FILED
SID J. WHITE
FEB 16 1993
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,099

JAMES TOMMY PEEK,

Respondent.

REPLY BRIEF OF PETITIONER

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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?

Respondent (hereinafter Peek) makes essentially two arguments. First, he asserts that "the decision of this Court in Anderson v. State, 592 So. 2d 1119 (Fla. 1st DCA 1991), review pending, Case No. 79,535, Hodges v. State, 596 so. 2d 481 (Fla. 1st DCA 1992), review pending, Case No. 79,728, and Jones v. State, 606 So. 2d 709 (Fla. 1st DCA 1992), 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." (I.B. 3)

In response, the State would simply point out that this issue has already been resolved in another case, State v. Rucker, 18 Fla. L. Weekly S93 (Fla. February 4, 1993). In addition, on the same date that Peek filed his answer brief, this Court released its opinion in Anderson, which provides, in pertinent part:

> We answered this [certified] question in the negative in State v. Rucker, ..., but held that harmless error analysis may be applied on appeal. We quash the decision of the district court in Anderson and remand for proceedings consistent with Rucker.

Slip Opin on, p. 2.

Peek s second argument is that Rucker 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 case 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]

In the case at bar, the following colloquy, in pertinent part, took place:

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[1] The trial court's exact words were, "In view of that, I **do** find that the evidence supports by a preponderance thereof 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 Peek has access to this transcript.

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. 35-36) (e.s.)

The trial court's finding in the instant case was 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 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). <u>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.</u>

<u>Id.</u>, at S 4 (e.s.)

The statutory findings currently in the habitual offender statute are all <u>objective</u> 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.

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.

CONCLUSION

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

Respectfully submitted,

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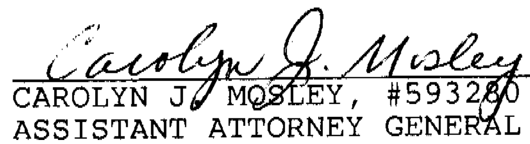

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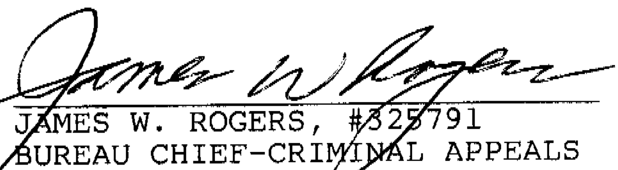

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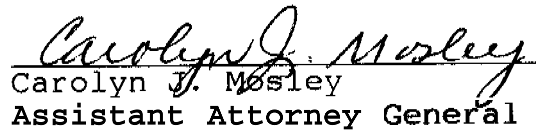
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing merits brief has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 16th day of February, 1993.



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