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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,938

GUILLERMO TRUJILLO-PENATE

Respondent.

______________________________/

MERITS BRIEF OF PETITIONER

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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?

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STATEMENT OF THE CASE AND FACTS

By informations filed May 11, 1990, Respondent Guillermo Trujillo-Penate was charged with two counts of sale of cocaine in violation of Sections 893.03(2)(a) and 893.13(1)(a) Florida Statutes; two counts of possession of cocaine in violation of Section 893.13(1)(f), Florida Statutes; and one count of possession of a firearm during the commission of a felony in violation of Section 790.07, Florida Statutes (R3-5,6-8). By information filed September 12, 1990, Respondent was charged with escape in violation of Section 944.440, Florida Statutes (R18-19).

The State filed notices of its intention to have the Defendant sentenced as an habitual offender or a habitual violent felony offender pursuant to Section 775.084 Florida Statutes (R9, 20).

On April 22, 1991, Respondent entered pleas of no contest to two counts of sale of cocaine, two counts of possession of cocaine and one count of carrying a firearm during the commission of a felony. He did not expressly reserve the right of appeal (R80-109), 165, 184-5).

At sentencing, the state offered as predicate convictions, prior felony convictions which defense counsel conceded were his (T 194-196)). The following colloquy took place (beginning at T 194):

[STATE ATTORNEY]: First I'm submitting to the Court State's Exhibit 1 for identification, and this represents a fingerprint card taken from this defendant at the jail on April 14, 1990, being a standard fingerprint card.

COURT: Any objection?

[DEFENSE COUNSEL] No objection.

COURT: It will be admitted without objection.

[STATE ATTORNEY]: I'm tendering to the court State's Exhibit 2 which is a certified judgment and conviction out of Collier County Florida, in the name of Lazaro Delgado Bonilla and Secundino Calderon, showing a conviction for escape entered the 26th day of September, 1984. The fingerprints here have been compared by Mr. Way of the sheriff's department and this is the same defendant according to him, and [defense counsel] has talked to Mr. Way about that.

COURT: [Defense counsel], any objection to the introduction of this document based on the fact that the State's claiming Mr. Bonilla and Mr. Calderon are the same and one and the same as your client, Mr. Trujillo?

[DEFENSE COUNSEL] No objection, Your Honor.

COURT: It shall be admitted without objection.

[STATE ATTORNEY]: I'm tendering to the court as State's exhibit 3 a judgment and sentence out of Okaloosa County, Florida, in Cases No. 88-311 and 88-560, which shows an adjudication and conviction of the defendant, Eduardo Mario Zelie, and he was adjudicated guilty of grand theft in Case 88-311 and escape in 88-560 by Judge Fleet on the 15th day of December, 1989, and the two sets of fingerprints which are certified and attached have also been compared by Investigator Way to the standards, and

he tells us that they are a match, and he has signed off or initialed the judgments.

COURT: Thank you. Any objection?

[DEFENSE COUNSEL]: None.

COURT: It will be admitted without objection.

[STATE ATTORNEY]: I'm tendering to the court as State's Exhibit 4 a judgment and sentence out of Santa Rosa - circuit Court of Santa Rosa County, Florida, in the name of Miguel Corralez a/k/a Eduardo Zelie, showing convictions for possession of cocaine and escape, entered on the 1st day of May, 1990, nunc pro tunc January 19, 1990, by Judge Nancy Gilliam.

COURT: Any objection, [defense counsel]?

[DEFENSE COUNSEL]: No Your Honor.

[STATE ATTORNEY]; And the fingerprints are also initialed by Investigator Way a having matched the standards.

COURT: Thank you.

[STATE ATTORNEY]: Based on those requisite number of convictions within the last five year, we're asking the Court to adjudicate this defendant as a habitual felony offender and to sentence him to 30 years in prison.

COURT: [Defense counsel] do you have anything you wish to offer in the habitual felony offender classification proceeding?

[DEFENSE COUNSEL]: Nothing, Your Honor.

The court found that the prior convictions were sufficient to classify appellant as an habitual felony offender (T 197), holding:

> The court finds, based upon the evidence submitted, that Mr. Trujillo is the person who is the subject of the records admitted as State's Exhibits 1,2,3, and 4, prior convictions. The court finds that the prior convictions constitute a statutory requirement -- or the statutory requirement as classification as an habitual felony offender. The Court finds that due to the nature and circumstances of the offenses involved, along with the offenses involved in this case, that the defendant does constitute a danger to society and I will, therefore, classify him for sentencing purposes as an habitual felony offender.]

Respondent was classified as an habitual felony offender (R 80-109, T 197), and the court inquired whether defense counsel had anything more to add:.

> COURT: I previously received from you a sentencing letter, Mr. Barth. Do you have anything you wish to offer at this time in extenuation or mitigation that has not yet been submitted?
>
> [DEFENSE COUNSEL]: No, Your Honor, IT'S already been submitted.

The court then sentenced Respondent to 25 years in the department of corrections on each of the second degree felonies, to run concurrent, and 10 years on each of the third degree felonies, to run concurrent, for a total sentence of 25 years state prison with credit for time served of 285 days.

Respondent appealed from his judgment and sentence, initially raising two issues. The first alleged an abuse in judicial discretion in finding appellant competent to proceed and the second claimed error, alleging that there was no interpreter at the competency and sentencing hearings. In a supplemental brief, Respondent raised the issue of whether "The trial court erred by making no finding that the convictions upon which appellant's classification as an habitual felony offender was based had not been pardoned or set aside." The State responded that (1) the issue of the voluntary and intelligent nature of the plea had never been placed before the trial court by motion to withdraw the plea, vacate the ruling of sentence thereon and was not therefore an appropriate subject for direct appeal (2) there was an interpreter present at the hearings at issue (supplementing the record accordingly) and (3) under Eutsey v. State, 383 So.2d 219 (Fla. 1980) the State does not have to disprove, and the trial court does not have to find, that unraised affirmative defenses do not exist.

The First District Court of Appeal issued a Per Curiam decision upholding the judgment and conviction and ruling that since the respondent had never challenged the voluntary and intelligent character of the plea in the trial court, he could not challenge the voluntary and intelligent nature of his plea on direct appeal.

The District court remanded the cause for resentencing however, finding that the trial court erred reversibly in failing to make the required statutory findings that the predicate convictions had not been pardoned or set aside and citing Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA October 14, 1992) (rendered after the briefs in the instant appeal were filed).

Subsequently, the District Court granted the State's Motion to certify the following question to this court as one of great public importance:

> Does the holding in Eutsey v. State, 393 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?

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, Petitioner did not raise this defense. Therefore, the trial court had no duty to make a finding thereupon.

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 held that the trial court must expressly find that a judgment of conviction is still valid, even though the defense never asserted that the judgment was set aside. This issue has been thoroughly briefed in three cases currently pending for review in this court, Anderson v. State,592 So.2d 1119 (Fla. 1st DCA 1991), review pending, Case No. 79,and Hodges v. State, 596 So.2d 481 (Fla. 1st DCA 1992), review pending, Case No. 79,728, *see also* Jones v. State F.L.W. D2375 (Fla. 1st DCA October 14, 1992) review pending, Case No. 80,751. The outcome in those cases will control the outcome here.

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.

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 post-conviction 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.

In Jones, supra, the First District suggests that the presumption of correctness accorded judgments of conviction can be used as evidence to support a factual finding that the judgment has not been set aside. To the contrary, presumptions are not evidence, but rather they are burden-shifting devices. A presumption says to a party that if you prove certain things, you

will be relieved of proving other things. For example, if the State proves that a judgment of conviction was entered, it does not have to show the continuing validity of the judgment until evidence of its invalidity is admitted. This brings us right back to affirmative defenses.

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, Respondent did not raise the affirmative defense that the judgments had been set aside, and 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,

ROBERT A. BUTTERWORTH
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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 Nancy Daniels, Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 14th day of January, 1993

MARILYN MCFADDEN
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,751

GUILLERMO TRUJILLO-PENATE

Respondent.

______________________________/

APPENDIX

Guillermo Trujillo-Penate, Slip Opinion (Fla. 1st DCA November 19, 1992)

Guillermo Trujillo-Penate, Slip Opinion (Fla. 1st DCA, December 16, 1992)(ON MOTION TO CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE)

91-1114372
B

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

GUILLERMO TRUJILLO-PENTATE,

Appellant,

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

v.

CASE NO. 91-2241

STATE OF FLORIDA,

Appellee.

Docketed
11-23-92
Florida Attorney General

NOV 23

Opinion filed November 19, 1992.

An appeal from the Circuit Court for Okaloosa County, G. Robert Barron, Judge.

Nancy A. Daniels, Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, Marilyn McFadden, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Appellant, Guillermo Trujillo-Pentate, appeals the judgment and habitual felony offender sentence imposed pursuant to his plea of nolo contendere to the offenses of sale and possession of cocaine, carrying a firearm in the commission of a felony, and escape. The state moved to dismiss the appeal, relying on Section 924.06(3), Florida Statutes (defendant who pleads nolo

contendere with no express reservation of the right to appeal shall have no right to a direct appeal). We deny the state's motion to dismiss, affirm the judgment, but remand for resentencing.

In the proceeding below the trial court ruled that appellant was competent to stand trial. It was only then that appellant entered his plea of nolo contendere. On appeal, appellant first raised two issues relating to appellant's competency to proceed to trial. Appellant later raised a supplemental issue with respect to sentencing.

With respect to the competency issues raised, the state moved to dismiss in light of appellant's nolo contendere plea. Appellant argues that the competency issues raised present questions as to the voluntary and intelligent character of the plea, cognizable on appeal pursuant to Robinson v. State, 373 So.2d 898 (Fla. 1979). Even assuming that the competency issues raised cast doubt upon the voluntary and intelligent character of appellant's plea, Robinson clearly states that an appeal from a plea should never be a substitute for a motion to withdraw the plea. Id. at 902. Thus, a challenge to the voluntary and intelligent character of the plea would be reviewable on direct appeal if the trial court had been presented with that question and rendered a ruling adverse to the defendant. Id.

Though appellant may not challenge the voluntary and intelligent nature of his plea on appeal, we nonetheless deny the state's motion to dismiss as we have jurisdiction of the case in

order to consider the sentencing issue raised, which is appealable under Robinson.[1] See Pyle v. State, 596 So.2d 744 (Fla. 1st DCA 1992).

Appellant argues that the trial court erred reversibly in failing to make the required statutory findings that the predicate convictions supporting habitual felony offender sentencing had not been pardoned or set aside. This court has recently ruled favorably upon appellant's argument. Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA October 14, 1992)(en banc). We therefore remand for resentencing. On remand, the trial court may impose the same sentence originally imposed if such can be done in accordance with Jones.

AFFIRMED in part, REVERSED in part and REMANDED for resentencing.

MINER, ALLEN, AND KAHN, JJ., CONCUR.

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[1] This disposition is without prejudice to appellant's entitlement to seek appropriate postconviction relief in the trial court.

91-111437-RR
B

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

GUILLERMO TRUJILLO-PENTATE,

Appellant,

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

v.

CASE NO. 91-2241

STATE OF FLORIDA,

Appellee.

Docketed
12-18-92
Florida Attorney General

RECEIVED
DEC 17 1992

Opinion filed December 16, 1992.

An appeal from the Circuit Court for Okaloosa County, G. Robert Barron, Judge.

Nancy A. Daniels, Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, Marilyn McFadden, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION TO CERTIFY A QUESTION
OF GREAT PUBLIC IMPORTANCE

We grant appellee's motion to certify a question of great public importance. As was done in Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA October 14, 1992), we certify the following question to the Florida Supreme Court as one of great public importance:

> Does the holding in Eutsey v. State, 393 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?

MINER, ALLEN and KAHN, JJ., CONCUR.