IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 81,081

BELINDA M. DAVIS and
MARY D. WATERS,

Respondent.

_____/

REPLY 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

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?

Respondents (hereinafter Davis and Waters) argue that State v. Rucker, 18 Fla. L. Weekly S93 (Fla. February 4, 1993) is distinguishable; that is, the facts there revealed that the error was harmless, but here the facts reveal that the error was harmful. The State respectfully disagrees. The facts in the instant cases are virtually indistinguishable from those in Rucker.

In Rucker, this Court summarized the trial court's findings as follows:

> After "considering the totality of the evidence," the court found by a preponderance of the evidence that Rucker qualified as a habitual felony offender. S93
>
> [T]he trial court expressly found that Rucker met the definition of habitual felony offender by a preponderance of the evidence. S94

Id., at S93, 94.[1]

---

[1] The trial court's exact words were, "In view of that, I do find that the evidence supports by a preponderance thereof

In the case at bar, after receiving unrebutted evidence from the State proving respondents' qualifications for habitual sentencing, and listening to argument of counsel, 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)
>
> 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)

The trial court's findings in the instant case were no less specific than was the trial court's finding in Rucker, but the point is that the findings in both cases were inadequate. This

---

classification of the defendant as a habitual offender and he will be sentenced as such." Rucker, (Sentencing Transcript, 264). The defendant in Rucker was represented by Nancy A. Daniels, Public Defender for the Second Judicial Circuit, and, therefore, counsel for Davis and Waters has access to this transcript.

Court held in Rucker that "a court must find by a preponderance of the evidence that the defendant has been convicted of two or more felonies within the requisite time period and that these convictions have not been pardoned or set aside." Id., at S94.

A determination that error occurred does not end the analysis, however. The second step is to determine the nature of the error (harmless vs. harmful). This Court explained in Rucker why the second step was appropriate, stating:

> This ruling is not inconsistent with **Walker**, wherein we stated that findings under section 775.084 are a "mandatory statutory duty":
>
> > We hold that the findings required by section 775.084 are critical to the statutory scheme and enable meaningful appellate review of these types of sentencing decisions. Without these findings, the review process would be difficult, if not impossible.
>
> 462 So. 2d at 454. The finding in issue in **Walker** concerned an earlier version of the habitual offender statute, which had provided:
>
> > [775.084](3) In a separate proceeding, the court shall determine if it is necessary for the protection of the public to sentence the defendant to an extended term as provided in subsection (4) and if the defendant is an habitual felony offender....
>
> §775.084(3), Fla. Stat. (1981). Because of the subjective nature of this "public protection" requirement, any failure to make an express finding would have frustrated meaningful appellate review. Unlike the "public protection" finding, however, which has since been deleted from the statute, the requirement in issue here--that the prior convictions have not been pardoned or set aside--is a ministerial determination involving no subjective analysis.

Id., at S94 (e.s.)

The statutory findings currently in the habitual offender statute are all objective in nature--(1) specific number of prior felony convictions, (2) committed within a specific time period, (3) which are still valid, and (4) for which the defendant has never been pardoned. A general finding by the trial court that the defendant qualifies for habitual sentencing, and which is not challenged in the trial court, does not frustrate appellate review.

There is no mandatory requirement in non-capital cases for appellate courts to review all findings and confirm that all non-capital sentences have been legally imposed. If there were, then all convicted criminals would be required to automatically appeal, as capital criminals do. §921.141(4), Fla. Stat.

Respondent reads Rucker much too narrowly by overlooking significant language in the decision.

> In the present case, the State introduced certified copies of Rucker's prior convictions, both of which occurred within the requisite period of time. Rucker conceded the validity of the convictions and the trial court expressly found that Rucker met the definition of habitual felony offender by a preponderance of the evidence. Because this evidence was unrebutted and Rucker does not now assert that his prior convictions were pardoned or set aside, any failure to make more specific findings was harmless. Were we to remand for resentencing, the result would be mere legal churning.

Id. It appears that the Fourth District has also read Rucker much too narrowly. See Robinson v. State, 18 Fla. L. Weekly D510 (Fla. 4th DCA February 17, 1993).

Turning to the facts in the instant cases, Davis is correct that only one prior felony judgment of conviction (1986 conviction for battery on a law enforcement officer) was admitted in evidence at the hearing. However, this was not the only evidence admitted in the case. The trial court also relied on the following evidence:

> 1. When Davis committed the present offense, she was on probation for committing another felony (uttering forged instrument), for which her probation was revoked at this same hearing, and she was sentenced to prison for 3 1/2 years, sentence to run concurrently with the habitual offender sentences. (R. 461-463)
>
> It would be nonsense to require the filing of a certified copy of a judgment of conviction when that very case is before the court for sentencing along with other cases in which habitual offender sentencing is being considered.
>
> 2. Davis had no objection to her criminal history listed in the Presentence Investigation Report, as was modified by the prosecutor, except for a contempt order, which Davis did not recall having been entered. (R. 479, 481)
>
> 3. 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 consideration of all of this evidence, it boggles the mind that Davis is requesting this court to reverse her sentence because the trial court did not make specific statutory findings.

Turning now to Waters, she contends that "[t]here is nothing in this record, not even a presentence investigation, to show that [she] was ever convicted of anything." (RB. 5) She overlooks the stipulation of counsel and her own admissions. Evidence cannot get any better than this. At the hearing, the prosecutor, without objection, represented that no evidence was required because "the PSI and the agreement of counsel establishes that she was sentenced to kidnapping in federal court." (R. 482-483) The court noted that the PSI report indicated that Waters was released to supervision on September 14, 1987 and to mandatory release on January 7, 1988. Id. Waters bore the burden of preparing the record on appeal in the First District Court of Appeal, and she cannot be heard to complain at this late date that the PSI report is missing from the record.

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). Based on this evidence, Waters' request that this court reverse her sentence is as mind boggling as is Davis' request. Implicit in the holding of Rucker is the requirement that arguments, like the ones advanced here, be accompanied by a good-faith assertion of prejudice. There obviously is no prejudice in the instant cases.

Where no unresolved claims of error are made in the trial court and the criminal appellant does not make a good faith assertion on appeal that the predicate felonies are invalid, it would be "mere legal churning" to remand for resentencing. In this connection, two points should be noted. First, there is an unfortunate and growing tendency to dismiss the importance of the contemporaneous objection rule in the sentencing process in the belief that remand and resentencing is a low cost procedure. Resentencing is a critical stage of a criminal prosecution requiring the presence of court personnel, the trial judge, counsel, and, of course, the convicted criminal. Fla. R. Crim. P. 3.180, 3.700, 3.720, and 3.721. Normally, as here, resentencing will also require transporting the criminal from state prison to the trial court, which is not inconsequential, particularly when multiplied by hundreds and thousands. Second, this Court explicitly disavowed certain language in State v. Rhoden, 448 So. 2d 1013 (Fla. 1984) suggesting that the contemporaneous objection rule did not apply to sentencing, admonished trial and appellate counsel for failure to preserve sentencing errors at trial and for raising them for the first time on appeal, and created an entirely new rule, 3.800(a), for the express purpose of raising and correcting illegal sentencing in the trial court, not on appeal. State v. Whitfield, 487 So. 2d 1045 (Fla. 1986). This Court should reiterate Whitfield and return to the historical rule, which serves the process so well, that unpreserved errors, with rare exceptions, cannot be raised for the first time on appeal.

Davis and Waters both argue that "[t]his case demonstrates the need for particularized statutory findings, especially where the prosecutor sloppily neglects to introduce the required documents." (RB. 4, 5) What these cases actually demonstrate is the critical need to return to a system of honoring the contemporaneous objection rule and to the ethical principle that no member of the Florida Bar will argue an issue unless it is based on a good-faith belief that the client has suffered prejudice from the alleged error, which prejudice will be corrected by reversal and remand. The appeal of a case, like these cases, hurts everyone involved. It gives the defendant false hope, and it wastes everyone else's time and energy, which are scarce resources indeed. No paying litigant would ever pursue an appeal under the circumstances of these cases.

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 reply 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 8th day of March, 1993.

Carolyn J. Mosley
Assistant Attorney General