IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,908

KELVIN SMITH,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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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, Smith v. State, 17 Fla. L. Weekly D2622 (Fla. 1st DCA Nov. 19, 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. See also Jones v. State, 606 So. 2d 709 (Fla. 1st DCA 1992) (en banc), review pending, case 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 in the instant case were:

> The court has considered matters and received the certified copies into evidence and finds that he does qualify as a [sic] habitual offender and should be sentenced accordingly (R 174).

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,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to Joe S. Garwood, Assistant Attorney General, Criminal Division, The Capitol, Tallahassee, Florida, this 13th day of January, 1993.

P. DOUGLAS BRINKMEYER

probationer's denial of ever engaging in this sexual offense in question.' '' *566 So.* 2d at 69. Reversing the order of revocation, Judge Frank explained for the appellate court:

> "A violation which triggers a revocation of probation must be willful and substantial and the willful and substantial nature of the violation must be supported by the greater weight of the evidence." *Hightower v. State,* 529 So. 2d 726 (Fla. 2d DCA 1988). In spite of Young's admission to the violation for the narrow reason that he had actually been dismissed from the SHARE program, he expressed a willingness to complete some form of MDSO counseling. The probation order did not specify the period within which Young was to complete the program, how many chances he would be given to obtain success, or when within the eighteen year term of his suspended sentence he was required to complete the program. Because the order was so nonspecific, and because Young professed his desire to complete this condition of probation in some form acceptable to him, we have determined from the totality of the several considerations that the trial court abused its discretion in revoking Young's probation.

566 So. 2d at 69-70.

The issue presented to us is a close one, and we are ever loath to second guess the trial court's discretionary disposition of the matter. However, in view of the applicable principles set forth in the cited cases, we conclude that Appellant's probation should not have been revoked on this record. We are cognizant of the need for maintaining order in the "therapeutic community" being fostered in the drug abuse treatment program here involved, and admittedly Gibbs's behavior was shown to be disruptive during the morning complaint meetings. However, based on this record, Gibbs's disruptive outbursts during the complaint meetings appear to be a manifestation of antisocial behavioral characteristics that derive from his drug abuse problem for which he needs treatment, and nothing in the testimony evidences a contrary assessment. Counselor Randolph agreed that Gibbs is in need of treatment and is treatable, but probably in some other setting. Gibbs's inability to control the antisocial behavior for which he needs treatment in a drug therapy program does not rise to the level of conduct evidencing a willful and substantial refusal to participate in the program required to revoke his probation. If this program does not in fact provide a suitable setting for treating his problems, it necessarily follows that his inability to properly conform to its requirements cannot be treated as a willful refusal to participate. As was true in *Young*, the general provisions of condition one in this case lack the specifics required to warrant a finding of willful and substantial violation under the circumstances.

For these reasons, the order of revocation is reversed and this case is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED. (ERVIN and WIGGINTON, JJ., **CONCUR.**)

* * *

Criminal law—Sentencing—Guidelines—Probation revocation—Error to increase sentence more than one cell without giving reason for departure—Habitual offender—Failure to make findings that predicate convictions have neither been pardoned nor set aside constitutes reversible error—Findings not waived by plea agreement in which defendant merely agreed that state attorney would recommend that he be sentenced as habitual offender nor by defense counsel's acknowledgment at hearing that state had proved the existence of the requisite two prior felony convictions—Question certified: 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?

KELVIN SMITH, Appellant, vs. STATE OF FLORIDA, Appellee. 1st District, Case No. 91-3620. Opinion filed November 19, 1992. An Appeal from the Circuit Court for Hamilton County. L. Arthur Lawrence, Judge. James C. Banks, Special Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Andrea D. England. Assistant Attorney General, Tallahassee, for Appellee.

(ERVIN, J.) We reverse the sentences of appellant, Kelvin Smith, for two reasons. First, Smith contends, and the state concedes, that the trial court erred in case number 90-34CF by sentencing Smith to ten years in prison for two counts of sale of cocaine following a violation of probation, which constituted a four-cell bump up from his original recommended guideline prison sentence of three and one-half to four and one-half years. Florida Rule of Criminal Procedure 3.701(d)(14) provides that a sentence imposed after revocation of probatiou may be increased only one cell without a trial judge giving a reason for departure. Because the sentencing judge did not articulate a reason for departure, Smith's sentence in case 90-34CF must be reversed and the case remanded for the judge to impose a sentence within the recommended or permitted range, or within the one-cell bump up.

In case number 91-55CF, the court sentenced Smith as a habitual felony offender to 15 years in prison for robbery without a firearm. The trial judge, however, failed to make the findings required by Section 775.084(1)(a)(3) and (4), Florida Statutes (1991), that he had not been pardoned, or that the prior convictions had not been set aside in a postconviction proceeding. A trial court's failure to make such findings is reversible error, even in the absence of objection. Jones *v. State*, **17 F.L.W.** D2375 (Fla. 1st DCA Oct. 14, 1992) (en banc).

The state contends that Smith agreed to a habitual-offender sentence in his plea agreement in case number 91-55CF, or, in the alternative, that he waived his right to the fact-finding process by acknowledging at the sentencing hearing that he met the criteria for habitualization. On the contrary, Smith merely agreed in the plea agreement that the state attorney would recommend that he be sentenced as a habitual offender. Such an agreement cannot be considered either a stipulation or a waiver. See *Harper v.* State, 17 F.L.W. D2315 (Fla. 5th DCA Oct. 9, 1992) (defendant's acceptance of prosecutor's recommendation of habitual offender sentencing was not a stipulation of habitual offender status nor waiver of fact-finding process). Moreover, at the habitualization hearing, defense counsel acknowledged only that the state had proved the existence of the requisite two prior felony convictions. He did not mention the findings required by section 775.084(1)(a)(3) and (4).

As we have done previously, we certify the following question to the Florida Supreme Court 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** DE**FENDANT DOES** NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY **THE STATE** HAVE BEEN **PARDONED** OR **SET ASIDE?**

(WIGGINTON and ZEHMER, JJ., **CONCUR,**)

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