097

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 82,775

FILED
SID J. WHITE
JAN 24 1994
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

2/14

MARK DACOSTA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward County. The Respondent, the State of Florida, was the Appellee and the prosecution, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" will be used to refer to the record on appeal, and the symbol "A" will be used to refer to Respondent's Appendix, which is a conformed copy of the District Court's opinion, attached hereto.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case, subject to the following additions, corrections and clarifications:

Petitioner was charged with burglary of a dwelling with a battery in Count I, false imprisonment in Count II, aggravated assault in Count III, possession of burglary tools in Count IV and indecent exposure in Count V (R 381-383). After jury trial, Petitioner was found guilty as charged on Count I, guilty of the lesser offense of assault on Count II, and not guilty on Counts II, IV and V (R 392-396).

At sentencing, Petitioner stipulated that he was qualified to be sentenced as a habitual offender and the State indicated that it had made copies of Petitioner's prior convictions part of the PSI (R 359). Petitioner acknowledged that the longest period of time he had been out of prison since 1980 was three and one-half years (R 360). The court noted that Petitioner had gone to prison four times, in 1980, 1983, 1986, 1988 (R 364). The court adjudicated Petitioner guilty of simple assault, a misdemeanor, on Count III, and sentenced Petitioner to time served (R 377). The Court sentenced Petitioner as a habitual offender on Count I, and the State indicated that Petitioner had not been pardoned for his prior offenses and that the PSI had been made part of the record (R 378).

On appeal, the Fourth District reversed Petitioner's sentence as to Count III, and directed that it be amended to reflect that simple assault is a misdemeanor (A 1). The court also affirmed Petitioner's habitual offender sentence on Count I, finding the

trial court's failure to make the statutorily required findings under section 775.084(1)(a)1. and 2. to be harmless. The court also certified the same question as was certified in Herrington v. State, 622 So. 2d 1339 (Fla. 4th DCA 1993).

SUMMARY OF THE ARGUMENT

The trial court's failure to make express findings that Petitioner had previously been convicted of two or more felonies and that his present crime had ben comitted within 5 years of his prior convictions, was harmless where Petitioner stipulated that he qualified as a habitual felony offender and where the record established that these two statutory factors had been met.

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 argues that due process requires that the statutorily required findings be made, else there can be no meaningful appellate review, and that principles of strict statutory construction require that the findings be made, and thus a harmless error analysis cannot be applied. The State disagrees, and submits that particularly on this record, where Petitioner stipulated that he qualified as a habitual offender, any error in the trial court's failure to make the statutorily required findings was harmless.

Sections 775.084(1)(a)1. and 2. require a trial court to find that a defendant has previously been convicted of two or more felonies and that the felony for which the defendant is being sentenced was committed within 5 years of the date of conviction of his last prior felony, or within 5 years of his release from a prison sentence imposed as a result of his last prior felony, before sentencing that defendant as a habitual offender. In Rucker v. State, 613 So. 2d 460 (Fla. 1993), this Court held that where, as here, copies of the defendant's prior convictions were in evidence, revealing that they were committed within the requisite period of time, where the defendant conceded the validity of his prior convictions, and where the defendant did not assert on appeal that the prior convictions were not valid, the trial court's

failure to expressly find that the defendant's prior convictions had not been pardoned or set aside was merely a ministerial determination involving no subjective analysis. Additionally, this Court found that because no subjective analysis was required, the defendant's right to meaningful appellate review was not frustrated by the trial court's failure to make express findings and thus subject to a harmless error analysis.

Clearly, here, as in Rucker, where the evidence of the existence and dates of Petitioner's prior convictions was unrebutted, no subjective analysis was required by the trial court, and its failure to make the express statutory findings was harmless. The First District recently recognized this logical extension of the Rucker reasoning in Tarver v. State, 617 So. 2d 336 (Fla. 1st DCA 1993), on facts virtually indistinguishable from those of the case at bar. Relying on this Court's decision in Rucker to hold the lack of findings regarding 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. [cite omitted]. 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 at 338.

Applying a harmless error analysis to the trial court's failure to make express findings prior to sentencing Petitioner as

a habitual offender does not deprive him of meaningful appellate review, because the record does contain evidence, here unrebutted and stipulated evidence, that criteria 1. and 2. were met. Further, while strict statutory construction is a principle which should guide courts where a statute is susceptible to differing constructions, it should not be applied where, as here, it would result in mere legal churning. See: Rucker at 462.

As Petitioner stipulated he was qualified as a habitual offender, and as his convictions were properly shown to the court, the trial court properly found Petitioner to be a habitual offender, thus the Fourth District's application of a harmless error analysis to this case was proper and Petitioner's sentence must be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to answer the certified question in the AFFIRMATIVE and to AFFIRM Petitioner's habitual offender sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General
Florida Bar No. 339067

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" has been furnished by Courier to: GARY CALDWELL, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 18th day of January, 1994.

Of Counsel

APPENDIX

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

92-1418 14

MARK DACOSTA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-2893.

L.T. CASE NO. 91-16975CF10A.

Opinion filed November 3, 1993

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

Appeal from the Circuit Court for Broward County; Howard M. Zeidwig, Judge.

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

Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We reverse Appellant's sentence as to count III, which the state correctly concedes must be amended to reflect a misdemeanor conviction for simple assault.

We affirm Appellant's sentence as a habitual offender, under count I, notwithstanding the court's failure to make the requisite statutory findings, under section 775.041(1)(a)1. and 2., Florida Statutes (1991), which the record reflects was harmless error. Herrington v. State, 18 Fla. L. Weekly D1921 (Fla. 4th DCA Sept. 1, 1993)(en banc). We certify to the supreme court the same question certified in Herrington.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR MODIFICATION OF SENTENCE.

DELL, C.J., STONE and WARNER, JJ., concur.