IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,099

JAMES TOMMY PEEK,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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	:	

RESPONDENT'S BRIEF ON THE MERITS

I STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably accurate. Attached hereto as an appendix are the opinions of the lower tribunal.

II SUMMARY OF THE ARGUMENT

This Court has before it three pending cases which will answer the instant certified question. The lower tribunal was correct in holding that the judge's findings here were woefully insufficient. The certified question must be answered in the negative and the decision approved.

Respondent does not agree that a recent decision of this Court is dispositive of the issue. That case answered the certified question in the negative, i.e., that Eutsey does not relieve the sentencing judge of his statutory duty to make findings. That case further held the error was harmless, which cannot be true in the instant case, because the only findings made by the sentencing judge in the instant case were that respondent qualified as an habitual offender, without saying how or why, or addressing any of the statutory criteria.

III ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

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, 383 So. 2d 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?

Respondent argues that the question certified by the district court should be answered in the negative, and the opinion affirmed.

Respondent agrees with the observation made in the state's brief that the decision of this Court in the pending cases of Anderson v. State, 592 So, 2d 1119 (Fla. 1st DCA 1991), review pending no. 79.535, and Hodges v. State, 596 So. 2d 481 (Fla. 1st DCA 1992), review pending, no. 79,728, Jones v. State, 606 So. 2d 709 (Fla. 1st DCA 1992) (en banc), review pending, case no. 80,751, will control the outcome of this case with respect to whether a trial court must find that the convictions relied upon as a predicate for an habitual felony offender sentence have not been pardoned or set aside. Respondent therefore adopts the arguments made by Anderson, Hodges, and Jones as his own.

Respondent does not agree with the observation made in the state's brief that the decision of this Court in State v. Rucker, 18 Fla. L. Weekly S93 (Fla. Feb. 4, 1993), is dispositive of the issue. Rucker answered the certified question in the negative, i.e., that Eutsey does not relieve the sentencing judge of his statutory duty to make findings. Rucker further held the error in his case was harmless because:

> [T]he trial court expressly found that Rucker met the definition of [an] habitual felony offender by a preponderance of the evidence.

Rucker, 18 Fla. L. Weekly at S94.

It is important to note that the only findings made by the sentencing judge in the instant case were that respondent qualified as an habitual offender (R 36), without saying how or why, or addressing any of the statutory criteria. These historical findings are woefully inadequate, and do not satisfy the requirements of Section 775.084, Florida Statutes, and this Court's prior opinion in Walker v. State, 462 So. 2d 452 (Fla. 1985), even under the harmless error standard expressed by this Court in Rucker.

IV CONCLUSION

Respondent respectfully requests that this Court answer the certified question in the negative and affirm the district court decision.

Respectfully submitted,
NANCY A. DANIELS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Mosley, Assistant Attorney General, by delivery to Plaza Level, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, this 11th day of February, 1993,

P. DOUGLAS BRINKMEYER

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.

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.

IN THE DISTRLCT COURT OF APPEAL

FIRST DTSTRICT, 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.

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

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 cites 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. Stat., 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.