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FILED
SID J. WHITE
APR 2 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MARVIN TUCKER, :

Petitioner, :

vs. : Case No. 80,870

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On May 21, 1991, the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information charging the Appellant, Marvin Tucker, with the following: possession of cocaine in violation of section 893.13-(1)(f), Florida Statutes (1989); possession of cocaine with intent to deliver within 1000 feet of a school in violation of section 893.13(1)(e), Florida Statutes (1989); and obstructing an officer with violence in violation of section 843.01, Florida Statutes (1989). All of these charges allegedly occurred on May 6, 1991, and involved one small brown packet containing 21 chunks of cocaine (R5-8). As a result of these charges, the possession of cocaine charge Mr. Tucker was presently on probation for (lower case number 90-18534) was also before the trial court on a violation of probation (R27,28,32-37). That possession charge had occurred on December 7, 1990.

On July 22, 1991, Mr. Tucker entered open pleas of no contest to the three new charges and the older probation case. There was no agreement as to sentence, and it was pointed out that the State had noticed Mr. Tucker as a violent habitual felony offender (R58-67,44-47). Mr. Tucker was sentenced as a violent habitual felony offender on August 27, 1991, as follows: 10 years prison on the possession of cocaine on May 6, 1991; 15 years prison with 3 years minimum mandatory on the possession of cocaine with intent to sell within 1000 feet of a school; 10 years prison on the obstructing with violence; and 10 years prison on the December 7,

1990, possession of cocaine. Credit for 114 days served was given, and all sentences were ordered to run concurrent (R12-18,38-42,68-78). The guidelines in this case recommended 9 to 12 years of prison (R19). Mr. Tucker timely filed his Notice of Appeal on September 18, 1991 (R50).

The Second District Court of Appeal issued an opinion in this case on November 6, 1992. That opinion reversed one charge based on double jeopardy but upheld all the remaining sentences. Mr. Tucker had attacked all of his sentences on the basis that he was improperly found to be a violent habitual offender; but the Second District Court of Appeal upheld these sentences in accordance with its opinion rendered in Baxter v. State, 599 So. 2d 721 (Fla. 2d DCA 1992).

SUMMARY OF THE ARGUMENT

The only issue remaining in this case after the Second District Court of Appeal's opinion is that of the imposition of the violent habitual offender sentence without findings that none of the priors was either pardoned or set aside in post-conviction proceedings. In this Court's recent case of State v. Rucker, 18 Fla. L. Weekly S93 (Fla. Feb. 4, 1993), this Court applied the harmless error rule when the trial court does not make such findings.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A VIOLENT HABITUAL FELONY OFFENDER WITHOUT MAKING FINDINGS THAT THE PRIOR CONVICTIONS WERE NOT PARDONED OR SET ASIDE IN POST-CONVICTION PROCEEDINGS.

Mr. Tucker had only two sentencing issues on appeal--one was decided in his favor and the other resulted in his seeking jurisdiction with this Court based on a conflict in District Court of Appeal decisions. Whereas some of District Court of Appeals had held that the trial court had an obligation to determine if the priors used to habitualize a sentence had been pardoned or set aside in post-conviction proceedings, the Second District Court of Appeal found no such duty. See Baxter v. State, 599 So. 2d 721 (Fla. 2d DCA 1992). That conflict has been recently resolved contrary to Mr. Tucker's position in this Court's case of Rucker wherein this Court held this question on priors to be a ministerial determination subject to harmless error analysis. Mr. Tucker cannot demonstrate harmful error.

CONCLUSION

Petitioner acknowledges that this case should be handled in accordance with this Court's decision in Rucker.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MARVIN TUCKER, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 91-03058

Opinion filed November 6, 1992.

Appeal from the Circuit Court for Hillsborough County; Barbara C. Fleischer, Judge.

James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Davis G. Anderson, Jr., Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Marvin Tucker was convicted of possession of cocaine, possession of cocaine with intent to deliver within 1000 feet of

a school and obstructing an officer with violence.[1] We reverse the conviction for possession of cocaine on double jeopardy grounds. Keene v. State, 600 So. 2d 513 (Fla. 2d DCA 1992).

We affirm the remaining convictions as well as the habitual offender sentence imposed. See Baxter v. State, 599 So. 2d 721 (Fla. 1992).

RYDER, A.C.J., HALL and THREADGILL, JJ., Concur.

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[1] §§ 893.13(1)(f), 893.13(1)(e), 843.01, Fla. Stat. (1989).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Davis G. Anderson, Jr., Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 31st day of March, 1993.

Respectfully submitted,

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