047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 81,262

KIM HIGGINS,

Respondent.

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent, KIM HIGGINS, was the Appellant below. He will be referred to as the Defendant, Respondent, or by his proper name. The Petitioner, State of Florida, Appellee below, will be referred to as the State. References to the record on appeal will be by the use of the symbol "R" followed by the appropriate volume and page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the State's statement of the case and facts as being generally supported by the record.

SUMMARY OF ARGUMENT

The real issue before this Court is not the same as the certified question. Rather, this Court should address the ultimate issue, i.e., is the entire judicial function of Florida Statute 775.084 "ministerial" in nature? Or, should the trial court be required to make some findings? This Court should apply the rationale of Robinson v. State, 18 Fla. L. Weekly, D510 (Fla. 4th DCA Feb. 17, 1993), and hold that the absence of any findings by the trial court requires reversal and resentencing.

ARGUMENT

ISSUE/CERTIFIED QUESTION

DOES THE HOLDING IN EUTSY 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]," EUTSY 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 realizes that this Court in State v. Rucker, 18 Fla. L. Weekly S93 (Fla. Feb. 4, 1993) has already answered this certified question. The answer was not favorable to the Respondent's position.

The Respondent, however, urges that this Court has not answered the real issue raised by the Respondent in the Court below and before this Court. The ultimate issue is whether the trial court is required to make any findings or whether the entire statute in question (Florida Statute 775.084) is simply ministerial in nature and does not require any findings by the trial court.

The Respondent is aware that this Court has reinforced the Rucker decision in its opinion in Thomas v. State, 18 Fla. L. Weekly S151 (Fla. March 11, 1993). However, as in Rucker, this Court did not address the ultimate issue presented here.

As acknowledged by the State, the Fourth District has concluded that Rucker applies only to the findings on pardon and set aside. In Robinson v. State, 18 Fla. L. Weekly D150 (Fla. 4th DCA Feb. 17, 1993), the Court stated:

> "The absence of any findings precludes the application of State v. Rucker, 18 Fla. L. Weekly S93 (Fla. Feb. 4, 1993).

At the sentencing below, in classifying Respondent as an habitual violent felony offender, the trial court stated:

> "I am going to classify him as an habitual violent felony offender." (R 86).

The trial court made no findings. The trial court made no other statements whatsoever relative to the criteria of Florida Statute 775.084. Not only did the trial court fail to make any findings, the trial court did not even state that the Respondent was an habitual offender "by a preponderance of the evidence." Surely, even under the Rucker rationale, at least that much is required.

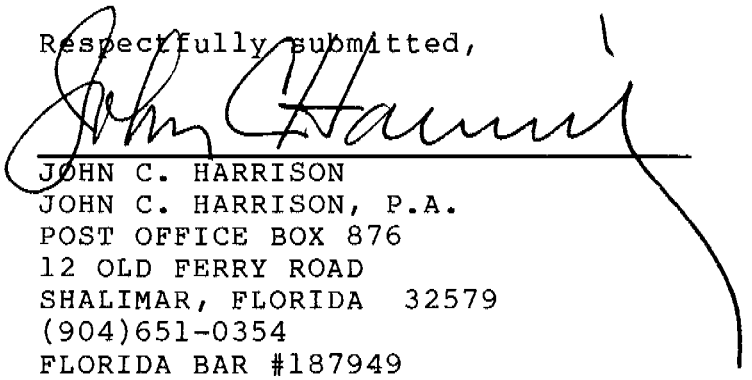
As in Robinson, the total absence of any findings by the trial court should preclude the application of Rucker.

CONCLUSION

This Court should address the ultimate issue raised here. Is the entire judicial function of Florida Statute 775.084 "ministerial" in nature? Or, should the trial court be required to make some findings on the record or, at least, state that its classification of a defendant as an habitual offender is made by the standard required by the statute, i.e., by a preponderance of the evidence?

Respondent submits that this Court should apply the Robinson approach and hold that the absence of any findings requires that the sentencing be reversed and the case remanded to the trial court for resentencing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished to Amelia L. Beisner, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 by regular United States Mail this 23rd day of March, 1993.

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