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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

MARK DACOSTA, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )  
 )  
 \_\_\_\_\_ )

CASE NO. 82,775

PETITIONER'S INITIAL BRIEF ON THE MERITS

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### STATEMENT OF THE CASE

After a jury found Mark DaCosta guilty of burglary and assault, the Circuit Court of the Fifteenth Judicial Circuit found him to be an habitual offender and sentenced him to 17 years of imprisonment for the burglary. At sentencing, there was some reference to Mr. DaCosta's prior convictions, R 359, 378, and he admitted that the longest he had been out of prison since 1980 was for three and one-half years. R 360. He court-appointed attorney stipulated that he qualified to be sentenced as an habitual offender. R 359. She asked for the 17 year sentence which her client received. The trial court failed to make the requisite findings in sentencing Mr. DaCosta to be an habitual offender.

On appeal, the District Court of Appeal, Fourth District, affirmed the sentence but certified to this Court the question of whether the failure to make the required findings under the habitual offender could be held harmless.

### SUMMARY OF THE ARGUMENT

Harmless error analysis should not apply to the failure to make the statutory findings in an habitual offender proceeding.

### ARGUMENT

In State v. Rucker, 613 So. 2d 460 (Fla. 1993), the trial court sentenced the defendant as an habitual offender without specifically finding whether he had been pardoned for the qualifying offenses or whether any of the qualified offenses had been otherwise set aside. Although section 775.084(1)(a) requires such findings,<sup>1</sup> this Court

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<sup>1</sup> It also requires that the trial court find that the defendant has previously been convicted of felonies within a requisite time period prior to the instant sentencing. A copy of the statute is appended to this brief.

found that the failure to make these two findings was harmless error. The trial court had made the basic findings that the defendant otherwise qualified to be an habitual offender.

The case at bar presents this Court with the question of whether it should extend State v. Rucker to cases in which the trial court failed to make any of the requisite findings under section 775.084(1) (a). Mr. DaCosta contends that it should not.

The Due Process Clause applies to habitual offender proceedings. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). In Specht the Court held that Colorado's Sex Offenders Act was unconstitutional. The Court wrote in pertinent part:

The case is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue" on which a defendant "must receive reasonable notice and an opportunity to be heard." Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

386 U.S. at 610 (citations omitted; emphasis added).

Hence, there can be no meaningful appellate review (and hence no harmless error analysis) where the trial court makes no findings at all. Cf. Sullivan v. Louisiana, 113 S.Ct. 2078 (1993) (harmless error analysis does not apply where, because of defective instruction on reasonable doubt, there has in effect been no jury determination that state proved elements of offense beyond reasonable doubt). The lack of findings gives the appellate nothing to review, so that the court cannot make a determination of harmless error.

Policy considerations support Mr. DaCosta's argument. Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980).


Strict construction of the statute requires that the trial court make the requisite findings, not that the appellate court substitute its judgement when the trial court has failed comply. Since the statute plainly requires the findings, the failure to make them requires reversal.

CONCLUSION

This Court should reverse the judgement of the lower court and direct that the habitual offender sentence be reversed.

Respectfully submitted,

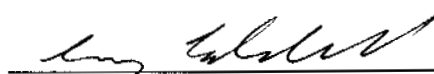
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARAH B. MAYER, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 23 day of December, 1993.

  
\_\_\_\_\_  
Of Counsel