IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,079

JEROME WILLIAMS,

Respondent.

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

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

In accordance with a negotiated guilty plea (R. 6; SR. 4-5), the trial court adjudicated respondent (hereinafter Williams) guilty of armed burglary, kidnapping, robbery, battery on an elderly person, and attempted sexual battery occurring on March 10, 1991. (R. 43)

Without objection, the prosecutor represented to the trial court at the sentencing hearing that Williams and his lawyer were given proper notice of the State's intention to seek habitual offender sentencing. (R. 33) The prosecutor also tendered, without objection, certified copies of several of Williams' judgments and sentences from 1988 and earlier, including Madison County convictions for burglary. (R. 33)

A presentence investigation report was prepared, to which defense counsel had no objections, (R. 27) The prosecutor made two corrections: (1) The convictions in Madison County *Case* Nos. *88-59* and 88-118 were for burglary of a dwelling, as was demonstrated by the certified copies shown to defense counsel; (2) Williams had been released from prison eight days (not two days) when he committed the instant offenses. (R. 27-28)

Defense counsel described Williams as "a young man that has been constantly in trouble." (R. *39)* Williams informed the court that he had "a messy record, burglary and all that, petit thefts and all that," and that he had been in and out of prison. (R. 40-41)

A guidelines scoresheet was prepared, which reflected that Williams had previously committed nine felonies. (R. 21) Defense counsel urged the trial court to sentence Williams within the guidelines permitted range, noting that the cap was 40 years' imprisonment. (R. 39)

Without objection, the prosecutor summarized Williams' criminal history as follows:

> Looking back briefly at his prior record, the Court will note that it began in 1974 as a juvenile. Even as a juvenile he was committed to the Dozier School for Boys in 1977. *So* he actually served a term of commitment as a juvenile for a burglary type crime.
>
> Continuing into 1978, when the Defendant became of age as an adult, immediately he got into the criminal justice system by shooting into an occupied dwelling. Here he was given an opportunity to rehabilitate himself and given two years of probation. He was not even adjudicated guilty in that case.
>
> Within a period of less than a year, the Defendant was then adjudged guilty of uttering a forgery, a theft related type crime in Leon County, Florida, and was finally sentenced as an adult to the Department of Corrections for two years.
>
> Within, again within a two year span, the Defendant was back out of prison, in Madison County, where he was convicted of two counts of burglary, excuse me, three counts of burglary. The Court then in that case sentenced him to prison, where he received five years of prison, or ten years of prison. Five for some counts to run consecutive to others. But a ten year prison sentence was imposed in 1981.
>
> The Defendant again was released from prison. He was back out on the streets. And in 1987 again was in Madison County and again

committed more burglaries. One of which was a dwelling. The PSI shows a structure, but the certified copy indicates it was a dwelling. Here again, he was given another opportunity to rehabilitate himself without going to prison and was sentenced to a term of community control.

After being placed on community control in 1987, late 1987, while on community control he continued his criminal patterns, while supposedly being supervised in his jail cell of his home, committing petit thefts, a phrase, minor things, but continuing in with the criminal justice system until 1988, when he again committed a rash of burglaries. Again, one of which was a dwelling.

In 88-119, he was convicted of burglary of a dwelling, instead of a structure as indicated in the PSI; grand theft, another felony; burglary of a structure in Case 88-119, and another theft related crime in 88-119. Another burglary of a structure in Case Number 88-125 in Madison County, and a theft as well. And here he received another prison sentence. I think the total of those was seven years that he received in 1988.

The State at that point asked Judge Peach to depart from the guidelines, to impose a sentence that would keep the Defendant in prison and protect society. Judge Peach declined to do so but did sentence him to the seven years.

Within eight days of being released from prison on the latest sentence that was imposed, the Defendant again was continuing in his criminal behavior. This time escalating to much more serious crimes. Although burglaries are very serious and burglaries of a dwelling are serious, this time he is convicted and facing the Court for sentencing on a burglary while armed, a very serious first degree felony punishable by life; kidnapping, a first degree punishable by life; a robbery, a violent crime; battery on a person 65 years of age or older; and this time attempting to commit sexual battery on that same victim.

(R. 34-36)

After listening to argument of counsel, the trial stated, "He is end will be sentenced as an habitual offender." (R. 43) The trial court sentenced Williams to prison for life (including a 3-year minimum mandatory term) for armed burglary, life for kidnapping, 30 years for robbery, 5 years (including a 3-year minimum mandatory term) for battery on an elderly person, and 5 years for attempted sexual battery, all to run consecutively. (R. 43) The trial court's oral sentencing order was subsequently reduced to writing. (R. 8-15)

Williams appealed from his judgments and sentences on two grounds: (1) the trial court had failed to make the statutorily required findings for imposing habitual offender sentences; and (2) the trial court erroneously imposed a three-year minimum mandatory term for the offense of battery on an elderly person. The First District Court of Appeal agreed with Williams and reversed his sentences but certified the same question that was certified in Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991), review pending, Case No. 79,535.

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 Williams 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." Id., at S93. 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 Williams 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 Williams' prior judgments of conviction far several felonies. He also represented to the court, without objection, that Williams had been released from custody just eight days before committing the current crimes. Williams, personally and through his counsel, acknowledged his extensive criminal record. 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, #593780
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

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 11th day of February, 1993.

Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,079

JEROME WILLIAMS,

Respondent.

_____/

APPENDIX

Williams v. State, Slip Opinion (Fla. 1st DCA November 2, 1992), On Motion for Certification (December 15, 1992)

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JEROME WILLIAMS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 91-01973

NOV 03 [illegible]

Opinion filed November 2, 1992.

An Appeal from the Circuit Court for Madison County. E. Vernon Douglas, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

PER CURIAM.

This cause is before us on appeal from a judgment and sentence following a plea of guilty to burglary while armed, kidnapping without a firearm, robbery without a firearm, battery on a person 65 years of age or older, and attempted sexual battery. No sentence was agreed upon in exchange for appellant's plea.

In Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991), this court held that absent a stipulation by the defense, the trial court must make the findings required by section 775.084(1)(a), Florida Statutes, before imposing a habitual offender sentence. The trial court's failure to make such findings in the instant case is reversible error. On remand, the trial court may sentence appellant as a habitual offender if the requisite findings are made and supported by the evidence. Anderson, supra.

In addition, the State correctly concedes that the trial court erred in sentencing appellant to a mandatory minimum term for battery on a person over the age of 65. The minimum mandatory provisions of section 784.08, Florida Statutes, only apply to aggravated batteries.

Accordingly, we affirm the judgment but reverse the sentence for proceedings consistent herewith,

BOOTH, SHIVERS, AND WEBSTER, JJ., CONCUR.

91-1113197RC

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JEROME **WILLIAMS**,

Appellant,

vs.

STATE OF **FLORIDA**,

Appellee.

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

CASE NO. 91-01973

Opinion filed December 15, 1992.

An Appeal from the Circuit Court for Madison County. E. Vernon Douglas, Judge.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant **Public** Defender, Tallahassee, **for** Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

ON MOTION FOR CERTIFICATION

PER CURIAM.

Appellee moves this court for certification of the same question **certified in** Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991). In view of our express reliance on Anderson, the motion is granted and the following question certified 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]," Mulsey 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?

BOOTH, SHIVERS, AND WEBSTER, JJ., CONCUR.