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FILED
SID J. WHITE
MAY 10 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 80,855

BRUCE A. GAINES,
Respondent.

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

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COUNSEL FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1-4
SUMMARY OF ARGUMENT	5
ARGUMENT	
<u>ISSUE</u>	
WHETHER THE TRIAL COURT COMPLIED WITH THE PROVISIONS OF THE HABITUAL OFFENDER STATUTE.	6
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF CITATIONS

CASES

PAGE(S)

State v. Rucker, 18 Fla. L. Weekly S93
(Fla. February 4, 1993)

6

STATEMENT OF THE CASE AND FACTS

This case involves an interpretation of the habitual offender statute. Prior to trial, the prosecutor notified the respondent, Bruce Gaines (hereinafter Gaines), in writing of his intention to seek habitual offender sentencing. (R. 12; T. 105) Thereafter, Gaines was convicted by a jury of grand theft. (R. 46) Immediately following the jury's verdict, the following colloquy, in pertinent part, took place:

THE COURT: I notice here that the state has requested habitual offender disposition. *** Do you [prosecutor] have a belief that Mr. Gaines qualifies as a career criminal?

PROSECUTOR: Your Honor, I have certified copies of the judgments and sentences in my possession at this time that would amply qualify Mr. Gaines for treatment as a career criminal.

COURT: ... Do you want to order the PSI and proceed to sentencing within thirty days?

DEFENSE COUNSEL: ... Your Honor, we would waive the necessity for a PSI.

COURT: Well, the only other matter would be that as to the career criminal situation. Mr. Jaworski [prosecutor] has certain prior convictions that he wants to enter of record. I'm going to give the defendant a chance to review those and see if he objects to any of those or claims they are not his. *** If he does, I'm going to continue the proceedings until we can clarify the issue.

... Mr. Gaines, ... a career criminal statute allows me, if I were to find you a habitual offender -- it has two effects.

One is that I can double the normal sentence given by a trial court for a grand theft. In other words, I could find you -- the jury having found you guilty of grand theft, I could adjudicate you guilty and sentence you to up to ten years in the division of corrections.

The second matter is that as a habitual offender, if I declare you a habitual offender and I give you a sentence either outside of guidelines under the habitual offender law or even within guidelines, whatever you qualify, that you would serve, instead of the average twenty to thirty per cent of the time a normal inmate would serve, you would serve probably sixty per cent of that time, because you are only entitled to the type of statutory gain time that the statute sets forth and you are entitled to no more than that. It's called incentive gain time. It's the only gain time a habitual offender prisoner can receive as opposed to other gain times that are available to other prisoners.

Also, the presentence investigation tells me about your background, your record, your socioeconomic situation and anything else that you may wish to put in it to help me understand better about who you are and what this is about.

So if you want that, I will order it. If you do not want that, you have a minimum right to review those previous convictions the state is going to ask me to rely on. The choice is yours. ... ***

[Gaines and his attorney were given copies of the judgments and sentences to review.] ***

COURT: I will continue this sentencing until Tuesday. I want you to think about the presentence investigation and I want you to think about any objections that you may have to the habitual offender statute. Mr. Andrews [defense counsel] will talk to you about that and go through the convictions with you, because I'm going to hold a hearing and at that hearing I have to make certain findings.

One is whether or not you are a habitual offender. That's based on prior convictions, the five-year time limitation from the last one or the last date of service of sentence before release or before you're out of supervision with the division, the notice provisions that were sent to you and then I'll make a decision.

If that's all true and you haven't been pardoned or excused, then I'll make a decision whether or not you're a habitual and then I'll make a decision about what to do about the sentence, whether to stay within the guidelines, call you a habitual, not call you a habitual or use the habitual sentencing to enhance your sentence. ... If on Tuesday you decide you want a PSI, I will order a PSI. That gives you and your lawyer a chance to talk about it over the weekend. I think that's fair. Other than that, I'll sentence you on Tuesday.

(T. 105-111) Gaines was then adjudicated guilty of grand theft.

(T. 111)

Certified copies of judgments of conviction were admitted in evidence showing that Gaines had previously committed at least seven felonies, for which he was most recently adjudicated guilty and sentenced to prison for nine years on May 20, 1987 (R. 26-45), which was less than four years from the date of the current offense, January 18, 1991 (R. 5).

The sentencing hearing was held seven weeks later before the same judge. (T. 1, 114) In the interim a PSI report had been prepared. (T. 115) A Governor's Affidavit was filed showing that Gaines had never been pardoned for any of his offenses. (R. 51; T. 117) A corrected scoresheet reflected that Gaines had committed seven prior felonies in addition to several misdemeanors. (R. 50; T. 116) Defense counsel admitted that "as documented" Gaines did "have a lengthy record" and had "earned this scoresheet," but, nevertheless, urged the trial court to forego habitual sentencing. (T. 118-119)

The maximum statutory sentence for Gaines' offense was five years' imprisonment, enhanced to ten years under the habitual

offender statute, with a permitted sentencing range under the guidelines of 5 1/2 to 12 years' imprisonment. (R. 50; T. 119, 121) The trial court stated:

[I]t's the judgment and sentence of the Court, first of all, that you are an habitual offender. ... I find that you are an habitual offender. You have ... [s]even total [felonies]. Clearly, you fall into the habitual offender category. ... I think it is appropriate for you to be habitualized and to not get the benefit of certain gain time, as people who have not accumulated the record that you have. ... [T]here were a great many citizens involved in this case -- apart from the people that work for Belk Lindsey -- and the police officers. It's just not a good situation. I adjudicate you guilty of grand theft and declare you to be an habitual offender, in accord with Florida Statutes.

(T. 120-121) The court sentenced Gaines to prison for "seven years, in accordance with the bottom end of the recommended guidelines, based on [his] record...." (T. 121)

Gaines appealed from his judgment and sentence, arguing that the trial court failed to comply with the provisions of the habitual offender statute. The First District Court of Appeal agreed and reversed Gaines' sentence, stating that the trial court found that Gaines had committed prior felonies, but it did not expressly find that the felonies were committed within the requisite time period, or that the judgments of conviction had not been set aside, or that the defendant had never been pardoned for the prior offenses. (Slip Opinion, Appendix)

The State timely sought discretionary review of the First District's opinion, and this court accepted jurisdiction.

SUMMARY OF ARGUMENT

The trial court in the instant case made a general finding but not specific findings on habitualization. The absence of specific findings constituted harmless error. The unrebutted evidence in the record shows that Gaines 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 un rebutted 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 Gaines qualified for sentencing as an habitual felony offender. However, the un rebutted 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."

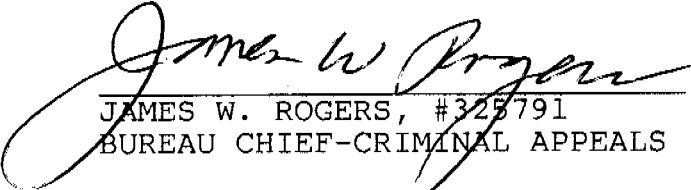
CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm Gaines' judgment and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL


CAROLYN J. MOSLEY, #503280
ASSISTANT ATTORNEY GENERAL

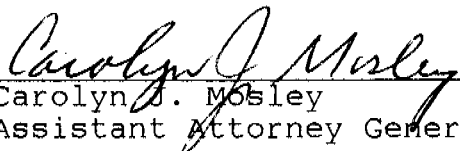

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to John R. Dixon, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida, 32301 this 10th day of May, 1993.



Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 80,855

BRUCE A. GAINES,

Respondent.

_____ /

APPENDIX

Gaines v. State, Slip Opinion (Fla. 1st DCA
October 23, 1992)

4111778-TRR ✓
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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BRUCE A. GAINES,)
Appellant,)
v.)
STATE OF FLORIDA,)
Appellee.)

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

CASE NO. 91-2904

Docketed
10-27-92
Florida Attorney
General *rb*

OCT 27 1992

Opinion filed October 23, 1992.

An Appeal from the Circuit Court for Alachua County.
Stan R. Morris, Judge.

Nancy A. Daniels, Public Defender, and John R. Dixon, Asst.
Public Defender, Tallahassee, for Appellant.

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

PER CURIAM.

Bruce A. Gaines has appealed from sentencing as an
habitual felony offender, following his conviction of grand
theft. We reverse, and remand for resentencing.

At the sentencing hearing following Gaines' conviction,
the state presented certified copies of seven prior felony
convictions. The trial court orally found that Gaines had prior

felony convictions, section 775.084(1)(a)1., Florida Statutes, but did not find that the current felony was committed within five years of the date of conviction of the last prior felony, that Gaines had not been pardoned for any qualifying offense, nor that none of the qualifying offenses had been set aside in a post-conviction proceeding. §§ 775.084(1)(a)2.-4., Fla. Stat. The court then found Gaines qualified as an habitual felony offender, and sentenced him as such.

The habitual offender statute requires that the findings enumerated in section 775.084(1)(a) be made by a preponderance of the evidence before the enhanced penalties afforded by that statute may be applied. § 775.084(3)(d), Fla. Stat. The Supreme Court has found a legislative intent that the findings be made with specificity. Walker v. State, 462 So.2d 452, 454 (Fla. 1985). A review of the record shows that the trial court made no findings, specific or otherwise, on three of the four enumerated factors. Therefore, the habitual offender sentence imposed herein must be reversed, and the case remanded for resentencing. See Knickerbocker v. State, 17 F.L.W. D1976 (Fla. 1st DCA August 21, 1992); Rome v. State, 17 F.L.W. D2061 (Fla. 1st DCA September 2, 1992); Barfield v. State, 17 F.L.W. D2246 (Fla. 1st DCA September 25, 1992).

Reversed and remanded for resentencing.

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