IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 80,835

LEROY TOOMBS, :

Respondent. :

_____/

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

JOHN R. DIXON
ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR RESPONDENT

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	:	

RESPONDENT'S BRIEF ON THE MERITS

I STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably accurate. Attached hereto as an appendix is the opinion of the lower tribunal.

II SUMMARY OF THE ARGUMENT

Respondent does not agree that the recent Rucker decision of this Court is dispositive of the issue. That case answered the certified question in the negative, i.e., that Eutsey v. State, 383 So.2d 219 (Fla. 1980), does not relieve the sentencing judge of his statutory duty to make findings. That case further held the error was harmless, which cannot be true in the instant case, because the sentencing judge made absolutely no findings in the instant case, and did not address any of the statutory criteria. The brief discussion of respondent's prior record at the sentencing hearing does not satisfy the statute, so it cannot be said the failure to satisfy the statute's requirements was harmless error.

III ARGUMENT

ISSUE:

WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO SATISFY ITS STATUTORY OBLIGATION TO MAKE ALL THE FINDINGS REQUIRED BY THE HABITUAL OFFENDER STATUTE.

Respondent argues that his habitual offender sentence was improper because the trial court failed to make the specific findings of fact required by the habitual offender statute.

Respondent does not agree with the observation made in the state's brief that the decision of this Court in State v. Rucker, 18 Fla. L. Weekly S93 (Fla. Feb. 4, 1993), is dispositive of the issue. Rucker answered the certified question in the negative, i.e., that Eutsey v. State, 383 So. 2d 219 (Fla. 1980), does not relieve the sentencing judge of his statutory duty to make findings. Rucker further held the error in his case was harmless because:

> [T]he trial court expressly found that Rucker met the definition of [an] habitual felony offender by a preponderance of the evidence.

Rucker, 18 Fla. L. Weekly at S94. See also, Robinson v. State, 18 Fla. L. Weekly 510 (Fla. 4th DCA 1993)(the absence of any findings by the trial court precludes the application of Rucker).

In the present case, the sentencing judge made no specific findings, only a general statement that respondent met the criteria for sentencing as an habitual offender (V2 193-194). The judge did not indicate which felony convictions he relied

upon nor did he make any of the required findings by a preponderance of the evidence. No written findings were filed.

The cursory statement by the judge was inadequate, and does not satisfy the requirements of Section 775.084, Florida Statutes, and this Court's prior opinion in Walker v. State, 462 So. 2d 452 (Fla. 1985), even under the relaxed harmless error standard expressed by this Court in Rucker.

IV CONCLUSION

Respondent respectfully requests that this Court affirm the district court decision, because a harmless error analysis cannot be performed based upon this record.

Respectfully submitted,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Mosley, Assistant Attorney General, by delivery to Plaza Level, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, this 31st day of March, 1993.

JOHN R. DIXON

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
vs.	:	CASE NO. 80,835
LEROY TOOMBS,	:	
Respondent.	:	
	:	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

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.

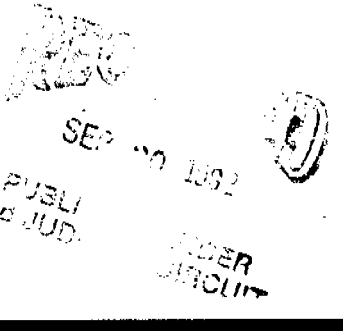
An Appeal from the Circuit Court for Duval County.
John Southwood, Judge.

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.