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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,835

LEROY TOOMBS,

Respondent.

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent, Leroy Toombs (hereinafter Toombs), was convicted by a jury of sale or delivery of cocaine (R. 22), for which he was adjudicated guilty and sentenced to prison as an habitual felony offender for twenty years (T. 194-195).

Prior to sentencing, the prosecutor filed a notice of his intention to seek habitual offender sentencing (R. 9)

At the sentencing hearing, the prosecutor, without objection, placed in evidence certified copies of two prior felony judgments on Toombs, bearing the dates of October 17, 1988 and August 3, 1990. (R. 26-34; T. 185-187) The presentence investigation report and guidelines scoresheet reflected that Toombs had previously committed seven felonies and several misdemeanors. (R. 39-40; T. 189)

The trial court made the following finding of fact:

> I am satisfied, based upon the evidence received, that this defendant meets the criteria for classification as an habitual offender.

(T. 193-194)

Toombs appealed from his judgment and sentence raising the following issue:

> THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT AS AN HABITUAL FELONY OFFENDER BECAUSE THE COURT FAILED TO MAKE ALL THE FINDINGS REQUIRED BY THE STATUTE.

(I.B. i)

Toombs summarized his argument as follows:

> In this case, the trial court erred when it sentenced appellant as an habitual felony offender without making all the requisite findings. Specifically, the court failed to find that (1) neither of the prior convictions relied upon by the state had been set aside in a post-conviction proceeding and (2) appellant had not received a pardon for either of these convictions. Because the court failed to make the above findings, appellant's sentence as an habitual felony offender must be reversed.

(I.B. 4) The State's response was that it "does not have to prove, and the trial court does not have to find, that unraised affirmative defenses do not exist." (A.B. 3)

The First District Court of Appeal agreed with Toombs and reversed the sentence. (Slip Opinion, 1-2) Thereafter, the State timely invoked this Court's conflict jurisdiction.

SUMMARY OF ARGUMENT

Although the trial court did not make specific statutory findings, the error was harmless. The unrebutted evidence in the record shows that Toombs qualified for sentencing as an habitual felony offender.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT COMPLIED WITH THE PROVISIONS OF THE HABITUAL OFFENDER STATUTE.

This issue is controlled by State v. Rucker, 18 Fla. L. Weekly S93 (Fla. February 4, 1993) in which this Court stated:

> In Eutsey v. State, 383 So.2d 219 (Fla. 1980), we ruled that the burden is on the defendant to assert a pardon or set aside as an affirmative defense. Although this ruling does not relieve a court of its obligation to make the findings required by section 775.084, we conclude that where the State has introduced unrebutted evidence--such as certified copies--of the defendant's prior convictions, a court may infer that there has been no pardon or set aside. In such a case, a court's failure to make these ministerial findings is subject to harmless error analysis.

Id., at S94.

In the instant case, the trial court did not make specific findings of fact to support its conclusion that Toombs qualified for sentencing as an habitual felony offender. However, the unrebutted documentary evidence that is in the record on appeal amply supports the trial court's conclusion. In view of this evidence, the trial court's failure to make specific findings of fact was harmless error. Were this court to remand this case for resentencing, the result would be "mere legal churning."

CONCLUSION

Based on the foregoing discussion, the First District's decision should be quashed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #503280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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 P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 22nd day of March, 1993.

Carolyn J. Mosley
Assistant Attorney General

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_____/

APPENDIX

Thomas v. State, Slip Opinion (Fla. 1st DCA September 30, 1992)

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

92-110313-TCR

F

LEROY TOOMBS,)

Appellant,)

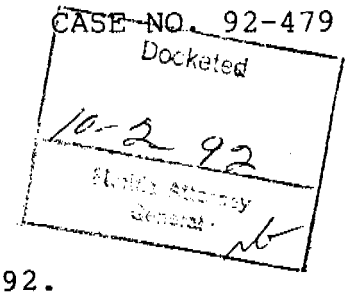
v.)

STATE OF FLORIDA,)

Appellee.)

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

CASE NO. 92-479



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.