IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,836

STANLEY E. ROBERTS,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
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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, Roberts v. State, 606 So. 2d 714 (Fla. 1st DCA 1992).

II SUMMARY OF THE ARGUMENT

This Court has before it two pending cases which will answer the instant certified question. The lower tribunal was correct in holding that the judge's findings here were woefully insufficient. The certified question must be answered in the negative and the decision approved.

III ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

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?

Respondent argues that the question certified by the district court should be answered in the negative, and the opinion affirmed.

Respondent agrees with the observation made in the state's brief that the decision of this Court in the pending cases of Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991), review pending no. 79.535, and Hodges v. State, 596 So. 2d 481 (Fla. 1st DCA 1992), review pending, no. 79,728, will control the outcome of this case with respect to whether a trial court must find that the convictions relied upon as a predicate for an habitual felony offender sentence have not been pardoned or set aside (State's Brief, 6). See also Jones v. State, 606 So. 2d 709 (Fla. 1st DCA 1992) (en banc), review pending, no. 80,751. Respondent therefore adopts the arguments made by Anderson and Hodges as his own.

It is important to note that the only findings made by the sentencing judge were:

> 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).

These historical findings are woefully inadequate, and do not satisfy the requirements of Section 775.084, Florida Statutes, even under the relaxed standard expressed by the lower tribunal in Jones, supra.

IV CONCLUSION

Respondent respectfully requests that this Court answer the certified question in the negative and affirm the district court decision,

Respectfully submitted,
NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY *that* a copy *of* the *foregoing* has been delivered to Richard Parker, Assistant Attorney General, Criminal Division, The Capitol, Tallahassee, Florida, this 6th day of January, 1993.

P. DOUGLAS BRINKMEYER

pardoned or set aside, the trial judge will have the opportunity to consider evidence relevant to that assertion and he will be able to make a finding concerning whether the affirmative defense has been proved. Absent such an assertion, the record typically contains no evidence upon which the trial judge could make the findings specified in section 775.084(1)(a)3 and 4.

Walker explains that the statute requires findings of fact prior to imposition of a habitual felony offender sentence in order to "enable meaningful appellate review of these types of sentencing decisions." *Walker*, 462 So.2d at 454. Findings of fact allow the appellate court to determine whether the trial judge considered and decided each issue which was subject to proof at the sentencing hearing. But there is no need for findings relating to issues which were not subject to proof below. Because the appellant did not raise it, the section 775.084(1)(a)4 issue was not subject to proof in the trial court. Therefore, a finding of fact under the subparagraph would not aid our review of the appellant's sentences.

Finally, even if the statute is construed to require a section 775.084(1)(a)4 finding under the circumstances presented here, any failure to make the finding before imposing a habitual felony offender sentence is necessarily harmless error. *See Myers v. State*, 499 So.2d 895 (Fla. 1st DCA1986) ("[T]he trial court committed harmless error, if any error at all, in failing to recite the specific finding that Myers had not been pardoned or received post-conviction relief from his last felony conviction since this finding was fully supported by the record.") In light of the *Eutsey* decision and the appellant's failure to assert that a predicate conviction has been set aside, it might be said that the record in this case also provides support for a finding that the appellant's conviction has not been set aside. In any event, it is clear that a contrary finding is precluded. Under these circumstances, any error in failing to make a finding under section 775.084(1)(a)4 could not have affected the trial court proceedings.

Stanley E. ROBERTS, Appellant,

v.

STATE of Florida, Appellee.

No. 90–2665.

District Court of Appeal of Florida, First District.

Nov. 2, 1992.

Defendant was sentenced as a habitual offender, after entering plea of nolo contendere to a charge of burglary, in the Circuit Court, Escambia County, William Anderson, J. Defendant appealed. The District Court of Appeal held that: (1) trial court improperly imposed additional prison term for burglary, as punishment for breach of probation, and (2) trial court improperly declared defendant to be habitual offender.

Reversed and remanded.

1. Criminal Law ⇐982.9(7)

Trial court which had imposed prison sentence for burglary and probation on charge of grand theft, could not impose additional sentence for burglary following revocation of probation; no probationary period had been imposed for burglary, and sentence had been served.

2. Criminal Law ⇐1203.21

Trial court improperly declared burglary defendant to be habitual offender; trial court had not made necessary findings that prior convictions were obtained within five-year period, that defendant had not received pardon for any of the predicate crimes, and as to whether any convictions for such crimes had been set aside in post-conviction proceedings. We
§ 775.084.

Nancy A. Daniels, Public De
P. Douglas Brinkmeyer, Asst.
fender, Tallahassee, for appell

Robert A. Butterworth, Atty
Charles T. Faircloth, Jr., Asst.
Tallahassee, for appellee.

PER CURIAM.

Appellant seeks review of his
an habitual felony offender fo
plea of nolo contendere in circui
number 90–348 to the offenses
of a dwelling and resisting arr
violence. Appellant also seeks
the sentences imposed upon
probation in circuit court case
4865. We reverse and remand
tencing.

In case number 87–4865, ap
sentenced to four years' impris
burglary. He was also senten
years' probation for grand th
consecutively to the term of im
In March 1990, an affidavit of
probation was filed in case n
4865, alleging that appellant tri
into a residence and resisted a l
ment officer without violence.
probation was revoked and the
sentenced him to seven years
ment on each count, with the s
run concurrently with the sente
current offense of burglary.

[1] The trial court erred i
probation and imposing a sent
burglary count. Appellant was
on probation for burglary and
the four-year term of imprison
seven-year sentence for burgla
upon revocation of probation,
The seven-year sentence impose
theft exceeds the five-year stat
mum sentence for this offense.
tence is reversed and we reman
tencing on the violation of pro

[2] In case number 90–34
court adjudged appellant to be
felony offender and sentenced

conviction proceedings. West's F.S.A. § 775.084.

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

Robert A. Butterworth, Atty. Gen., and Charles T. Faircloth, Jr., Asst. Atty. Gen., 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.

[1] 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.

[2] In case number 90-848, 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*, 606 So.2d 709 (Fla. 1st DCA 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.