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IN THE SUPREME COURT OF FLORIDA

11/26

STEPHEN HERRINGTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 82,~~640~~ 460

FILED
SID J. WHITE
NOV 2 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

ANTHONY CALVELLO
Assistant Public Defender

Attorney for Stephen Herrington

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FLORIDA RULES OF CRIMINAL PROCEDURE

PRELIMINARY STATEMENT

Petitioner was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Judicial Circuit, In and For County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will denote Record on Appeal.

STATEMENT OF THE CASE

Petitioner, Stephen Herrington, was charged by Information filed in the Fifteenth Judicial circuit in Case No. 89-3736 with burglary (R 279). In Case No. 89-3740, Petitioner was charged with burglary and petit theft (R 338). In Case No. 89-3734, Petitioner was charged with five (5) counts of burglary, grand theft, petit theft (R 386-387). In Case No. 89-3735, Petitioner was charged with four (4) counts of burglary, grand theft, and petit theft (R 238-239). Pursuant to a plea agreement on the 1989 cases, Petitioner was sentenced to concurrent terms of one year in jail and fifteen (15) years probation (R 245-248, 286-288, 400-405).

Thereafter an affidavit for violation of probation was filed against Petitioner (R 249). Petitioner's probation was modified to include six (6) months of community control (R 255). Then an affidavit of violation of this community control was subsequently filed against Petitioner (R 251).

Petitioner was charged by Information filed in the Fifteenth Judicial Circuit in Case No. 90-9218 with burglary and grand theft (R 135-136). In Case No. 90-9219, Petitioner was charged with burglary, attempted burglary and grand theft (R 312-313). In Case No. 90-9071, Petitioner was charged with burglary and petit theft (R 363). In Case No. 90-9069, Petitioner was charged with burglary and grand theft (R 181). Pursuant to a plea agreement, Petitioner pled guilty to violating his community control in the 1989 cases and he also pled guilty to the substantive 1990 cases (R 183, 184, 256-258). Petitioner was sentenced to five (5) years in the

Department of Corrections followed by probation (R 140-142, 144-145, 298-301). Also an affidavit of violation of probation was filed against Petitioner (R 143).

Petitioner was charged by Information filed in the Fifteenth Judicial Circuit in Case No. 91-7662 with three (3) counts of burglary, two (2) counts of petit theft, and one count of grand theft (R 209-211). In Case No. 91-8375, Petitioner was charged with burglary and grand theft (R 153-154). The State filed a notice to habitualize Petitioner (R 266, 355). Petitioner entered guilty pleas to the court on the violations of probation and to the substantive 1991 cases (R 147, 166, 218, 269-270).

After a sentencing hearing, Petitioner was classified and sentenced as a habitual felony offender in Case No. 91-7662 to thirty (30) years in prison and as a habitual offender in Count I, a consecutive term of one year community control followed by twenty-nine (29) years probation in Count III, ten (10) years probation in Count IV, and thirty (30) years probation in Count V. In Case No. 91-8375, Petitioner was sentenced to thirty (30) years as a habitual offender in Count I and to ten (10) years as a habitual offender in Count II. On the 1989 and 1990 probation revocation cases, Petitioner was sentenced to thirty (30) years as a habitual offender on all the second degree felony counts and to ten (10) years as a habitual offender on all the third degree felony counts (R 124-128, 148-149, 171-172, 195-196, 222, 272-274, 306, 376, 441-445).

Timely Notice of Appeal was filed by Petitioner to the Fourth

District Court of Appeal.

The Fourth District in a written opinion Herrington v. State, 18 Fla. L. Weekly D 1485 (Fla. 4th DCA June 23, 1993), en banc, [See Appendix] affirmed the order classifying and sentencing Petitioner as a habitual felony offender for the 1991 charges. The Fourth District held that the trial court's failure to make the findings of fact required by Section 775.041(1)(a) 1 and 2 F.S. (1991) was harmless error. The Court held: "We conclude that where, as here, the evidence of prior convictions which qualify the defendant as an habitual offender is unrefuted and unquestioned, the trial court's failure to make findings of fact as to those convictions is harmless error." Judge Stone in a dissenting opinion stated that he "would reverse Appellant's [Petitioner's] sentence for failure to make the required habitual offender findings. The harmless error analysis authorized by, and applied in, Rucker is limited to subsection 3 and 4 of Section 775.084(1)(a), Florida Statutes."

On September 1, 1993, the Fourth District denied Petitioner-Appellant's motion for rehearing but certified the following question as one of great public importance:

> WHETHER A TRIAL COURT'S FAILURE TO MAKE THE REQUISITE STATUTORY FINDINGS UNDER SECTION 775.084(1)(a) 1 AND 2 IS SUBJECT TO THE SAME HARMLESS ERROR ANALYSIS CONTAINED IN Rucker v. State, 613 So. 2d 460 (Fla. 1993) WHERE THE EVIDENCE OF THE PRIOR CONVICTIONS WHICH QUALIFY A DEFENDANT AS A HABITUAL OFFENDER IS UNREBUTTED.

Herrington v. State, 18 Fla. L. Weekly D1920 (Fla. 4th DCA September 1, 1993).

Timely Notice of Discretionary Review was filed by Petitioner.

STATEMENT OF THE FACTS

Jennifer Heineman, a probation officer, testified that Petitioner was placed on probation for fifteen (15) years on June 29, 1989 in Case Nos. 89-3734, 89-3735, 89-3736, and 89-3740. Petitioner was also sentenced to a year in jail and ordered to pay restitution and undergo a psychological evaluation. Petitioner paid the restitution in three (3) of the cases but still owed $6,420.98 in Case No. 89-3734 (R 9-10). Petitioner was subsequently violated and was sentenced to the Department of Corrections and placed in the Youthful Offender Boot Camp. Petitioner was released in February 1991, and his probation was reinstated (R 11). Petitioner was now on probation for the four (4) 1989 cases and for Case Nos. 90-9071, 90-9069, 90-9218, 90-9219 (R 12).

Ms. Heineman also testified that Petitioner underwent a psychological evaluation and attended four (4) counselling sessions before withdrawing for financial reasons (R 13). Petitioner is a confused, alienated young man who is still in the mist of adolescent resentment. Petitioner was again violated on August 6, 1991 (R 14).

Jay Mullins, a fingerprint examiner with the Palm Beach Sheriff;s Office, testified that he took the fingerprints of Petitioner and compared them with the pen pack from the Department of Corrections containing prints from Case Nos. 89-3740, 89-3736, 89-3735, 89-3734, 90-9219, 90-9071, 90-9069, and 90-9218. Mr. Mullins came up with the conclusion that the prints were made by

one and the same person (R 20-24).

Robert Tennant, a Palm Beach Sheriff's Office detective, testified that he was the investigator on Petitioner's 1990 and 1991 cases. According to Detective Tennant, Petitioner progressed from loitering and prowling to burglaries and theft. Detective Tennant testified that he has no idea as to Petitioner's motive and that he was quite impressed with Petitioner after Boot Camp (R 27-29). Detective Tennant also testified that he drove around with Petitioner and that Petitioner pointed out and confessed to his crimes (R 33). Deputy O'Shea further testified that he believes that if Petitioner is released, his crimes will intensify (R 35).

Marcia Herrington testified that she is Petitioner's mother and that Petitioner has a low self-esteem as he is not successful at much of anything. However, Petitioner is artistic. Ms. Herrington believes that Petitioner can be treated with counselling (R 43-48). Kenneth Hardin testified that he knows Petitioner through his sister and that Petitioner is a non-violent, considerate person with psychological problems (R 56-58).

Petitioner testified that the first time he stole something was when he was in junior high school and that it was not his idea (R 58-59). Petitioner further testified that he has an addiction to stealing even though it started out as fun at first. Petitioner is addicted to doing it (R 63-65). Petitioner also testified that while at the stockade, he had been doing artwork (R 67). Petitioner wants to stop burglarizing and make something of his life (R 71).

Helen Bush, a licensed clinical social worker and a licensed family and marriage therapist, testified that she practices in the area of obsessive compulsive disorders (R 89-99). Petitioner was referred to her and she examined him on March 12, 1992 for an hour and a half (R 98-99). In Ms. Bush's opinion, Petitioner has an obsessive compulsive personality. In other words, Petitioner knows what he's doing is destructive, but he continues to steal because of this obsessive compulsive disorder as would an alcoholic or a gambler. Petitioner is a 22 year old in need of treatment who is an excellent artist (R 101-103, 105, 110-112).

SUMMARY OF THE ARGUMENT

Petitioner was classified and sentenced as a habitual felony offender pursuant to Section 775.084. Each of the findings required as a basis for sentencing a defendant as a habitual offender must be made by a preponderance of the evidence, must be strictly followed, and must be made with specificity. The trial court utterly failed to make the requisite statutory findings under Section 775.084(1)(a)1 and 2 Florida Statutes (1991) that:

> 1. The defendant has previously been convicted for any combination of two or more felonies in this state or other qualified offenses;
>
> 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.

The trial court's failure to make these crucial statutory findings resulted in reversible error. The "harmless error" analysis made by the Fourth District in the instant case should not be applied to the trial court's failure to make these crucial statutory findings, supra. This Court's decision in State v. Rucker, 613 So. 2d 460 (Fla. 1993) relied on by the Fourth District is inapplicable at bar.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO MAKE THE REQUIRED STATUTORY FINDINGS PRIOR TO CLASSIFYING AND SENTENCING PETITIONER AS A HABITUAL FELONY OFFENDER.

It is a fundamental tenant of statutory construction that penal statutes must be strictly construed. Section 775.021(1), F.S. (1991); State ex rel Washington v. Rivkind, 350 So. 2d 575 (Fla. 1977). If there is any doubt as to a criminal statutes meaning it should be resolved in favor of the citizen. Section 775.021(1), F.S. (1991); State ex rel Grady v. Coleman, 133 Fla. 400, 183 So. 25 (1938). Further, to the extent that any definiteness is lacking, a criminal statute must likewise be construed in the manner most favorable to the accused. Perkins v. State, 576 So. 2d 1310 (Fla. 1991).[1]

Petitioner was sentenced as a habitual felony offender pursuant to Section 774.084. Sentencing under the Florida habitual felony offender statute is permissive not mandatory. Tucker v. State, 595 So. 2d 956 (Fla. 1992); Burdick v. State, 594 So. 2d 267 (Fla. 1992).

Section 775.084(3)(d) expressly providing that each of the findings required as a basis for sentencing a defendant as a habitual felony offender must be made by a preponderance of the evidence. Section 775.084(1)(a) 1 and 2 clearly set forth two (2)

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[1] This Court has held that this statutory rule applies to the sentencing guidelines. Flowers v. State, 586 So. 2d 1058 (1991). Further, the rule of lenity applies to the sentencing guidelines rules. Lewis v. State, 574 So. 2d 245 (Fla. 2d DCA 1991), approved, 586 So. 2d 338 (Fla. 1992).

of the findings that must be made by the trial courts as a prerequisite for sentencing a defendant as a habitual felony offender:

> 1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses;
>
> 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.

The classification of a defendant as a habitual felony offender without making the statutorily required findings is reversible fundamental error. Parker v. State, 546 So. 2d 727 (Fla. 1989); Walker v. State, 462 So. 2d 452 (Fla. 1985); Eutsey v. State, 383 So. 2d 219 (Fla. 1980); Powell v. State, 596 So. 2d 770, 771 (Fla. 5th DCA 1992). As stated by this Honorable Court in Walker:

> 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 of these types of sentencing decisions would be difficult, if not impossible. It is clear the legislature intended the trial court to make specific findings of fact when sentencing a defendant as a[n] habitual offender. Given this mandatory statutory duty, the trial court's failure to make such findings is appealable regardless of whether such failure is objected to at trial. (emphasis added).

Id. at 454.

Turning to the instant case, the trial court at the conclusion of the habitual offender hearing merely stated "based upon your record, this Court has absolutely no alternative but to declare you to be an habitual offender ..." (R 125). This is insufficient under the applicable statutory provisions and this Honorable Court's decisions in both Powell and Walker. Hence the order declaring Petitioner a habitual felony offender should be vacated.

The Fourth District in the instant case declined to vacate Petitioner's classification as a habitual felony offender by applying a "harmless error" analysis to the trial court's failure to make the critical statutory findings mandated by Section 775.084(1)(a) 1 and 2 Florida Statutes (1991). The Fourth District suggested that this result was sanctioned by this Court's decision in State v. Rucker, 613 So. 2d 460 (Fla. 1993).

In Rucker, this Court held that the trial court's failure to make the statutory findings of facts as to Section 775.084(1)(a) 3 and 4 (that the prior felony convictions had not been pardoned or set aside through post-conviction proceedings) was harmless error where there was unrefuted evidence of the prior convictions as required by Section 775.084(1)(a) 1 and 2.

In making its erroneous logical leap, the Fourth District utterly failed to recognize the clear distinction between the requirements of 1 and 2 (qualifying offense, temporal element) and the 3 and 4 requirements concerning a pardon, post-conviction set aside. This Court in Eutsey made clear that the defendant has the burden of asserting a pardon or post-conviction set aside (3 and

4) at the proceeding likening then to affirmative defenses. However, the defense has absolutely no burden to establish the prerequisite felony and the required temporal element. This is the crucial factor which separates Rucker from the instant situation.

The findings mandated by Section 775.084(1)(a) 1 and 2 are a prequisite to classification of a defendant as a habitual felony offender. It is clear that the legislature intended the trial judge to make the specific findings of fact when sentencing a defendant as a habitual offender. It is a fundamental rule of statutory construction that legislative intent is the polestar by which the courts must be guided. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). The legislature squarely placed the duty on the trial judge to make the finding that the defendant "has previously been convicted of any two or more felonies," Section 775.084(1)(a)(1) and that this "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 ...." Section 775.084(1)(a)(2). Further, the trial court is required to determine if this felony can nevertheless be a predicate conviction under the habitual offender statute if said offense is an otherwise "qualified offense" pursuant to Section 775.084(1)(c) F.S. (1991).[2]

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[2] Section 775.084(1)(c) provides: (c) "Qualified offense" means any offense, substantially similar in elements and penalties to an offense in this state, which is in violation of law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction, that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

This Court and the District Courts of Appeal have mandated strict and complete compliance with Section 39.111(7)(d) F.S. (1989) and Section 39.059(7) F.S. (1991), prior to sentencing a juvenile as an adult. See Rhoden v. State, 448 So. 2d 1013 (Fla. 1984) (Trial court must make required statutory findings before sentencing a juvenile as an adult); Trueblood v. State, 610 So. 2d 14, 15 (Fla. 1st DCA 1992); Taylor v. State, 593 So. 2d 1147, 1148 (Fla. 1st DCA 1992) (The failure of the trial court to address even one of five statutory criteria to sentence juveniles as adults required reversal); Stanley v. State, 582 So. 2d 140, 141 (Fla. 5th DCA 1991) (Reversal was required of order imposing adult sanctions on juvenile who pled to felony, due to trial court's failure to make written findings as to whether adult sanctions were suitable, even though juvenile judge had previously considered similar criteria in transferring defendant to adult court for prosecution). This strict compliance with the statutory criteria required for an order imposing adult sanctions on a juvenile should be equally applied to a habitual felony offender classification pursuant to Section 775.084.

The decision to sentence a defendant as a habitual felony offender has extreme consequences for the defendant. Under the plain and unambiguous language of the habitual felony offender statute, the trial 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. This mandatory duty should never be delegated to an appellate court. The enormous

impact of this monumental decision requires the statutory provisions necessary for its implementation to be strictly enforced without any reference whatsoever to a "harmless error" analysis. This Court should answer the certified question in the NEGATIVE. These findings should be made by the sentencing judge prior to classifying and sentencing a defendant as a habitual felony offender not by an appellate court subsequently canvassing an appellate record after the fact.

Therefore this Honorable Court should reverse the decision of the Fourth District Court of Appeal. Hence the order classifying and sentencing Petitioner as a habitual felony offender should be vacated and this cause remanded to the trial court for resentencing within Petitioner's Fla. R. Crim. P. 3.701 sentencing guidelines range. See generally, c.f. Pope v. State, 561 So. 2d 554 (Fla. 1990).

CONCLUSION

This Honorable Court should reverse the decision of the Fourth District Court of Appeal. Hence the order classifying and sentencing Petitioner as a habitual felony offender should be vacated and this cause remanded to the trial court for resentencing within Petitioner's Fla. R. Crim. P. 3.701 sentencing guidelines range.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

ANTHONY CALVELLO
Assistant Public Defender
Florida Bar # 266345
15th Judicial Circuit of Florida
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Stephen Herrington

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 1st day of November, 1993.

Attorney for Stephen Herrington

IN THE SUPREME COURT OF FLORIDA

STEPHEN HERRINGTON, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 82,640

APPENDIX 1

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1993

STEPHEN HERRINGTON, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 92-1654. L.T. CASE NOS. 91-8375CF A02, 91-7662CF A02, 90-9071CF A02, 89-3736CF A02, 89-3735CF A02, 90-9069CF A02, 89-3740CF A02, 89-3734CF A02, 90-9219CF A02, 90-9218CF A02.

Opinion filed June 23, 1993

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Palm Beach County; Walter Colbath, Judge.

Richard L. Jorandby, Public Defender, and Robert Friedman, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

EN BANC

KLEIN, J.

Defendant appeals his sentence as an habitual offender because the court failed to make findings of fact required by section 775.041(1)(a) 1 & 2, Florida Statutes (1991). We conclude that the court's failure to make these findings is harmless error, and resolve a conflict between two of our opinions, Robinson v. State, 614 So. 2d 21 (Fla. 4th DCA 1993), and Carbone v. State, 18 Fla. L. Weekly D795 (Fla. 4th DCA Mar. 24, 1993).

Defendant, charged in 1989 with seventeen counts of burglary, petty theft, or grand theft, agreed to a plea in which he was sentenced to one year in jail and fifteen years' probation. In 1990 defendant was charged with additional burglaries and grand thefts. He pled guilty and was sentenced to five years followed by probation. In 1991 defendant was charged with eight more counts of burglaries and grand thefts, and again pled guilty.

The state sought habitual offender classification on the 1991 charges. At the sentencing hearing a fingerprint examiner testified that the defendant's fingerprints matched those from the 1989 and 1990 cases, and defendant did not contest the fact that those were his convictions. The trial court sentenced him as an habitual offender on the 1991 charges, but did not make findings of fact.

Section 775.084(1)(a) 1, 2, 3 & 4, Florida Statutes (1991), provides that the court may extend the term of imprisonment for a defendant, as an habitual felony offender, if it finds that: (1) defendant has prior convictions of certain felonies, (2) the convictions for prior felonies occurred within a specific period of time related to commission of the latest felony, (3) the convictions were not pardoned, and (4) the convictions were not set aside. The statute requires findings of fact.

In State v. Rucker, 613 So. 2d 460 (Fla. 1993), the Florida Supreme Court held that a trial court's failure to make findings of fact as to section 775.084(1)(a) 3 & 4 (that the

prior felony convictions had not been pardoned or set aside) was harmless error, where there was unrefuted evidence of the prior convictions as required by section 775.084(1)(a) 1 & 2. It is not clear from Rucker whether the harmless error analysis can be applicable to the 1 and 2 requirements, since Rucker involved the failure to make findings only as to the 3 and 4 requirements. One panel of this court concluded that the absence of any findings precludes the harmless error analysis of Rucker, (Robinson), while another panel concluded that the failure to make "the findings" required by the statute is harmless under Rucker, (Carbone).

We conclude that where, as here, the evidence of prior convictions which qualify the defendant as an habitual offender is unrefuted and unquestioned, the trial court's failure to make findings of fact as to those convictions is harmless error. The First District has also come to the same conclusion in Tarver v. State, 18 Fla. L. Weekly D975 (Fla. 1st DCA Apr. 12, 1993). In Tarver, the First District noted apparent conflict with our opinion in Robinson. We hereby recede from that decision.

We recognize that there are arguable differences between the 1 and 2 requirements and the 3 and 4 requirements. Our supreme court, in Eutsey v. State, 383 So. 2d 219 (Fla. 1980), held that the defendant has the burden of asserting a pardon or set aside (3 and 4), likening them to affirmative defenses. Where the 1 and 2 requirements of the statute (prior convictions) are undisputed, however, we can see no reason why the harmless error analysis of Rucker should not be applied.

We come to our conclusion with some reluctance because it is arguable that we have eviscerated the fact finding requirements which the legislature mandated in the statute. But for Rucker we would reverse this sentence; however, in light of it, we are persuaded that a reversal of an habitual offender sentence for lack of findings of fact, where the prior convictions are undisputed, would be a needless waste of time and expense.

We do not, by this opinion, condone trial judges ignoring the clear fact finding requirements of the habitual offender statute. Although it is harmless error under the facts in this case, it is nevertheless error, and could well require reversal if there were any question about the prior convictions. We therefore express the hope that trial courts will make the findings of fact in every case.

Defendant also argues that the trial court erred in retroactively sentencing him as an habitual offender for the 1989 and 1990 charges because he violated his probation in those cases. The state concedes this error based on Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989).

We therefore affirm defendant's habitual offender sentence for the 1991 charges, but reverse the habitual offender sentences for the 1989 and 1990 charges, and remand for resentencing on the 1989 and 1990 charges.

GLICKSTEIN, C.J., ANSTEAD, LETTS, HERSEY, GUNTHER, WARNER, POLEN, and FARMER, JJ., concur.
STONE, J., dissents with opinion with which DELL, J., concurs.

STONE, J., dissenting.

I would not recede from Robinson, and would reverse Appellant's sentence for failure to make the required habitual offender findings. The harmless error analysis authorized by, and applied in, Rucker is limited to subsections 3 and 4 of section 775.084(1)(a), Florida Statutes.

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1993

STEPHEN HERRINGTON, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 92-1654. L.T. CASE NOS. 91-8375CF A02, 91-7662CF A02, 90-9071CF A02, 89-3736CF A02, 89-3735CF A02, 90-9069CF A02, 89-3740CF A02, 89-3734CF A02, 90-9219CF A02, 90-9218CF A02.

Opinion filed September 1, 1993

Appeal from the Circuit Court for Palm Beach County; Walter Colbath, Judge.

Richard L. Jorandby, Public Defender, and Robert Friedman, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

ON REHEARING EN BANC

KLEIN, J.

We deny rehearing but certify the following question as one of great public importance:

> WHETHER A TRIAL COURT'S FAILURE TO MAKE THE REQUISITE STATUTORY FINDINGS UNDER SECTION 775.084(1)(a) 1 AND 2 IS SUBJECT TO THE SAME HARMLESS ERROR ANALYSIS CONTAINED IN Rucker v. State, 613 So. 2d 460 (Fla. 1993) WHERE THE EVIDENCE OF THE PRIOR CONVICTIONS WHICH QUALIFY A DEFENDANT AS A HABITUAL OFFENDER IS UNREBUTTED.

DELL, C.J., ANSTEAD, HERSEY, GLICKSTEIN, GUNTHER, STONE, WARNER, POLEN and FARMER, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Appendix has been furnished by courier to Joseph Tringali, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 1st day of November, 1993.

ANTHONY CALVELLO
Assistant Public Defender