IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 83,359



**DENNIS ARNOLD,**

Petitioner,

vs.

**STATE OF FLORIDA,**

Respondent.

# RESPONDENT'S BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant a criminal prosecution from the Fifteenth Judicial Circuit, in and for Palm Beach 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 and Facts, subject to the following additions, corrections and clarifications:

At sentencing, Respondent presented certified copies showing Petitioner's prior convictions for burglary of a dwelling in Case No. 86-11689; for grand theft in Case No. 87-3579; and two counts of burglary of a structure and petit theft in Case No. 88-0377 (SR 1-4). Petitioner did not object to the certified copies introduced by Respondent and, in fact, acknowledged his prior record (R 22-26, 63-64, 67).

## 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 been comitted within 5 years of his prior convictions, was harmless where Petitioner acknowledged his prior record and where the evidence 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 WHERE THE EVIDENCE ESTABLISHED PETITIONER QUALIFIED FOR TREATMENT AS A HABITUAL OFFENDER; ANY ERROR SHOULD BE SUBJECT TO A HARMLESS ERROR ANALYSIS (Restated).

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. Respondent disagrees, and submits that particularly on this record, where Petitioner admitted his prior convictions, 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, the First District held that the lack of findings regarding criteria 1. and 2. was harmless error, stating:

> ...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 agreed to 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's prior convictions were properly shown to the trial court, as he acknowledged that the evidence of his prior convictions presented by Respondent was accurate, as that evidence established that Petitioner had been convicted of two or more felonies which were committed within five years of the offense in the instant case, and as Petitioner does not challenge those convictions on appeal, 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,

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## 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: SUSAN D. CLINE, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 24th day of May, 1994.

Of Counsel

# APPENDIX

B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

93-1260 32

DENNIS ARNOLD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93-0015.

L.T. CASE NO. 91-13730 CF A02.

Opinion filed February 9, 1994

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

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

Richard L. Jorandby, Public Defender, and Susan D. Cline, 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.



STEVENSON, J.

We reverse appellant's sentence in case no. 92-7417 because he was not furnished written notice of the state's intent to seek enhanced penalties against him pursuant to the habitual offender statute prior to entry of his pleas of guilty. Ashley v. State, 614 So.2d 486 (Fla. 1993). The appellee relies on Mansfield v. State, 618 So.2d 1385 (Fla. 2d DCA 1993), as authority for its contention that the failure to provide written

notice may be harmless error. Mansfield is distinguishable from this case, however, because there the defendant signed a written plea agreement in which he specifically stated that he understood that if the court accepted his plea that he would be habitualized. In the case at bar, the plea was not entered pursuant to an agreement and appellant did not sign any waivers. The appellant must be resentenced in case no. 92-7417 without habitual offender classification. Ashley.

The state concedes that a ministerial error appears in the written sentence as it does not correspond to the court's oral pronouncements at the hearing. The trial court orally sentenced appellant to six months in the county jail on Count II in case no. 91-13730 to run consecutively to Count I in case no. 92-7417. The written sentence reflects that the jail sentence is to run consecutively to case no. 92-7417, without specifying Count I. This correction is especially significant because appellant was sentenced to ten years in prison on count I and ten years probation on Count II in case no. 92-7417.

We affirm appellant's sentence as a habitual offender in case nos. 92-1018 and 91-13730 despite the trial court's failure to make requisite statutory findings, pursuant to sections 775.084(1)(a)1. and 2., Florida Statutes (1991). The record reflects that this error was harmless. Herrington v. State, 622 So.2d 1339 (Fla. 4th DCA 1993)(en banc); Dacosta v. State, 625 So.2d 1317 (Fla. 4th DCA 1993). We again certify to the Supreme Court the question certified in Herrington.

Accordingly, we affirm in part, reverse in part and remand for resentencing and correction of clerical errors.

HERSEY and POLEN, JJ. concur.