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IN THE SUPREME: COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 81,099

JAMES TOMMY PEEK,

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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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?

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STATEMENT OF THE CASE AND FACTS

Respondent, James Tommy Peek (hereinafter Peek), was sentenced for committing the following offenses occurring in March 1991 in several different cases: (1) conspiracy to traffic in cocaine; (2) two counts of trafficking in cocaine over 28 grams; (3) three counts of sale of cocaine; (4) three counts of possession of cocaine with intent to sell; (5) possession of cocaine; (6) possession of marijuana with intent to sell; (7) possession of marijuana under 20 grams; and (8) possession of drug paraphernalia. (R. 88-97)¹

On May 29, 1991, petitioner, State of Florida (hereinafter State), filed a written notice of its intent to seek habitual offender sentencing. (R. 19) At the sentencing hearing held on August 21, 1991 (R. 25), the State placed in evidence certified copies of several of Peek's prior felony convictions and a certificate from the Office of Executive Clemency indicating that Peek had not been pardoned for any of his prior offenses (R. 34, 41-87). These documents showed that on June 6, 1988, Peek was convicted in Escambia County of robbery, aggravated battery, burglary of a dwelling, and dealing in stolen property for which he was sentenced to prison for two years followed by three years' probation (R. 41-45, 50-53, 71-74, 83); on October 25, 1989, he was convicted in Escambia County of three counts of burglary of a dwelling, one count of robbery, one count of aggravated battery,

¹ Peek had pled nolo contendere to these offenses, but the plea colloquy is not part of the record on appeal.

one count of grand theft, and two counts of dealing in stolen property for which he received a prison sentence of four and one-half years (R. 46-49); and on November 14, 1989, he was convicted in Escambia County of uttering a forged instrument for which he received a five-year prison sentence (R. 66-70).

The following colloquy took place during the sentencing hearing:

DEFENSE COUNSEL: I would also question **his** prior record in the PSI, it noted which, I take the State is relying upon in order to try to get the violent habitual felony offender status, that would be the 1988 conviction for simple robbery and aggravated battery, use of a deadly weapon. I would argue to the Court that since Mr. Peek was only **17** years old at the time of the offense and I think 18 years old at the time of his actual sentencing, he was sentenced **as** a youthful offender by the Court and I would argue to the Court that since he was sentenced as a youthful offender that might more properly be termed a juvenile conviction and, therefore, he should not be given the violent felony -- habitual felony treatment, because it was more or less a juvenile conviction. (R. 28)

What hurts Mr. Peek, obviously, is his prior record, Your Honor. And that's why he scored so highly. If the Court will note though, **looking at** the PSI page five, there really is only one particular prior record and that's the 1988 conviction. There were several different counts that he entered a plea to, but actually it was only one particular criminal episode, and he was sentenced at the same time. (R. 29)

We're going to recommend to the Court, Your Honor, the Court **impose** a period of incarceration of 17 years, which is within the permitted range and the guidelines with the three-year minimum mandatory, which is necessary in this case. (R. 31)

... I don't feel that under the totality of the circumstances in this **case** the State has shown a need or the necessity of sentencing Mr. Peek **as** a habitual violent felony offender.

COURT: Well, you are aware there's two findings. One is habitual violent felony offender, and just the habitual felony offender.

DEFENSE COUNSEL: Yes, sir.

COURT: Is there any reason why he would not qualify even under your argument for treatment **as** habitual felony offender?

DEFENSE COUNSEL: None other than the argument I advised earlier, Your Honor. And that is since he was treated **as** a youthful offender then that would not suffice under the statute **as** a prior within the five years.

COURT: Even if you took that out, do you not still see that he qualifies under the statute **as** habitual felony offender?

DEFENSE COUNSEL: On the '89 conviction, Your Honor, he would. This is the second one within five years. ... (R. 35-36)

COURT: I do find that he qualifies as a habitual felony offender and the sentence imposed will be under that statute. (R. 36)

(R. 28-36)

The trial court then proceeded to adjudicate Peek guilty and to impose the following sentences: (1) 22 years' imprisonment (including 3-year minimum mandatory term on one count) on the first-degree felonies, plus \$50,000 fine on one count: (2) 15 years' imprisonment on the second-degree felonies: and (3) 1 year imprisonment on the first-degree misdemeanors, all sentences to run concurrently. (R. 37-38) The recommended sentencing

guidelines range was 22 to 27 years' imprisonment. (R. 97) The trial Court's verbal sentencing order was subsequently reduced to writing. (R. 88-97)

Peek appealed from his judgments and sentences raising the following issues: (1) the trial court erred by sentencing the defendant as an habitual felony offender without first making the statutorily required findings; and (2) the trial court imposed an unauthorized sentence for a third-degree felony and for first-degree misdemeanors. The First District Court of Appeal agreed with Peek and reversed his sentences, In response to the State's motion, 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, was certified in the instant case. (See appendix.)

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 Peek 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 unrebuted 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 conclusion that Pleasant 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 conclusion. The record contains certified copies of prior judgments of conviction for numerous felonies and an admission from defense counsel that Peek had committed these offenses. The record also contains documentary proof that Peek has never been pardoned for these offenses. 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."

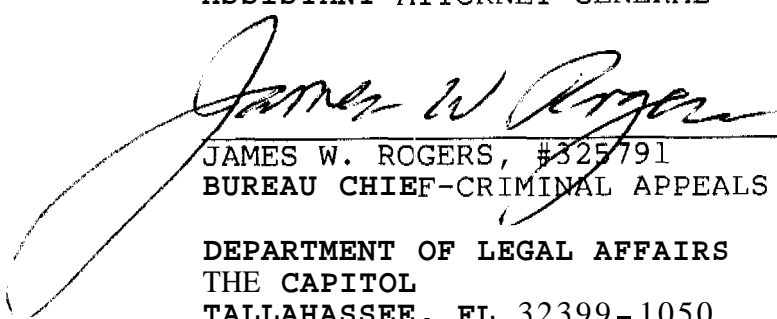
CONCLUSION

Based on the foregoing discussion, the First District's decision should be quashed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL


CAROLYN J. MOSLEY, #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

1 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 8th day of February, 1993.



Carolyn J. Mosley
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 81,099

JAMES TOMMY PEAK,

Respondent.

_____ /

APPENDIX

Peek v. State, Slip Opinion (Fla. 1st DCA November 2, 1992),
On Motion for Certification (December 22, 1992)

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JAMES TOMMY PEEK,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

* NOT FINAL UNTIL TIME EXPIRES
* TO FILE MOTION FOR REHEARING AND
* DISPOSITION THEREOF IF FILED.
* CASE NO. 91-2872.

RECEIVED

(NOV 03 1992)

Opinion filed November 2, 1992.

Appeal from the Circuit Court for Escambia County.
Judge Lacey Collier.

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, Tallahassee, for appellee.

PER CURIAM.

Appellant's sentences are REVERSED and the case is REMANDED to the trial court for resentencing in compliance with the habitual offender statute. Jones v. State, No. 91.-2961 (Fla. 1st DCA Oct. 14, 1992). The trial court is reminded that section 775.084, Florida Statutes, no longer applies to misdemeanor offenses, and that the sentence for the third degree felony may not exceed the ten year statutory maximum.

ERVIN, ZEHMER, and BARFIELD, JJ., CONCUR.

Docketed
11-4-92
FILED BY
G. J. J. [Signature]

91-111766-TR
8

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JAMES TOMMY PEEK,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

* NOT FINAL UNTIL TIME EXPIRES
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* DISPOSITION THEREOF IF FILED.

* CASE NO. 91-2872.

Docketed
12-23-92
Florida Attorney
General

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DEC 22 1992

DEPT. OF LEGAL AFFAIRS
Division of General Legal Services

Opinion filed December 22, 1992.

Appeal from the Circuit Court For Escambia County.
Judge Lacey Collier.

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, Tallahassee, for appellee.

ON MOTION FOR CERTIFICATION

DEC 22 1992

PER CURIAM.

Appellee's motion for certification is granted. The
question previously certified in Jones v. State, 17 Fla. L.
Weekly D2375 (Fla. 1st DCA October 14, 1992), is certified in the
instant case.

ERVIN and ZEHMER, JJ., CONCUR. BARFIELD, J., DISSENTS, WITH
OPINION.

BARFIELD, J., dissents.

I dissent to the granting of the motion for certification, not to the certification itself. It is unnecessary that this court recertify an issue presently pending before the supreme court. Our opinion rites and follows the case presently pending before the Florida Supreme Court. This is a sufficient basis for invoking the jurisdiction of the supreme court. Jollie v. State, 405 So. 2d 418 (Fla. 1981). It is an unnecessary burden on counsel and the judges of this court to constantly review and address this kind of redundancy.