FILED
SID J. WHITE
MAR 4 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 81,100

THOMAS JOSEPH ARNOLD, :

Respondent. :

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 230502
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASE(S)

STATUTES

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,100

THOMAS JOSEPH ARNOLD,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and appellant before the District Court of Appeal, First District. He will be referred to in this brief as "respondent," "petitioner," or by his proper name. Reference to the brief of the state dated February 8, 1993, will be by use of the symbol "BS" followed by the appropriate page number in parentheses.

Attached to this brief is an appendix containing the Answer Brief of Appellee filed April 30, 1992.

II. STATEMENT OF THE CASE AND FACTS

Respondent accepts the the Statement Of The Case And Facts as set forth in the brief of the state (BS-1-5), with one exception and one addition. The exception is contained in note 1 of the brief of the state (BS-3).

Since it is respondent's position that the trial court erred in not making a finding that the subject convictions had not been set aside, even if counsel stipulated that the state need not prove that they had not been set aside does not dispense with the requirement that the finding be made. In any event, as Mr. Rogers and Ms. Moseley are well aware, the undersigned was not present at the proceedings in the trial court, and consequently does not know "what the prosecutor said" or "what defense counsel understood him to say."

The addition is based upon the argument made by the state to the district court. The brief filed by the state is attached to this brief as an appendix. The state argued to the district court that trial defense counsel had waived the issue raised on appeal, a point expressly considered and rejected by the district court. The state also argued that the trial court was not statutorily required to find that the predicate convictions had not been set aside, contending that under Eutsey v. State, 383 So.2d 219 (Fla. 1980), it was an affirmative defense. Further, the state did not even argue that any failure to make the statutorily required findings was harmless error.

III. SUMMARY OF ARGUMENT

Since the actual argument is within the page limitations for a summary of argument, a formal summary will be omitted here.

IV. ARGUMENT

THE TRIAL COURT'S FAILURE TO FIND THAT THE PREDICATE CONVICTIONS HAVE NOT BEEN SET ASIDE IS NOT HARMLESS ERROR (restated).

Relying upon State v. Rucker, 18 FLW S93 (Fla. Feb. 4, 1993), the state argues that the trial court's failure to find that the predicate convictions had not been set aside is harmless error (BS-7-8). Respondent disagrees.

In Rucker, this Court held that Eutsey did not relieve the trial court of its duty to find that the predicate convictions had not been set aside. The Court went on to find that the error was harmless in that case.

Respondent first argues that this Court should not reach the Rucker-based arguments because they were not made to the district court. In other words, the state seeks to quash the district court's decision for reasons not even argued to that court. A review of the brief filed by the state (attached as an appendix) reveals that, in the district court, the state argued that defense counsel had waived the argument raised on appeal. The district court rejected this position. The state does not make its waiver argument to this Court.

Further, the state argued to the lower tribunal that the trial court had no duty at all to make a finding that the predicate convictions had not been set aside, arguing it was an affirmative defense under Eutsey. This argument was rejected in Rucker. Moreover, the state did not argue to the district court that, even if the trial court was required to make the findings, its failure to do so was harmless error.

Respondent contends it is fundamentally wrong for the state to seek to quash the district court's opinion on grounds that easily could have been, but were not, made to that court, but are instead made for the very first time to this Court. In other words, this Court should not permit the state to sandbag the first district.

Respondent will now address the state's harmless error argument.

In Rucker, and in this case, trial counsel in effect conceded that the defendant did meet the criteria of the habitual felony offender statute. In Rucker, the opinion reveals that the trial court considered the totality of the evidence and expressly found that Rucker qualified as a habitual felony offender by a preponderance of the evidence.

In the instant case, the trial court did not make reference to the totality of the evidence, although it did note that it was stipulated that the defendant qualifies statutorily. Moreover, the trial court made no reference to the standard of proof, namely, by a preponderance of the evidence. See Section 775.084(3)(d), Florida Statutes (1991). Respondent argues that the absence of reference to the evidence and the burden of proof distinguishes this case from Rucker, with the result that the error cannot be dismissed as harmless.

V. CONCLUSION

Based upon the foregoing, respondent requests the Court to affirm the result reached by the district court.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES #230502
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Answer Brief on the Merits has been furnished by delivery to Mr. Carolyn Mosley, Assistant Attorney General, Criminal Appeals Division, The Capital, Plaza Level, Florida, 32301; and a copy has been mailed to respondent, Thomas Joseph Arnold, on this 4th day of March, 1993.

CARL S. McGINNES

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 81,100

THOMAS JOSEPH ARNOLD, :

Respondent. :

_____/

A P P E N D I X

TO

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Paul S. McGinnes

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

THOMAS JOSEPH ARNOLD

Appellant,

v. CASE NO. 91-1040

STATE OF FLORIDA,

Appellee.

_____/

MAY 1 1992
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Appellee, State of Florida, adopts appellant's preliminary statement with the addition that appellee will be referred to as "State."

STATEMENT OF THE CASE AND FACTS

The State accepts appellant's statement of the case and facts with the following additions.

During the sentencing hearing, the following colloquy, in pertinent part, took place:

> PROSECUTOR: Judge, I have two certified copies of the conviction for you out of -- one out of Bay County. That's Case No. 85-324. And one out of Jackson County, that's Case No. 86-562. I'll present those to the Court.
>
> There's been a stipulation to the authenticity of the certified copies of Judgment and Sentence, that this is indeed Thomas Joseph Arnold.
>
> We are relying on Case No. 85-324 for the violent habitualization in which he was convicted of trafficking in cocaine, grand theft, false report to a law enforcement officer, strong-armed robbery, aggravated assault with a firearm. And of course, the strong-armed robbery and aggravated assault with a firearm are the two that would qualify him for habitualization as a violent habitual offender.
>
> In addition, ... the present case he is here for was committed in five years of Case No. 85-324 in which he got a five-year sentence. So it would have been, if not within five years of the day he was convicted, definitely within five years of the time he was released from prison. I will present this to the court at this time.
>
> COURT: Have you had an opportunity to look at these?
>
> DEFENSE COUNSEL: Yes, sir.
>
> PROSECUTOR: Also, there's a stipulation as to the fact that Mr. Arnold has not been

pardoned on these cases and that (inaudible).[1]

DEFENSE COUNSEL: That's correct, Your Honor. (T. 9-10)

COURT: With the understanding in the stipulation that Mr. Arnold qualifies statutorily as an habitual felony offender, I will find that he is an ... habitual violent felony offender. (T. 11)

PROSECUTOR: ... [Mr. Arnold has] committed all kinds of crimes: drug crimes, property crimes, violent personal crimes, escape, all different kinds of crimes he has committed in the past.

In addition, this particular incident occurred on July 1 of 1990; and just about a month before that on June 8th, 1990, of course, he was involved in an incident that was almost exactly similar to this in which he was tried and convicted in late January. I could almost just say, "Ditto," for the facts in that case as to what happened in this case because in this case it's a case in which he also entered the apartment of some individuals, tied them up, paraded them around the apartment, threatened them, threatened to kill them, took cash and jewelry from them, threatened them if they called the cops that he would kill them, and cut the phone line so that they could not call the police. In addition, when the police finally caught up to him he tried to get away with a high speed chase, and the cops had to try to catch him. (T. 13)

COURT: ... And for you to be involved in the kind of activities that you have been in, in the broad scope of activities that you have been in, in the short period of time

---

[1] The burden being on the appellant, the State has not sought to obtain a stipulation from counsel to explain what was inaudible to the court reporter, but the most reasonable inference to be drawn is that the prosecutor stated that "the convictions had not been set aside."

that you have been on this earth is just -- You apparently were trying to become John Dillinger. ... And frankly, my feeling is that you have to be removed from society. ...

DEFENDANT: ... I don't understand what you mean by extensive history. I have been in trouble twice in my life.

COURT: Mr. Arnold, trouble twice in your life simply does not describe three counts of armed robbery, two counts of grand theft of an automobile, trafficking in cocaine, another strong armed robbery, an aggravated assault with a firearm, and trafficking -- and false report to an officer and an escape. (T. 16)

(T. 9-16)

SUMMARY OF ARGUMENT

I. The trial court complied with the provisions of the habitual offender statute. Defense counsel stipulated that appellant qualified for sentencing as an habitual violent felony offender, and the trial court so found. Defense counsel's stipulation obviated the need for detailed findings on each of the statutory factors. His stipulation also constituted a waiver of appellant's right to appeal a purely technical error.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT FAILED TO COMPLY WITH THE PROVISIONS OF THE HABITUAL OFFENDER STATUTE.

At sentencing, defense counsel stipulated that appellant qualified for sentencing as an habitual violent felony offender. (T. 9-10) This stipulation obviated the need for detailed findings on each of the statutory factors. It further served as a waiver of any right appellant may have had to raise for the first time on appeal a purely technical error.[2] Based on defense counsel's stipulation, the trial court's compliance with the provisions of the habitual offender statute was adequate. (T. 11)

On three different occasions, this court has held that the statutory findings are subject to waiver. Likely v. State, 583 So.2d 414 (Fla. 1st DCA 1991); Caristi v. State, 578 So.2d 769, 774 (Fla. 1st DCA 1991); and Jefferson v. State, 571 So.2d 70, 71 (Fla. 1st DCA 1990). The holdings in these cases are consistent with the holding in Eutsey v. State, 383 So.2d 219 (Fla. 1980) that two of the statutory findings are affirmative defenses, the significance of which is that they are subject to waiver. In two recent cases, however, this court has held to the contrary. See

---

[2] Alternatively, the trial court's duty in the penalty phase may be viewed as analogous to its duty in the guilt phase. When the trial court fails to instruct on one of the essential elements of the offense charged, no fundamental error occurs if the essential element was not in dispute. Stewart v. State, 420 So.2d 862 (Fla. 1982). By analogy, when the trial court fails to make a specific statutory finding, no fundamental error occurs if the finding was not in dispute.

Anderson v. State, 17 F.L.W. D471 (Fla. 1st DCA 1992), review pending (Fla., Case No. 79,535), and Hodges v. State, 17 F.L.W. D787 (Fla. 1st DCA March 24, 1992). The State respectfully submits that these cases were wrongly decided.

The legislature did not expressly allocate the burdens of proof when it created the habitual offender statute. In the face of legislative silence, the supreme court interpreted the statute to place the burden on the defendant to prove two of the factors as affirmative defenses, which by definition are subject to waiver. The trial court is under no duty to make a finding of fact on an affirmative defense that was never raised by the defendant.

The Eutsey decision was eminently correct for a number of reasons. (1) It reaffirmed the presumption of correctness accorded judgments and sentences; (2) it saved scarce resources that would have been spent in presenting evidence on matters not in dispute in the overwhelming majority of cases; (3) it saved scarce resources by simplifying and narrowing the issues; (4) it placed the burden of raising the issues on the person with the best opportunity to know the relevant facts; and (5) it relieved the prosecution of the necessity of proving the nonexistence of a fact.

The Eutsey decision reaffirmed the presumption of correction accorded judgments and sentences. A judgment of conviction is presumed to be correct until reversed, Stevens v. State, 409 So.2d 1051 (Fla. 1982). In view of the rare occurrence of a

reversal of a conviction, a logical extension of this presumption is that the judgment is presumed to have remained in full force and effect unreversed in the absence of proof to the contrary. The burden is on the defendant to prove that his judgment of conviction should be set aside, Wilson v. State, 436 So.2d 908, 911 (Fla. 1983), and, by analogy, the burden is on the defendant to prove that his judgment was in fact reversed or set aside.

The Eutsey decision reflected the court's understanding that most convicted felons are not pardoned, and neither are their judgments set aside. Pardons are granted by the Governor and Cabinet sitting as the Executive Clemency Board. See art. IV, § 8, Fla. Const.; ch. 940, Fla. Stat. A comparison of the eligibility requirements for applying for a pardon under the Rules of Executive Clemency and the eligibility requirements for an habitual offender under section 775.084 is instructive. Section 5.A of the Rules provides:

> A person may not apply for a pardon unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including, community control, control release, and conditional release for at least 10 years. (e.s.)

Section 775.084(1)(a)2 provides:

> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later; (e.s.)

It is clear that the "within" five years eligibility criteria for an habitual offender and the "for at least 10 years" eligibility criteria for a pardon are mutually exclusive. The ten years represents a recent increase from a former five year requirement but the "within" and "for at least" would still be mutually exclusive. It is harder, and rightly so, for a person with a criminal record to meet the criteria for a pardon than it is for the same person to merely avoid the criteria for enhanced sentencing as an habitual offender.

The State has not amassed the statistics on the number of convictions that are affirmed each year, but experience teaches that the overwhelming majority of convictions are upheld on appeal and in collateral proceedings.

The court in Eutsey understood that it would be an exorbitant and absurd waste of time to make the prosecution prove in all cases the absence of a pardon and the absence of a reversal of the conviction. The court further understood that if such rare issues are to be injected into the case, the defendant is the one to do it.

The Eutsey decision had the additional effect of saving scarce resources by simplifying and narrowing the issues. Time is no less valuable at the sentencing stage than at the trial stage. A trial would be a rather cumbersome proceeding if the State had to establish its case by proving not only the elements of the crime but also the nonexistence of every conceivable defense. Likewise, a sentencing hearing would needlessly be

complicated by the State having to prove matters on which there was no dispute.

The Eutsey decision placed the burden of raising the issues on the person with the best opportunity to know the relevant facts. The defendant, better than anyone, would know whether he has been pardoned or his conviction set aside. The defendant's burden of bringing forth evidence on these issues would be inconsequential. Under the provisions of the habitual offender statute, defendants are given advance notice of the State's intent to seek habitual offender sentencing. The purpose of the notice is to give the defendant an opportunity to challenge the predicate convictions by showing, e.g., that they never happened, are too remote, have been pardoned, or have been overturned in post-conviction proceedings.

Because of prior notice, as Eutsey so plainly holds, whether one speaks of affirmative defenses to habitual offender sentencing or the accuracy of PSIs, it comports with due process, and fundamental fairness, to place the burden on the defendant to challenge the validity of predicate convictions. The prosecution's duty to prove the prior predicate offenses is analogous to its duty to prove the elements of the principal crime, and the defendant's duty to produce evidence of a pardon or reversal of the conviction is analogous to his duty to produce evidence on defenses, such as insanity, alibi, and self-defense.

By placing the burden on the defendant, the Eutsey decision relieved the prosecution of the necessity of proving a negative.

To show the nonexistence of a pardon in Florida, this would require the State to communicate with the Office of Executive Clemency and ask it to search its records in the years since the conviction to determine if a pardon had been granted and to attest in a letter or other written communication that there was no evidence showing that a pardon had been granted. Where the predicate conviction is from another jurisdiction, obtaining evidence on pardons would require the State to research the law of the foreign jurisdiction and locate the appropriate office or offices which can attest to the lack of evidence showing that a pardon has been granted. Sentencing, of course, would be delayed for the weeks or months that this process requires.

The difficulty of proving the nonexistence of an order setting aside the judgment of conviction is even more pronounced. There is no central point at which all post-conviction reversals of convictions are registered. To meet its burden, the State would have to show that it researched the various records of state, foreign, and federal courts and the databases of computerized legal research, such as WESTLAW. Whether the State's research would be adequate to meet the preponderance-of-the-evidence test would be subject to debate.

To reiterate, in the interests of simplifying issues, saving time, and avoiding undue hardship on the prosecution, and completely consistent with due process, Eutsey correctly placed the burden on the defendant to produce evidence which would be readily accessible to him at minimal effort.

Because these matters are affirmative defenses, they are subject to waiver, the effect of which is to relieve the trial court of its duty to make a negative finding in the face of silence from the defense. Absent any evidence on the subject, the trial court cannot realistically make any finding as to whether the defendant was or was not pardoned of the prior offense or that the prior offense was or was not set aside. To require the trial court to make such findings when the issues were never raised is senseless. There could be no relief on appeal, for the lack of evidence to support the findings would be irrelevant.

The habitual offender statute must be interpreted with its judicial gloss. As this court and the supreme court recently stated, "[I]t is a function of the judiciary to declare what the law is." Heath v. State, 532 So.2d 9, 10 (Fla. 1st DCA 1988); State v. Smith, 547 So.2d 613, 616 (Fla. 1989). See, also, Glass v. State, 574 So.2d 1099 (Fla. 1991) (probationary split sentence issue). Presumably the legislature has adopted this judicial construction of the statute because it has been amended several times subsequent to the publication of Eutsey without the language at issue here being altered. Burdick v. State, 17 F.L.W. S88, S89 (Fla. February 6, 1992).

The decision in Anderson has created an absurd result. According to Anderson, the case must be remanded for a new sentencing hearing at which the trial court must state on the record, "I find that the defendant has not been pardoned, and

neither has his prior judgments been set aside." The defendant will then appeal this sentencing order to the First District Court of Appeal. He will argue that there is no evidence to support the trial court's findings, and the State will respond that the absence of evidence is irrelevant because these are affirmative defenses, citing Eutsey. This court, if it follows supreme court precedent, will then affirm the sentencing order.

Eutsey has been the law in Florida controlling the imposition of habitual felony sentences for some twelve years. It is safe to say without fear of serious contradiction that few, if any, of the thousands of habitual felony sentences imposed in those years were grounded on the State, sua sponte, raising and producing evidence showing that the predicate felonies had not been pardoned or set aside and the trial court making concomitant findings. Thus, the Anderson and Hodges holdings not only create a major upheaval in settled case law and future sentencing hearings, they also bring into question every habitual felony sentence imposed in the last twelve years. Because they are also grounded on the proposition that the State and trial court must raise and dispose of the question even when the defendant does not raise the issue, they treat this so-called error or omission as fundamental error. Thus, every prisoner now serving an habitual offender sentence has an arguable basis to petition for collateral relief. Indeed, every habitualized prisoner could file a habeas petition in the First District alleging ineffective assistance of counsel for not raising this error, and he would be

entitled to relief since this error has been characterized as fundamental.

The Anderson holding not only directly contradicts an explicit holding of Eutsey, it undermines the entire rationale of Eutsey in upholding the constitutionality of the statute. The court in Eutsey addressed the broader question of whether the full panoply of due process rights required in the guilt phase was also required in the sentencing phase, i.e., was the state required to affirmatively prove all information used in the sentencing process beyond a reasonable doubt? The court held it was not. One of the specific issues was whether the State could rely on Presentence Investigation reports in showing that the defendant should be sentenced as an habitual offender. The court held that it could and that the burden was on the defendant to come forth challenging the information in the PSI with witnesses and evidence. In so holding, the court relied in large part on, and explicitly adopted language from, an erudite opinion by former Judge Robert Smith in Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979). Judge Smith's examination and recitation of the facts in Adams on which the habitual offender sentence was based is highly instructive. He stated:

> Turning to the facts of this case, we see that the sentencing judge found Adams was previously convicted of armed robbery and was released less than five years before committing the felonies for which he was to be sentenced, all of which was admitted or properly proved by competent evidence, including a witness who was subject to cross-examination. Adams was thus shown to be an

habitual felony offender within the meaning of section 775.084(1)(a).

Id., at 58 (e.s.).

Section 775.084(1)(a), Florida Statutes (1977), which Judge Smith addressed, provided in relevant part that the trial court may impose an habitual offender sentence if it finds:

> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
> 4. A conviction of a felony, misdemeanor, or other qualified offense necessary to the operation of this section has not been set aside in any post-conviction proceeding.

There are several significant points about the above. First, the statute in Adams contained the same pardon and post-conviction set aside provisions addressed in Eutsey and in Anderson. Second, Judge Smith's recitation of facts, or trial court findings, said nothing about pardons or post-conviction overturns for the simple reason that Adams is grounded on the settled principle, subsequently reiterated in Eutsey, that affirmative defenses which are not raised by the defendant are waived.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm appellant's sentences.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN J. MOSLEY, #593280
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Carl S. McGinnes, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 S. Monroe Street, Tallahassee, Florida 32301, this 30th day of April, 1992.

Carolyn J. Mosley
Assistant Attorney General