IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,100

THOMAS JOSEPH ARNOLD,

Respondent.

_____/

MERITS BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

By amended information in Case No. 90-2999, respondent, Thomas Joseph Arnold (hereinafter Arnold), was charged with committing three counts of armed robbery and armed kidnapping occurring on July 1, 1990 and two counts of carrying a concealed firearm and one count of possession of a firearm by a convicted felon. (R. 3-5) He pled nolo contendere to three counts of strong arm robbery and three counts of false imprisonment. (R. 69-69A, 89-90; T. 3-7) In Case No. 89-5957, he pled nolo contendere to grand theft auto. (R. 69-69A, 89-90; T. 3-7) In exchange for Arnold's plea, the State agreed to drop all other charges. (Id.) There was no agreement on sentencing, except with respect to restitution. (T. 4)

On October 5, 1990, petitioner, State of Florida (hereinafter State), filed a motion seeking habitual violent felony offender sentencing. (R. 35-36) Defense counsel was given an opportunity to review the motion prior to the sentencing hearing. He discussed with Arnold "the consequences of habitualization and provided him with a copy of the statute and case law involving it." (T. 8) Defense counsel acknowledged to the court that he had been given sufficient time to prepare for the sentencing hearing which took place on April 3, 1991. (T. 8-9)

A PSI report in another case was prepared two months prior to the sentencing hearing in the instant case. Arnold had remained in custody since that time with no changes in his

circumstances. Defense counsel waived preparation of a new report. (T. 7)

A guidelines scoresheet was prepared, which reflected that Arnold had previously committed six felonies. (R. 83) Defense counsel was satisfied with the scoresheet. (T. 3)

The State placed in evidence certified copies of judgments and sentences showing that on November 19, 1985, Arnold was convicted in Bay County of trafficking in cocaine, grand theft, false report to law enforcement officer, strong arm robbery, and aggravated assault with a firearm, for which he received a sentence of five years' imprisonment (R. 42-49; T. 9); and on January 20, 1987, he was convicted in Jackson County of escape and grand theft auto, for which he received a sentence of two years' imprisonment (R. 50-54; T. 9).

During the sentencing hearing, the following colloquy 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. 85-234 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.

COURT: Then is there any matter you wish to present to the Court, Mr. Woods?

DEFENSE COUNSEL: Basically, Your Honor, I don't think that habitualization is necessary in this case by virtue of the fact that the Defendant is presently under sentence of life imprisonment and that habitualization is just, you know, adding additional fuel to a fire that is already burning pretty brightly. The other thing I would ask the Court to consider, none of these victims have suffered any serious injury .... And further, that

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[1] The burden being on appellant to provide the appellate court with a complete record, the State did not seek to obtain a stipulation from counsel to explain what was inaudible to the court reporter, but the most reasonable inference to be drawn was that the prosecutor stated that "the convictions had not been set aside." If that indeed was what the prosecutor said and that was what the defense understood him to say, then Arnold has deliberately misled the First District Court of Appeal in order to obtain a new sentencing hearing.

any sentence imposed by the court be concurrent with his prior life sentence. (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 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)

The trial court adjudicated Arnold guilty of the offenses to which he had pled no contest and sentenced him to prison for a total of forty-five years (including a ten-year minimum mandatory term) in Case No. 90-2999, followed by five years' imprisonment in Case No. 89-5957. (T. 17-20) The trial court's oral sentencing order was subsequently reduced to writing. (R. 61-68)

Arnold appealed from his judgments and sentences on the ground that the trial court had failed to make the statutorily required findings for imposing habitual offender sentences. The First District Court of Appeal agreed with Arnold to the extent that no finding was made that the predicate judgments of conviction had not been set aside. The First District reversed Arnold's sentences but certified 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.

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 Arnold qualified for sentencing as an habitual violent 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." Id., at S93. 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 Davis and Waters 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. The record contains certified copies of prior judgments of conviction for violent felonies and a stipulation from defense counsel that Arnold had committed the prior offenses, that he had never been pardoned, and arguably (inaudible part of transcript) that the judgments had never been set aside. In view of this evidence, the trial court's failure to make specific findings of fact was harmless error. Were this court to remand these cases 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 Carl S. McGinnes, 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

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APPENDIX

Arnold v. State, Slip Opinion (Fla. 1st DCA December 22, 1992)

91-1109 01-24
9

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

THOMAS JOSEPH ARNOLD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 91-1040

DEC 22 1992

Opinion filed December 22, 1992.

Appeal from the Circuit Court for Leon County.
F.E. Steinmeyer, Judge.

Nancy A. Daniels, Public Defender, and Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, for Appellee.

ALLEN, J.

Arnold appeals from the trial court's imposition of a habitual violent felony offender sentence, arguing that the trial court failed to make the necessary findings under the statute. See Jones v. State, 17 F.L.W. D2375 (Fla. 1st DCA Oct. 14, 1992). Because the trial court failed to make the finding specified at section 775.084(1)(b)(4), Florida Statutes (1989), that the predicate conviction had not been set aside, and because Arnold did not waive the requirement for this finding, we vacate the sentence and remand for resentencing.

Arnold stipulated at sentencing that the requirements of section 775.084(1)(b)(1)-(3) were satisfied. Accordingly, the necessity for findings under those subparagraphs was waived. After being advised of this stipulation, the trial judge said that he understood this stipulation to be a stipulation that Arnold qualified for sentencing as a habitual felony offender. The trial judge therefore made no findings under 775.084(1)(b) before imposing the habitual violent felony offender sentence. Arnold did not waive the requirement that the trial court make a specific finding pursuant to section 775.084(1)(b)(4), and his failure to correct the trial court's misunderstanding of the stipulation's legal effect cannot itself serve as a waiver. Treating Arnold's silence as a waiver under these circumstances would be tantamount to requiring a contemporaneous objection. But no contemporaneous objection is required to preserve for appeal a trial court's failure to make the findings mandated by section 775.084. See Anderson v. State, 592 So.2d 1119 (Fla. 1st DCA 1991). And the situation here is entirely unlike the waiver in Robinson v. State, 605 So.2d 500 (Fla. 1st DCA 1992), where Robinson affirmatively represented that he did not dispute his qualification to be sentenced as a habitual felony offender.

The habitual violent felony offender sentence is vacated and this cause is remanded for resentencing. We certify the same question we certified in Jones and Anderson.

ZEHMER, J. CONCURS; JOANOS, C.J. DISSENTS WITH OPINION.

JOANOS, C.J.

I respectfully dissent. I would interpret what occurred in the sentencing process as a stipulation by appellant's trial counsel that appellant qualified as a habitual offender. First, he concurred in the representation made by the prosecutor as to the authenticity of the judgments and that defendant had not been pardoned. Next, he argued against the imposition of the habitual sentence without hint that defendant did not qualify. And then, most importantly, when the trial judge concluded that the parties had stipulated that appellant qualified as a habitual offender, he did not challenge the interpretation. If it was not clear enough to be a stipulation, certainly it amounted to a waiver of the requirement that the specific findings be made. See Robinson v. State, 605 So.2d 500 (Fla. 1st DCA 1992).