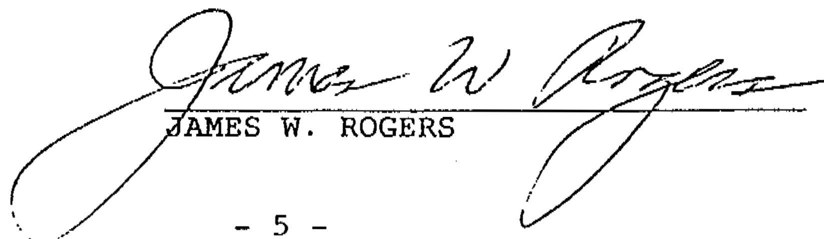
JAMES W. ROGERS
Senior Assistant Attorney General
Fla. Bar #325791

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050
904/488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 14th day of October, 1992.



JAMES W. ROGERS

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

92-110813-TR
F

LEROY TOOMBS, :

Appellant, :

v. : CASE NO. 92-479

STATE OF FLORIDA, :

Appellee. :

______________________________ :

Docketed
10-29-92
Florida Attorney General

RECEIVED
OCT 27 1992
Criminal Appeals
Dept. of Legal Affairs

RESPONSE TO MOTION FOR REHEARING, CERTIFICATION AND

AND MOTION FOR REHEARING EN BANC

Appellant opposes appellee's motion for rehearing and motion for rehearing en banc, and as grounds therefore would show:

1. This Court has recently rejected the arguments made in appellee's answer brief in an en banc opinion dated October 14, 1992. Jones v. State, case no. 91-2961 (Fla. 1st DCA October 14, 1992).

2. In light of Jones, appellee's motions for rehearing should be denied.

3. Appellant does not oppose the motion to certify the same question certified in Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991).

WHEREFORE, appellant requests this Court to deny

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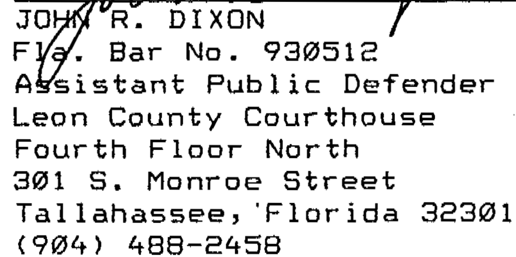
appellee's motion for rehearing and motion for rehearing en banc.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



JOHN R. DIXON
Fla. Bar No. 930512
Assistant Public Defender
Leon County Courthouse
Fourth Floor North
301 S. Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Robert A. Butterworth, Attorney General, 2020 Capital Circle Southeast, Suite 211, Tallahassee, Florida, 32301, and a copy has been mailed to appellant, Leroy Toombs, DC #015694, Okaloosa Correctional Institution, Post Office Box 578, Crestview, Florida, 32536, on this 23rd day of October, 1992.

JOHN R. DIXON

9

Rogers
AHG

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

November 3, 1992

CASE NO: 92-00479

NOV 5

L.T. CASE NO. 91-10041 CF

Leroy Toombs v. State of Florida

Appellant(s), Appellee(s).

92-11313-TUR F

BY ORDER OF THE COURT:

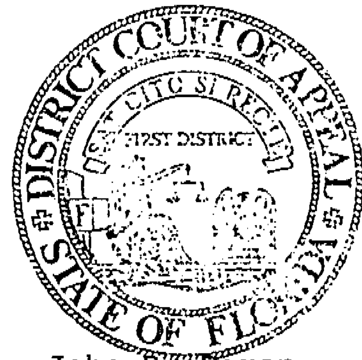
Motion for rehearing and/or clarification, certification and motion for rehearing en banc, filed October 14, 1992, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler

JON S. WHEELER, CLERK

By Bonnie Black
Deputy Clerk



Copies:

P. Douglas Brinkmeyer
James W. Rogers

John R. Dixon

sold or served are stricken, as they do not reasonably relate to the crimes for which Wright was convicted. *See Daniels v. State,* 583 So.2d 423 (Fla. 2d DCA 1991); *Rodriquez v. State,* 378 So.2d 7 (Fla. 2d DCA 1979).

Appellant's convictions are affirmed, but the sentence is reversed and the case is remanded for further proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded.

SCHOONOVER, C.J. and LEHAN, J., concur.

Willie BONNER, Appellant,

v.

STATE of Florida, Appellee.

No. 91–01453.

District Court of Appeal of Florida, Second District.

June 5, 1992.

Defendant was convicted in the Circuit Court, Hillsborough County, Barbara Fleischer, J., of various drug offenses. Defendant appealed. The District Court of Appeal held that claims that there was no evidence presented and no findings as to whether defendant had been pardoned for any of prior felonies used in habitual offender sentencing or whether any of prior felony convictions had been set aside in postconviction proceedings were affirmative defenses which had to be raised by defendant at trial court level.

Affirmed.

Criminal Law ⟾1203.27

Claims that there was no evidence presented and no findings as to whether defendant had been pardoned for any of prior felonies used during habitual offender sentencing or whether any of prior felony convictions had been set aside in postconviction proceedings were affirmative defenses which had to be raised by defendant at trial court level. West's F.S.A. § 775.084(1)(a)3, 4.

James Marion Moorman, Public Defender, and Cynthia J. Dodge, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Carol M. Dittmar, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Appellant raises two points in this appeal from judgments and sentences for various drug offenses. As to the first point, we find the evidence sufficient to support the convictions.

Appellant's second point is that the trial court sentenced him as a habitual offender without making the necessary findings. We note that, at the sentencing hearing, the trial judge had appellant's PSI before him and recited more than sufficient prior felony convictions, one of which was specifically noted by the assistant state attorney to be within five years of the instant conviction. When the trial judge asked if anybody had "any quarrel" with the PSI, defense counsel responded that he did not.

It is true that there was no evidence presented, and no findings, as to whether appellant had been pardoned for any of the prior felonies or whether any of the prior felony convictions had been set aside in post-conviction proceedings. See section 775.084(1)(a)3–4, Fla.Stat. (1991). However, those two matters are affirmative defenses which must be raised by appellant at the trial court level. *See Baxter v. State,* 599 So.2d 721 (Fla. 2d DCA 1992).

Affirmed.

SCHOONOVER, C.J., and LEHAN and FRANK, JJ., concur.