IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. CASE NO.: 80,836

STANLEY E. ROBERTS,

Respandent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

By information filed January 7, 1988, appellant was charged under lower 'court number 87-4865 with burglary of a structure and grand theft (R 1). He entered a plea of no contest, and on March 1, 1988, he was sentenced to state prison on the burglary for four years and placed on two years probation on the grand theft, to run consecutively (R 4-8).

On March 26, 1990, an affidavit of violation of probation [VOP] was filed, alleging that appellant had committed burglary of a dwelling and resisting arrest without violence (R 9).

On July 18, 1990, appellant appeared before Circuit Judge William H. Anderson on the VOP in case number 87-4865 and the new charge in case number 90-348.[1] The prosecutor stated that appellant had entered an admission to the VOP and had entered a plea of no contest to the new charges in exchange for a seven-year cap, with the state requeeting that appellant be sentenced as a career criminal (R 28). Appellant presented argument and the testimony of his brother in mitigation (R 29-38). The prosecutor stated that appellant had nine burglary and seven grand theft convictions. (R 37).

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[1] The supplemental record, containing this transcript, is erroneously labeled with docket number 89-2517.

The court stated that appellant had been sentenced in 1988 for burglary and grand theft, and in 1986 for burglary and grand theft (R 38-39). The court further stated:

> I do have to find on the record that you are a career criminal, and I think that to protect the people of the community from further burglaries to be committed by you, that I do have to classify you as a career criminal. (R 39-40).

In case number 90-348, appellant was sentenced as an habitual offender on the burglary of a dwelling to six years in prison, and to one year on the resisting arrest without violence, to run consecutively. (R 15; 17; 40).

In case number 87-4865, appellant's probation was revoked (R 21), and he was sentenced on the burglary and grand theft, not as an habitual offender, to seven years in prison, to run concurrently (R 16; 41).

The petitioner appealed to the First District Court of Appeal, which granted review on October 18, 1990. Petitioner's brief set forth three issues and argued that he was improperly sentenced as an habitual offender because the trial court made inadequate findings, that the lower court sentenced him excessively on the grand theft charges in case number 87-4865 because the maximum sentence was five years and the judge gave him seven, and that the seven-year sentence he received for burglary was also illegal because he had already been sentenced

to four years on that charge and was not on probation for that offense. The district court reversed the seven-year sentence for burglary and also reversed the seven-year sentenced for grand theft, remanding for resentencing on the violation of probation.

The court also concluded that reversal and remand was required on the first issue in Roberts' brief, which was whether the trial court had failed to make the necessary statutory findings for habitual felony offender sentencing. The district court had previously found that the failure to make such findings constituted reversible error, even in the absence of an objection, in Anderson v. State, 529 So.2d 1119, 1120 (Fla. 1st DCA 1991), petition for review filed, No. 79,535 (Fla. March 16, 1991), and Hodges v. State, 596 So.2d 481, 482 (Fla. 1st DCA 1992). Nevertheless, in accordance with Anderson and Hodges, the court certified the following question as one of great public importance:

> DOES THE HOLDING IN EUTSEY V. STATE, 383 So.2d 219 (FLA. 1980), THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE TO [A DEFENDANT]," EUTSEY, 383 SO.2D AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

This is the only question now before the court in this case, and the State acknowledges that the answer will control the instant case.

SUMMARY OF ARGUMENT

The trial court is under no obligation to make a finding of fact on an affirmative defense that is not raised and supported with evidence. Invalidation of a judgment is an affirmative defense under the habitual offender statute. In the instant case, Roberts did not raise this defense. Therefore, the trial court had no duty to make a finding of fact unsupported by evidence.

ARGUMENT

ISSUE (CERTIFIED QUESTION)

DOES THE HOLDING IN EUTSEY V. STATE, 383 So.2d 219 (FLA. 1980) THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE TO [A DEFENDANT], "EUTSEY AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

The First District has repeatedly held that, to support a habitual felony offender sentence, the trial court must expressly find that a judgment of conviction is still valid, even if the defense does not assert that the judgment was set aside. This issue has been thoroughly briefed in two cases currently pending for review in this court, Anderson v. State, 529 So.2d 1119, (Fla. 1st DCA 1991), and Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), review pending, Case No. 79,728, and the outcome in those cases will control the outcome here.

The State will briefly focus on the rationale advanced by the First District to support its decision. The First District relied on the language of the statute and the trial court's obligation to follow the law. The State agrees that the statute authorizes the trial court to habitualize a defendant if it finds, inter alia, that the predicate judgments of conviction have not been set aside. The State also agrees that the trial court is bound to follow the law as set forth by the legislature.

The dispute is over the effect of the following holding in Eutsey v. State, 383 So.2d 219, 226 (Fla. 1980) on the trial court's statutory duty:

> 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 postconviction proceeding since these are affirmative defenses available to Eutsey rather than matters required to be proved by the State.

Id., at 226. The First District construes Eutsey as having no effect at all, whereas the State construes it as having substantial effect.

Trial courts logically need evidence in order to make a finding of fact. Under the habitual offender statute, the State presents evidence to show that the defendant has previously committed certain types of offenses within a specified period of time. Based on this evidence, the trial court makes certain findings of fact, the correctness of which is subject to appellate review. However, when the finding of fact relates to an affirmative defense, it will not be made until the defense is raised and supported with evidence.

The First District has ruled that a certified judgment of conviction presented at sentencing is presumed to be correct. Thus, it can be presented as evidence that the judgment has not been set aside. However, presumptions are not evidence; they are simply burden-shifting devices. A presumption says that if a party proves certain things, that party will be relieved of

proving other things. Thus, for example, if the State proves that a judgment of conviction was entered, it should not have to show the continuing validity of the judgment until evidence of its invalidity is admitted. Therefore, where there is evidence in the record that a judgment of conviction has been entered against a defendant, the burden should properly be on the defendant, as an affirmative defense, to prove that his conviction has not been set aside.

Moreover, findings of fact without supporting evidence do not facilitate appellate review. An appellate court cannot determine the correctness of a factual finding unsupported by evidence. In the instant case, the state introduced certified judgments of conviction for each crime for which Roberts was being sentenced (R 13), and the trial court found that he qualified for habitual felony offender sentencing. Because Roberts did not raise the affirmative defense that the judgments had been set aside, any finding by the trial court on this issue would have been meaningless.

CONCLUSION

The certified question should be answered affirmatively and the First District's decision reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to P. DOUGLAS BRINKMEYER, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 28th day of December, 1992.

Charlie McCoy FOR
RICHARD PARKER
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v. CASE NO.: 80,836

STANLEY E. ROBERTS,

Respondent.

APPENDIX

Roberts v. State, Slip Opinion (Fla. 1st DCA November 2, 1992)

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

STANLEY E. ROBERTS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

* CASE NO. 90-2665.

Opinion filed November 2, 1992.

Appeal from the Circuit Court for Escambia County. Judge William Anderson.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, and Charles T. Faircloth, Jr., Assistant Attorney General., Tallahassee, for appellee.

PER CURIAM.

Appellant seeks review of his sentence as an habitual felony offender following his plea of nolo contendere in circuit court case number 90-348 to the offenses of burglary of a dwelling and

resisting arrest without violence. Appellant also seeks review of the sentences imposed upon violation of probation in circuit court case number 87-4865. We reverse and remand for resentencing.

In case number 87-4865, appellant was sentenced to four years' imprisonment for burglary. He was also sentenced to two years' probation for grand theft, to run consecutively to the term of imprisonment. In March 1990, an affidavit of violation of probation was filed in case number 87-4865, alleging that appellant tried to break into a residence and resisted a law enforcement officer without violence. Appellant's probation was revoked and the trial court sentenced him to seven years' imprisonment on each count, with the sentences to run concurrently with the sentence for the current offense of burglary.

The trial court erred in revoking probation and imposing a sentence on the burglary count. Appellant was not placed on probation for burglary and had served the four-year term of imprisonment. The seven-year sentence for burglary, imposed upon revocation of probation, is reversed. The seven-year sentence imposed for grand theft exceeds the five-year statutory maximum sentence for this offense. This sentence is reversed and we remand for resentencing on the violation of probation.

In case number 90-348, the trial court adjudged appellant to be an habitual felony offender and sentenced him to six years' imprisonment for burglary of a dwelling. Appellant was sentenced

to one year for resisting arrest without violence, to run concurrent with the sentence for burglary. Appellant argues that the trial court erroneously imposed an habitual offender sentence without sufficient findings. Specifically, appellant argues the trial court failed to make findings regarding which convictions were obtained within the five-year period, whether he has received a pardon for any crime necessary for the operation of section 775.084, and whether any crime necessary for the operation of this section has been set aside in any post-conviction proceeding.

We are constrained to follow the majority's decision in Jones v. State, Case No. 91-2961 (Fla. 1st DCA Oct. 14, 1992), and accordingly reverse appellant's sentence and remand for resentencing. The trial court, on resentencing, may reconsider the appellant's habitual felony offender status and reimpose that status after making specific findings of fact as required by the statute. As in Jones, we certify the following question as one of great public importance:

> Does the holding in Eutsey v. State, 383 So.2d 219 (Fla. 1980), that: the state has no burden of proof as to whether the convictions necessary for habitual felony offender sentencing have been pardoned or set aside, in that they are "affirmative defenses available to [a defendant]," Eutsey at 226, relieve the trial court of its statutory obligation to make findings regarding those factors, if the defendant does not affirmatively raise, as a defense, that the qualifying convictions provided by the state have been pardoned or set aside?

REVERSED and REMANDED.

BOOTH, BARFIELD, and ALLEN, JJ., CONCUR.