IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,034

JOEY WASHINGTON,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

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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 are the opinions of the lower tribunal.

II SUMMARY OF THE ARGUMENT

This Court has before it three 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, Jones v. State, 606 So. 2d 709 (Fla. 1st DCA 1992) (en banc), review pending, case no. 80,751, 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. Respondent therefore adopts the arguments made by Anderson, Hodges, and Jones as his own.

It is important to note that the only findings made by the sentencing judge in the instant case were that respondent qualified as an habitual offender:

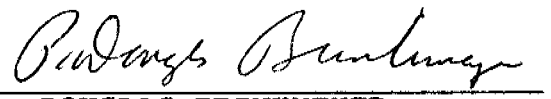
> I do find that he does qualify as a [sic] habitual offender in this case and will sentence accordingly. (R 166).

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,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Joe S. Garwood, Assistant Attorney General, by delivery to Plaza Level, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, this 4th day of February, 1993.

P. DOUGLAS BRINKMEYER

91-1162-RC

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JOEY WASHINGTON, * NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND

Appellant, * DISPOSITION THEREOF IF FILED.

V. * CASE NO. 91-2647

STATE OF FLORIDA, *

Appellee. *

Opinion filed November 19, 1992.

An appeal from the Circuit Court for Suwannee 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.

WIGGINTON, J.

Appellant appeals his convictions of three counts of sale of a controlled substance and one count of possession of a controlled substance with intent to sell, and his sentences as an habitual offender of 30 concurrent years on each count. We affirm the convictions but reverse the sentences and remand for resentencing.

In sentencing appellant as an habitual offender, the trial judge failed to make a specific finding that he meets each of the criteria of section 775.084(1)(a) (1989). As this court recently declared in Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA Oct. 14, 1992): "The failure to make such findings constitutes reversible error." Therefore, appellant's sentences are hereby reversed and this cause is remanded for resentencing in compliance with section 775.084.

ERVIN and ZEHMER, JJ., CONCUR.

91-111620-TLK
Q

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

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

JOEY WASHINGTON,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-2647

Opinion filed December 31, 1992.

An appeal from the Circuit Court for Suwannee 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.

OPINION ON MOTION FOR CLARIFICATION AND SUGGESTION FOR CERTIFICATION

WIGGINTON, J.

The state has filed a motion asking this court to certify to the supreme court the question certified in Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA Oct. 14, 1992). We grant the motion and, as in Jones, certify to the supreme court the following question 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 DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS THE DEFENSE, THAT THE QUALIFYING CONDITIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

ERVIN and ZEHMER, JJ., CONCUR.