IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,067

AL BRONCO JACKSON,

Respondent.

_____/

MERITS BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

In accordance with a negotiated nolo contendere plea (R. 29, 296), the trial court adjudicated respondent (hereinafter Jackson) guilty of eight counts of sale of cocaine, nine counts of possession of cocaine, and one count of resisting an officer without violence occurring in April and May 1991 (R. 1-18, 206).

In May and June 1991, the prosecutor filed written notices of his intention to seek habitual offender sentencing. (R. 19-27)

Jackson's nolo contendere plea was entered "with the understanding that if [he] is found to be an habitual felony offender the state will request a maximum sentence of 30 years and a guidelines sentence if he is not." (R. 28-29, 294, 296)

At the sentencing hearing held on December 18, 1991 (R. 302), the prosecutor, without objection, placed in evidence certified copies of Jackson's two prior felony judgments bearing the dates of December 5, 1985 and April 10, 1989. (R. 203) Defense counsel had no objections to the presentence investigation report. (R. 203)

The following colloquy, in pertinent part, took place at the sentencing hearing:

> COURT: Anything you wish to offer, Mr. Loveless [defense counsel], in opposition of the HFO classification evidence?
>
> LOVELESS: As a legal technicality being fulfilled according to the statute, your Honor, obviously, I have none. That's what the statute says.
>
> COURT: The Court therefore finds based on the evidence presented that Mr. Jackson does

> meet the criteria for classification as a habitual felony offender, and I will therefore so classify him for sentencing purposes. I will proceed to sentencing at this time and hear from the defense if you wish to be heard.

(R. 204) While arguing on the sentencing issue, defense counsel acknowledged Jackson's two prior felony convictions. (R. 204-205)

The trial court sentenced Jackson to prison as an habitual felony offender for a total of thirty years. (R. 42-130, 206)

Jackson appealed from his judgments and sentences. His appellate counsel filed an Anders brief. The State filed an answer brief in which it raised two issues, one relating to the defendant's right to appeal and the other relating to the absence of specific findings on the affirmative defenses (executive pardon and set aside of conviction). The First District Court of Appeal reversed Jackson's sentences but certified the same question that was certified in Jones v. State, 17 Fla. L. Weekly (Fla. 1st DCA October 14, 1992), review pending, Case No. 80,751.

SUMMARY OF ARGUMENT

Although the trial court did not make specific statutory findings, the error was harmless. The unrebutted documentary and testimonial evidence in the record shows that Jackson qualified for sentencing as an habitual felony offender.

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, 18 Fla. L. Weekly S93 (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." 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.

Id., at S94.

In the instant case, the trial court did not make specific findings of fact to support its conclusions that Jackson 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 conclusions. The prosecutor placed in evidence certified copies of Jackson's prior judgments of conviction for two felonies. Defense counsel admitted that Jackson met the statutory requirements for sentencing as an habitual felony offender. (R. 204) 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,

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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 P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 15th day of February, 1993.

Carolyn J. Mosley

Carolyn J. Mosley
Assistant Attorney General

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APPENDIX

Jackson v. State, Slip Opinion (Fla. 1st DCA December 16, 1992)

92-110168-TC02 V

IN THE DISTRICT COURT OF APPEAL F

FIRST DISTRICT, STATE OF FLORIDA

AL BRONCO JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 92-196

Opinion filed December 16, 1992.

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

P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for appellant.

James W. Rogers, Senior Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Appellant's sentence is reversed in accordance with this court's opinion in Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA Oct. 14, 1992) (en banc). We certify to the Florida Supreme Court as a question of great public importance the same question certified in Jones.

JOANOS, C.J., SMITH and MINER, JJ., CONCUR.