IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v.

CASE NO.: 80,908

KELVIN SMITH,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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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 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?

STATEMENT OF THE CASE AND FACTS

CASE NO. 91-34CF

Kelvin Smith was charged with two counts of sale of cocaine, nd two counts of possession of cocaine with intent to sell or deliver, by Information dated March 12, 1990. (R 3-4). On June 4, 1992, Smith offered and the trial court accepted his guilty plea to two counts of sale of cocaine. (R 38). Smith's recommended sentence under the guidelines was 3½ to 4½ years in the Department of Corrections. On June 24, 1990, Smith was sentenced to forty months in the Department of Corrections on Count I (R 43-6), and five (5) years probation on Count II. (R 48-9). The State entered a *nolle prosequi* with respect to the remaining charges. (R 54). On May 7, 1991, an Affidavit of Violation of Probation was filed against Smith. (R 52). Smith entered a plea to the violation of probation and the trial court accepted Smith's plea. (R 124). On October 7, 1991, the trial court sentenced Smith to ten (10) years in the Department of

corrections to run concurrently with case no. **91-55** (see **below). (R** 180, 70-75). Notice of Appeal was filed on November 11, 1991 (R 76) **and** an Amended Notice of Appeal **was** filed on January 6, 1992. (R **83).**

CASE NO. 91-55CF

Kelvin Smith was charged with robbery with a firearm and possession of a firearm by a convicted felon by Information dated May 13, 1991. (R 92-3). On October 7, 1991, Smith entered and the trial court accepted a plea of guilty to the lesser included offense of robbery withaut a firearm. (R 124). As part of the negotiated plea agreement, **the** State agreed to:

> [a]ccept this plea, dismiss Count II and recommend that the court sentence defendant as a habitual offender for a term not [to] exceed 15 years. Additionally, case #90-34CF (VOP) will be sentenced concurrently with 91-55CF. Defendant may argue for a term less than 15 years DOC. The State will not seek probation following any term of incarceration.

(R 124).

The State entered a *nolle prosequi* as to Count 11. (R 150). On October 7, 1991, the trial court held a sentencing hearing. (R 165). The State introduced certified copies of Smith's prior convictions for two counts of sale of cocaine in Ben Hill county, Georgia, on October 11, **1989** (R 132-68), **for** possession of cocaine in Irwin County, Georgia, on December 12, 1989 (**R** 138-9, 168), and for two counts of sale of cocaine in Hamilton County, Florida, on June 25, **1990.** (R **133-7, 140-1,** 168). After **the** prosecutor

introduced certified copies of Smith's prior felony convictions in support of habitualization (R 168), defense counsel:

> acknowledge[d] that those are Mr. Kelvin Smith's convictions, total of three separate convictions. So it would appear that for the criteria of the two prior convictions, the last one being within five years of sentencing, the State should be within merit to seek habitualization. I guess the issue to address now is whether or not the Court could deem appropriate the sentence of habitual offender.

(R 168-9).

After hearing argument by defense counsel and by Kelvin Smith as to why Smith should not be sentenced as an habitual felon (R 170-4), the trial court stated:

> The Court has considered matters and received the certified copies into evidence and finds that he [Smith] does qualify as a habitual offender and should be sentenced accordingly.

(R 174).

Smith's recommended guidelines sentence was nine to twelve years. (R 179). The trial judge sentenced Smith to 15 years in the Department of Corrections as a habitual Eelony offender. (R 180, 144-9). Notice of Appeal was filed on November 1, 1991, and an Amended Notice of Appeal was filed on January 6, 1992. (R 158).

Smith raised two issues in his Initial Brief filed in the First District Court of Appeal. A3 to the first issue, the State conceded that the trial court erred in case number 90-34CF by sentencing Smith to ten years in prison for the two counts of sale of cocaine following a violation of probation. As. to the second

issue, the district court of appeal held that the trial court erred by failing to make the findings required by section 775.084(1)(a)(3) and (4), Florida Statutes (1991). The First District reversed the sentence in case no. 91-55CF, but certified the question of great public importance that it had previously certified in Anderson v. State, 529 So.2d 1119, 1120 (Fla. 1st DCA 1991), *petition for review filed*, no. 79,535 (Fla. Mar. 16, 1991), and in Hodges v. State, 596 So.2d 481, 482 (Fla. 1st DCA 1992).

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, Smith did not raise this defense. Therefore, the trial court had no duty to make a finding under section 774.084(1)(a)(3) or (4), Florida Statutes (1991), that the prior felony convictions had not been pardoned or set aside in postconviction proceedings.

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, far 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 Smith was being sentenced (R 13), and the trial court found that he qualified for habitual felony offender sentencing. Because Smith 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 Petitioner's Brief on the Merits has been forwarded by U.S. Mail to MR. P. DOUGLAS BRINKMEYER, Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301, this 8th day of January, 1993.

JOE S. GARWOOD
Assistant Attorney General