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w/app

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

BRETT TODD PLEASANT,

Respondent.

CASE NO. 80,997

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #325791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent, Brett Todd Pleasant (hereinafter Pleasant), was convicted by a jury of attempted armed robbery and armed robbery occurring on January 15, 1991 (R. 206, 211), for which he was adjudicated guilty (R. 220) and sentenced to prison as an habitual felony offender for twenty-five years on each offense, sentences to run concurrently (R. 216-222, 239-242).[1]

Prior to the sentencing hearing, petitioner, State of Florida (hereinafter State), filed a written notice of its intent to seek habitual felony offender sentencing on March 11, 1991. (R. 209) At the sentencing hearing held on July 24, 1991 (R. 216), the State placed in evidence certified copies of several prior felony convictions and a certificate from the Office of Executive Clemency indicating that Pleasant had not been pardoned for any of his Florida offenses (R. 217-218, 223-237). The documentary evidence proved that on July 18, 1985, Pleasant was sentenced to prison for three years for robbery and battery on a law enforcement officer, sentences to run concurrently with each other and concurrently with a federal sentence of twelve years' imprisonment for robbery (18 U.S.C. § 2113) that was imposed on July 1, 1985. (R. 223-237)

Defense counsel's only objection to the presentence investigation report related to Pleasant's educational history, and he admitted that the score of 304 points on the guidelines

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[1] The written judgment contains a scrivener's error. It reflects convictions for two armed robberies. (R. 239)

scoresheet was correct. (R. 217-218) The scoresheet reflected that Pleasant had previously committed three felonies: two robberies and battery on a law enforcement officer. (R. 243)

The following colloquy took place at the sentencing hearing:

> COURT: The State has presented evidence that on the face of it would place the defendant in the criteria of a habitual offender.
>
> DEFENSE COUNSEL: We acknowledge those prior convictions, Your Honor.
>
> COURT: All right. Then anything you wish to offer as to disposition?
>
> DEFENSE COUNSEL: Just request the Court to consider sentencing Mr. Pleasant within the sentencing guidelines and not declaring him a career criminal. He still maintains that he is not the right person for these charges. Is there anything you want to say, Brett?
>
> DEFENDANT: I want to ask the Court to have mercy on me and whatever time that I do have to serve I'm still young and I'm eligible to get out whenever eligible for parole so I can straighten out my life.
>
> COURT: Mrs. Patterson.
>
> PROSECUTOR: Judge, as the Court is aware, the defendant had just gotten out of prison in Chicago for a robbery, comes down to Florida and commits two within days of being released from prison. I think he's shown that he's not willing to get his life straightened out and the State is requesting the maximum career criminal sanctions.
>
> COURT: What do you see that being?
>
> PROSECUTOR: Life in prison, Judge.
>
> COURT: Mrs. Richards.

DEFENSE COUNSEL: Your Honor, I don't think that this offense occurred within days of his being released from prison. He was in Chicago on parole and had been released approximately six months prior. Is that right, Brett.

DEFENDANT: It was about six months.

(R. 218)

Pleasant appealed from his judgment and sentence raising the following issues: (1) trial court committed fundamental error by sentencing the defendant as an habitual felony offender without first making the statutorily required findings; and (2) the judgment erroneously reflected convictions for two counts of armed robbery. The First District Court of Appeal agreed with Pleasant and reversed his judgment and sentence. In response to the State's motion, the same question that was certified in Jones v. State, 17 Fla. L. Weekly D2375 (Fla. 1st DCA October 14, 1992), review pending, Case No. 80,751, was certified in the instant case. (See appendix.)

SUMMARY OF ARGUMENT

Although the trial court did not make specific statutory findings, the error was harmless. The unrebutted evidence in the record shows that Pleasant committed three prior felonies (two robberies and battery on a law enforcement officer), and that he was placed on parole six months before committing the current crimes. The evidence further shows, directly or inferentially, that these judgments of conviction are still valid and that Pleasant has never been pardoned for committing these offenses.

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?

In State v. Rucker, Case No. 79, 932 (Fla. February 4, 1993), this Court recently answered the certified question presented in the instant case, stating "We answer in the negative and quash the decision of the district court." (Slip Opinion, 2) It elaborated:

> In Eutsey v. State, 383 So.2d 219 (Fla. 1980), we ruled that the burden is on the defendant to assert a pardon or set aside as an affirmative defense. Although this ruling does not relieve a court of its obligation to make the findings required by section 775.084, we conclude that where the State has introduced unrebutted evidence--such as certified copies--of the defendant's prior convictions, a court may infer that there has been no pardon or set aside. In such a case, a court's failure to make these ministerial findings is subject to harmless error analysis.

(Slip Opinion, 4)

In the instant case, the trial court did not make specific findings of fact to support its conclusion that Pleasant qualified for sentencing as an habitual felony offender.

However, the documentary and testimonial evidence that is in the record on appeal amply supports the trial court's conclusion. Pleasant did not challenge the placement in evidence of certified copies of his prior judgments of conviction for three felonies, and he voluntarily admitted that he had been placed on parole six months before committing the current offenses. In view of this evidence, the trial court's failure to make specific findings of fact was harmless error. Were this court to remand this case for resentencing, the result would be "mere legal churning."

CONCLUSION

Based on the foregoing discussion, the First District's decision should be quashed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #503280
ASSISTANT ATTORNEY GENERAL

JAMES W. ROGERS, #328791
BUREAU CHIEF-CRIMINAL APPEALS

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

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 Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 5th day of February, 1993.

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,751

WILLIAM V. JONES,

Respondent.

_____/

APPENDIX

Pleasant v. State, Slip Opinion (Fla. 1st DCA October 29, 1992)

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BRETT TODD PLEASANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 91-2546

Opinion filed October 29, 1992.

An appeal from the circuit court for Escambia County, Lacey A. Collier, Judge.

Nancy A. Daniels, Public Defender, and Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Brett Todd Pleasant appeals a judgment and sentence adjudicating him guilty of two counts of armed robbery and sentencing him as a habitual felony offender to two concurrent terms of 25 years' incarceration. We reverse and remand.

Appellant first argues on appeal that the trial court committed fundamental error in sentencing him as a habitual

felony offender without making the findings of fact required by section 775.084(1)(a), Florida Statutes (1991). Since the court's failure to make the statutorily-required findings was fundamental error, Jones v. State, No. 91-2961 (Fla. 1st DCA Oct. 14, 1992); Walker v. State, 462 So. 2d 452, 454 (Fla. 1985); Rolle v. State, 586 So. 2d 1293 (Fla. 4th DCA 1991), we vacate the sentences and remand for resentencing. See Martin v. State, 592 So. 2d 1219, 1220 (Fla. 1st DCA 1992).

Appellant also argues that the trial court reversibly erred in entering a written judgment and sentence adjudicating him guilty of two armed robberies, because the amended information charged him with, and the jury found him guilty of, one armed robbery and one attempted armed robbery. The state concedes error on this point. We reverse and remand for entry of a final judgment that correctly reflects the crimes of which appellant was convicted.

REVERSED AND REMANDED.

ERVIN and ZEHMER, JJ., CONCUR. BARFIELD, J., DISSENTS WITH OPINION.

BARFIELD, J., Dissenting.

At the time of sentencing the state placed in evidence certified copies of several prior felony convictions to support the application of the habitual felony offender enhancement. In addition, a certificate from the Coordinator of the Office of Executive Clemency for the State of Florida was placed in evidence stating that she had researched the state's records and found no pardon of any kind having been granted to the appellant in connection with a conviction. The trial judge, on the record, concluded that the state had met the criteria for proving defendant an habitual offender. The defendant said nothing with respect to this status determination. Defendant made no objection and voiced no complaint.

This case again illustrates the patent absurdity of this court's position in the cited cases in the majority opinion, and its misunderstanding and misapplication of the concept of "fundamental" error.

Reliance on Walker v. State, 462 So.2d 452 (Fla. 1985), is misplaced as the court has failed to recognize that the conflict that gave rise to Walker was a provision of section 775.084 since repealed by the legislature. That repealed section, formerly section 775.084(3), required a separate proceeding in which the court was to consider the necessity for the protection of the public to sentence the defendant to an extended term of imprisonment. This somewhat subjective consideration rightfully required proof of matters less certain and predictable than

publication of public records. It required more studied judgment and explanation than the more mechanical application of the present law.

We should more closely heed the words of the supreme court in Eutsey v. State, 383 So.2d 219 (Fla. 1980). While dealing with the same statute present in Walker, and after devoting lengthy analysis to the levels of proof required, entitlement to jury trial, and objective requirements of the recidivist statute, the court disposed of the very issue presented in this case with the following sentence:

> We also reject his 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.

I respectfully dissent.

91-1115 91-TDR

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BRETT TODD PLEASANT,

Appellant,

v. CASE NO. 91-2546

STATE OF FLORIDA,

Appellee.

Opinion filed December 4, 1992.

An appeal from the circuit court for Escambia County, Lacey A. Collier, Judge.

Nancy A. Daniels, Public Defender, and Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

ON APPELLEE'S MOTION FOR CERTIFICATION

PER CURIAM.

On consideration of appellee's motion for certification, we agree that the same question certified in Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA October 14, 1992), should be certified to the supreme court, and we hereby do so.

ERVIN, ZEHMER, and BARFIELD, JJ., CONCUR.