IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,081

BELINDA M. DAVIS and
MARY D. WATERS,

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

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STATEMENT OF THE CASE AND FACTS

The instant case involves two respondents, Belinda M. Davis and Mary D. Waters (hereinafter Davis and Waters), who were jointly charged, tried, and convicted by a jury of robbery (R. 444, 446) occurring on March 20, 1991 (R. 438). The issue before this court relates only to the penalty phase. The pertinent facts will be presented separately for each respondent.

MARY D. WATERS

On August 9, 1991, petitioner, State of Florida (hereinafter State), filed a written notice of its intent to seek habitual offender sentencing. (R. 449) The sentencing hearing was held on August 27, 1991. (R. 473) A presentence investigation report was prepared. (R. 474) With respect to corrections of errors in the report, the following colloquy took place:

> DEFENSE COUNSEL: Ms. Waters advises that the information concerning the kidnapping charge which is listed at the top of page 8 regarding the sentence imposed on that case, she indicates that that is incorrect, that the sentence was actually 60 months rather than life as is indicated in the PSI.
>
> PROSECUTOR: What actually happened. She was sentenced to life and then she was later resentenced to five years after some period of time. I talked to the prosecutor who prosecuted that case about an hour ago and the clerk of the federal court in Mobile. It was a situation kind of like the one we're in now, I think except a gun was used. And a young man was accosted, and she claimed it was some sort of prostitution thing, and she [sic] claimed it wasn't and they convicted her of kidnapping. So I agree it was later changed to five years.

COURT: You agree it was later changed to five years. That stands corrected, then.

(R. 475-476)

The prosecutor informed the trial court that Waters qualified for habitual offender sentencing because of her prior convictions for kidnapping and grand theft auto. (R. 482) Thereafter, the following colloquy took place:

COURT: Well, do you need to take any evidence on that or is that established by your PSI?

PROSECUTOR: I think the PSI and the agreement of counsel establishes that she was sentenced to kidnapping in federal court. There is no withholding in federal court. There was an adjudication. I don't think there is any quarrel with that. Her release was in 1987.

COURT: The PSI says ... released to supervision 9-14-87 and mandatory released January 7, '88.

PROSECUTOR: So that is within five years of the commission?

COURT: I suppose that would be in September 14 of '87.

PROSECUTOR: Now, before that, she was adjudged guilty of grand theft auto, Your Honor, on page 7 of her PSI, 4-8-83, and also adjudged guilty of grand theft auto on 1-2-83. So having been adjudged guilty of two felony offenses in the Winter and Spring of 1983, within five years, she's found guilty of kidnapping and within five years of the kidnapping's release, she's committed this offense and has been convicted of this offense.

(R. 482-483)

Waters testified at the sentencing hearing. She admitted being released from custody in 1988 and living in a halfway house as a condition of her release (R. 486), and that she "had been out of jail a year and eight months" when the current crime occurred (R. 496). She also admitted having been previously convicted of auto theft, once in 1981 and twice in 1983 (R. 491-492), and kidnapping (R. 492-493, 496).

In sentencing Waters, the trial court stated:

> Well, Ms. Waters, of course, you have been found after a jury trial to be guilty of robbery, and I don't need to tell you what your prior record is. It's extensive and almost continual and for those reasons I am going to find that you are a habitual felony offender, and I have some doubt about the violent aspects of it. I think I will find you guilty simply as a habitual felony offender. I am going to sentence you to a recommended sentence under the sentencing guidelines of 15 years imprisonment.

(R. 500) The trial court further indicated that "the extended period of incarceration was necessary to protect the community and society from her criminal conduct." (R. 461) Thereafter, the trial court's verbal order was reduced to writing. (R. 510-516)

BELINDA M. DAVIS

On August 9, 1991, the State filed written notice of its intent to seek habitual offender sentencing. (R. 448) A presentence investigation report was prepared (R. 474), to which defense counsel indicated that "Davis doesn't have any quarrels with it except as to page 7 where there is an interview and she feels that she was misquoted by Mr. Lett, and she never told him

that she had supported herself by stealing and robbing." (R. 477) The prosecutor indicated that the PSI report should be corrected in the following manner:

> 1. **PSI report reflected that Davis had been convicted of three offenses in Case No. 86-573.** Davis was actually convicted of five offenses, one of which was a felony (battery on a law enforcement officer).
>
> 2. **PSI report omitted convictions.**
>
> A. "[I]n the offense cited 4-13-87, criminal mischief, the Court, Judge Harper sitting, found her guilty of contempt before the case was disposed of for her failure to appear."
>
> B. In Case No. 88-15461, Davis was found guilty of disorderly conduct.
>
> C. In Case No. 89-5549, Davis was placed on probation for forgery, a felony, and petty theft, for which she was on probation when current offenses were committed.
>
> D. In Case No. 89-18897, Davis was found guilty of prostitution and carrying a concealed weapon.
>
> E. In Case No. 89-19279, Davis was found guilty of prostitution.

(R. 478-480) The State placed in evidence certified copies of the judgment of conviction and sentencing orders in Case No. 86-0573. (R. 461, 467-472, 479)

With respect to the contempt order, defense counsel stated, "Judge, I don't have any real reason to quarrel with it," although "Ms. Davis doesn't remember that." (R. 479) With respect to all of the other corrections to the PSI report, defense counsel indicated that he had no objection. (R. 481)

In arguing for habitual sentencing, the prosecutor stated:

> Your Honor, in the case of Ms. Davis, she was on probation with this Court for a felony of uttering a forged instrument. Therefore, when this offense was committed this robbery, having been on probation at the time, that particular offense qualifies as one of the offenses for purposes of habitual felony offender status. Within five years preceding this offense, excuse me, of that probation, she also had a felony of battery on a police officer, February of 1986, which I referred to and showed the Court in the presentence report and the conviction. So in '86, a battery on a law enforcement officer, which is a felony and in '89 a felony, which she was placed on probation and then, of course, the incident offense of robbery. So she meets the requirements for habitual felony offender status.

(R. 453)

Davis testified in her own behalf at the sentencing hearing. She admitted, by implication, committing battery on a law enforcement officer, among other offenses, in June 1986 (R. 454-455), expressly admitted currently being on probation (R. 457), and expressly admitted having previously been convicted of felonies (R. 458). Defense counsel also admitted that Davis had "two prior felonies." (R. 460)

In sentencing Davis, the trial court stated:

> Ms. Davis, you know, I have gone through the pre-sentence investigation report and, as you know, you have had also an extensive prior record that starting in about 1981 continuing without interruption until up to the present and I find that you have been convicted of felonies which make you eligible for habitual felony offender treatment, and the extent of the prior record does lead me to believe an extended period of incarceration is necessary to protect the public and the community from further crimes. I am going to classify you as a habitual felony offender and I am going

> to sentence you to the recommended guidelines sentence of eight years imprisonment.

(R. 460-461) Thereafter, the trial court's verbal order was reduced to writing. (R. 502-509)

The trial court then revoked Davis' probation (underlying felony being uttering forged instrument) and sentenced her to prison for 3 1/2 years, sentence to run concurrently with the habitual offender sentences. (R. 461-463)

Davis and Waters appealed from their judgments and sentences on the ground that the trial court had failed to make the statutorily required findings for imposing habitual offender sentences. The First District Court of Appeal agreed with Davis and Waters and reversed their sentences but certified 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.

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 Davis and Waters had previously committed at least two felonies each, and that the current offense was committed while Davis was still on probation and within four years of Waters' release from federal prison. From the admissions by the respondents at sentencing, it reasonably may be inferred that the prior judgments of conviction are still valid and that no pardons have been granted.

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 Davis and Waters 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.

With respect to Davis, without objection, a certified copy of a prior judgment of conviction for a felony was admitted in evidence. (R. 461, 467-472, 479) Defense counsel had no objection to the prosecutor's representations as to Davis' prior criminal record (R. 479, 481), and he admitted that she had previously committed two felonies (R. 460). Testifying at trial, Davis admitted that she had been convicted of committing felonies and that she was currently on probation. (R. 457-458) Davis' felony probation was revoked at this same hearing, and a state prison sentence was imposed, to be served concurrently with the habitual offender sentences. (R. 461-463)

With respect to Waters, she admitted at the hearing that she had previously committed four felonies, and the PSI report reflected that she had been released from federal prison less than four years prior to committing the current offense. (R. 486, 492-493, 496)

In view of this evidence, the trial court's failure to make specific findings of fact was harmless error. Were this court to remand these cases 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, #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

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 Carol Ann Turner, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 8th day of February, 1993.

Carolyn J. Mosley

Carolyn J. Mosley
Assistant Attorney General

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STATE OF FLORIDA,

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_____/

APPENDIX

Davis et al. v. State, Slip Opinion (Fla. 1st DCA December 16, 1992)

91-111764-RK

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BELINDA M. DAVIS, and
MARY D. WATERS,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 91-2868

Opinion filed December 16, 1992.

An appeal from the Circuit Court for Escambia County. William Anderson, Judge.

Carol Ann Turner, Assistant Public Defender, Tallahassee, for appellants.

Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

Appellants' sentences are 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.