IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,083

TONY STONE,

Respondent.

_____/

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

In accordance with a negotiated nolo contendere plea (R. 12-13, 66-71), the trial court adjudicated respondent (hereinafter Stone) guilty of aggravated battery occurring on October 3, 1990 (R. 3, 77).

On November 6, 1990, the prosecutor filed a written notice of his intention to seek habitual offender sentencing. (R. 5)

At the sentencing hearing held on May 30, 1991 (R. 72), the prosecutor, without objection, placed in evidence certified copies of Stone's prior felony judgments for possession of cocaine, armed burglary, and robbery bearing the dates of May 21, 1987 and September 28, 1989. (R. 16-27, 73-74)[1] The trial court indicated that it had ordered, received, and reviewed a presentence investigation report. (R. 56-64, 72) A guidelines scoresheet was prepared which reflected that Stone had previously committed four felonies. (R. 34) The current offense was committed against another inmate while Stone was incarcerated in state prison (R. 1), and he was still in prison serving another sentence on the date of the sentencing hearing in the instant case (R. 76).

When asked whether he had anything to offer in rebuttal to the habitual felony offender evidence, defense counsel responded,

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[1] The State also placed in evidence an order withholding adjudication of guilt and placing Stone on probation in a 1985 burglary case. (R. 72-77) The trial court expressly stated it would not rely on this case to determine Stone's eligibility for habitual offender classification. (R. 75)

"No, sir, not as to the HFO, Your Honor." (R. 75) The trial court then stated, "The Court finds that he does qualify as an habitual felony offender in accordance with the evidence that has been submitted, and I will, therefore, classify him for sentencing purposes as an habitual felony offender." (R. 75) Stone was sentenced to prison for five years, consistent with the prosecutor's recommendation. (R. 22-33, 75, 77)

Stone appealed from his judgment and sentence, raising the issue that the trial court had failed to comply with the requirements of the habitual offender statute. The First District Court of Appeal agreed and reversed Stone's sentence but certified the same question that was certified in Anderson v. State, 592 So. 2d 119 (Fla. 1st DCA October 14, 1992), quashed, Slip Opinion, Case No. 79,535 (Fla. February 11, 1993).

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 Stone 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 Stone 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. Without objection, the prosecutor placed in evidence certified copies of Stone's prior judgments of conviction for three felonies. The current offense was committed against another inmate, and Stone was still in prison when he was sentenced in the instant case. Defense counsel informed the trial court that he had no rebuttal evidence to offer on this issue. 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 Abel Gomez, 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
Assistant Attorney General

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APPENDIX

Stone v. State, Slip Opinion (Fla. 1st DCA December 14, 1992)

91-1114 36-7K

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

TONY STONE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 91-2243

Opinion filed December 14, 1992.

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

Nancy A. Daniels, Public Defender; Abel Gomez, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; James W. Rogers, Assistant Attorney General, Tallahassee, for Appellee.

SHIVERS, Judge.

Tony Stone appeals his judgment and sentence as a habitual offender. Appellant Stone argues that in sentencing him as a habitual offender the trial judge did not make the findings required by Section 775.084, Florida Statutes (1989). We agree. The trial court has a mandatory duty to make all the findings listed in subsection 775.084(1)(a). Walker v. State, 462 So. 2d 452 (Fla. 1985). We therefore reverse and remand for the trial

court to make these requisite findings, including whether any prior felony conviction used as a predicate for Stone's habitual offender classification was pardoned or set aside. See Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991); Jones v. State, 17 F.L.W. 2375 (Fla. 1st DCA Oct. 14, 1992). As in Anderson, we certify the following question to the supreme court 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]', 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?

REVERSED and REMANDED.

MINER and ALLEN, JJ., CONCUR.