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IN THE SUPEME COURT OF FLORIDA

460
CASE NO. 82,640

STEPHEN HERRINGTON,

Petitioner,

vs

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the prosecution in the trial court and the appellee in the District Court of Appeal, Fourth District.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"PB" Petitioner's Brief on the Merits

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as presented in the Initial Brief of Petitioner to the extent that it presents an accurate, objective and non-argumentative recital of the procedural history of the case at bar.

STATEMENT OF THE FACTS

Respondent accepts the Statement of the Facts as presented in the Initial Brief of Petitioner to the extent that it presents an accurate, objective and non-argumentative recital of the facts in the case at bar and subject to the following addition, correction or modification, to wit:

The trial judge said that "based on Petitioner's record" he had absolutely no alternative but to declare him a habitual offender (R 125, PB 11).

SUMMARY OF THE ARGUMENT

The current habitual offender statute, F.S. 775.084, does not require a finding of "protection of the public" in order for a trial court to sentence a defendant as a habitual offender. All of the factors which go into determining whether a defendant is eligible for habitual offender treatment are "ministerial determinations involving no subjective analysis." State v. Rucker, 613 So. 2d 460, 462 (Fla. 1992). Consequently, the failure of a trial court to make specific findings as to each of the criteria laid out in F.S. 775.084(1)(a) is harmless error.

ARGUMENT

THE TRIAL COURT DID NOT REVERSIBLY ERR IN FAILING TO MAKE STATUTORILY REQUIRED FINDINGS PRIOR TO SENTENCING PETITIONER AS A HABITUAL OFFENDER; ANY ERROR SHOULD BE SUBJECT TO A "HARMLESS ERROR" ANALYSIS

Petitioner contends that the trial court reversibly erred when it sentenced him to a habitual offender sentence without making specific findings for each of the requirements found in Florida Statute 775.084(1)(a) (1991), and that the Fourth District Court of Appeal reversibly erred when it applied a harmless error analysis to the trial court's lack of specific findings on the requirements contained in Florida Statute 775.084(1)(a)(1) and (2) (1991).

The statute provides:

> "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, it finds that:
>
> 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 . . .
>
> 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 or other qualified offense necessary to the operation of this section has not been set aside in any post-conviction proceeding

In State v. Rucker, 613 So. 2d 460 (Fla. 1993), this Court said that the failure of a trial court to make specific findings for criteria numbers 3 and 4 is subject to a harmless error analysis. Relying on Rucker, the Fourth District Court of Appeal, while recognizing "there are arguable differences between the 1 and 2 requirements and the 3 and 4 requirements" nevertheless applied the same harmless error analysis and concluded that the trial court had not reversibly erred when it failed to make specific findings with respect to criteria 1 and 2.

Petitioner argues that the first two criteria are substantially different from the second two in that they constitute a prerequisite to the classification of a defendant as habitual offender and that the imposition of such a sentence without specific findings on those criteria is fundamental reversible error. In making this argument, Petitioner relies on Parker v. State, 546 So. 2d 727 (Fla. 1989) and Walker v. State, 462 So. 2d 219 (Fla. 1980). Respondent respectfully disagrees and suggests there is a basic material difference between those cases and the case at bar.

Both Parker and Walker were decided under a predecessor statute which required the sentencing court to "determine if it is necessary for the protection of the public to sentence the defendant to an extended term . . . " Fla.Stat. 775.084(3) (1987). This Court's attention to the statutory language is clearly shown in Eutsey v. State, 383 So. 2d 219, 226 (Fla. 1980) where it said:

> Section 775.084(3)(d) requires that the trial court make findings of fact that

> show on their face that an extended term is necessary to protect the public from defendant's further criminal conduct.

Given the existence of that statutory language, in Walker, supra, this Court said:

> 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. It is clear that the legislature intended the trial court to make specific findings of fact when sentencing a defendant as a habitual offender.

Walker, id., at 454.

However, in Rucker, supra, this Court held that a trial court's finding that prior convictions have not been pardoned or set aside "is a ministerial determination involving no subjective analysis." Id., at 462. Thus, reading Eutsey and Walker in conjunction with the decision in Rucker, it is apparent that this Court is concerned about meaningful appellate review of a trial court's subjective conclusion that in a particular case "protection of the public" required a habitual offender sentence, rather than review of simple ministerial determinations which are easily discernible from the record.

In 1988, the Florida Legislature rewrote the habitual offender sentencing requirements and specifically struck the "protection of the public" language. The new law was signed by the governor and became effective on October 1, 1988. See: Laws of Florida, Ch. 88-131. Thereafter trial courts were no longer required to make such a finding. In effect, the new

statute requires nothing more than the simple ministerial determinations discussed in Rucker; that is, under the new law, any twice convicted felon whose last conviction or release from prison occurred within five years and who has not been pardoned or had his conviction set aside is a "habitual felony offender" and is subject to being sentenced in accordance with F.S. 775.084(4)(a).

Respondent does not contend that habitual offender treatment is mandatory. Clearly, in Tucker v. State, 595 So. 2d 956 (Fla. 1992) and Burdick v. State, 594 So. 2d 267 (Fla. 1992) this Court ruled otherwise. However, the fact is that once a trial court decides to impose habitual offender treatment, all of the subsequent findings are simple ministerial determinations. The First District Court of Appeal recently recognized this logical extension of the Rucker reasoning in Tarver v. State, 617 So. 2d 336 (Fla. 1st DCA 1993), a case which is virtually factually indistinguishable from the case at bar. Relying on the Rucker decision to hold the lack of specific findings of criteria 1 and 2 to be harmless error, the Court said:

> . . . given the same unrebutted evidence no subjective analysis is required to determine either the existence of the requisite felony convictions, or that the last prior felony conviction occurred within 5 years of the present felony. Section 775.084(1)(a)1. and 2., Fla.Stat. Therefore, the logical outcome of Rucker is that, where the State has introduced unrebutted evidence of a defendant's prior convictions, the failure to make any of the findings set forth at section 775.084(1)(a) is harmless error.

Tarver, id., at 338.

Petitioner argues that the legislature intended the trial judge to make specific findings when sentencing a defendant as a habitual felony offender, and that "legislative intent is the polestar by which courts must be guided." (PB 12). Appellee has no quarrel with that argument; but the issue before this Court is whether the lack of such specific findings constitutes fundamental error or harmless error. In light of this Court's prior decisions as well as its reasoning in Rucker, Respondent respectfully submits the only logical conclusion is that the lack of specific findings under F.S. 775.084(1)(a) constitutes harmless error.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and citations of authority cited herein, Respondent respectfully requests that the Judgment and sentence of the trial court be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to: **ANTHONY CALVELLO, ESQUIRE,** Assistant Public Defender, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401 this 19th day of November, 1993.

Of Counsel

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