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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 80,855

BRUCE A. GAINES, :

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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TABLE OF CITATIONS

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Respondent.	:	
	:	

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, 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, 613 So. 2d 460 (Fla. 1993), is dispositive of the issue. Rucker answered the certified question in the negative, i.e., that Eutsey 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, 613 So. 2d at 461. See also, Robinson v. State, 614 So. 2d 21 (Fla. 4th DCA 1993)(the absence of any findings by the trial court precludes the application of Rucker).

The sentencing judge made no specific findings in the instant case, only a general statement that respondent met the criteria for sentencing as an habitual offender (S117-S121). 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. Therefore, this Court should affirm the decision of the district court of appeal.

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
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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 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 20th day of May, 1993.

JOHN R. DIXON

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
	:	
Petitioner,	:	
	:	
vs.	:	CASE NO. 80,855
	:	
BRUCE GAINES,	:	
	:	
Respondent.	:	
	:	

A P P E N D I X

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

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.