IN THE SUPREME COURT OF FLORIDA

EDGAR EUGENE STEPHENSON,
Petitioner,

v.

CASE NO. 84,208

STATE OF FLORIDA
Respondent.
_____/

PETITIONER'S SUPPLEMENTAL INITIAL BRIEF ON THE MERITS

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STATEMENT OF FACTS AND CASE

Edgar Eugene Stephenson was charged with armed robbery and attempted armed robbery in violation of section 812.013, Florida Statutes (R. 8-10; App. 1). The State filed notice that he be treated as a habitual offender (R. 13; App. 2).

The jury found Mr. Stephenson guilty of two counts of armed robbery and one count of attempted armed robbery (R. 39-40; App. 3). He was sentenced to three life sentences to be served concurrently, and was adjudicated to be a habitual offender under section 775.084(4)(B), Florida Statutes (R. 48-54; App. 4). A motion for a new trial was filed, claiming that the verdict was contrary to law and against the manifest weight of evidence (R. 56-57; App. 5). It was stricken for being filed untimely (TT. 157; App. 6).

(References to the record are: R. to Record on Appeal; TT to trial transcript; and App. to Petitioner's Appendix).

SUMMARY OF ARGUMENT

The trial judge erred by sentencing Mr. Stephenson to three life sentences. The sentences were predicated upon a finding that Mr. Stephenson had previous felony convictions. There is nothing in the record to support such finding. Moreover, the trial judge misconstrued section 775.084, as requiring the defendant to have been released from parole within five years of committing the offense, whereas the statute plainly requires a finding that the defendant have been released from prison within five years. As there is no evidence that Mr. Stephenson had been in prison within five years of the commission of this offense, the trial judge improperly applied section 775.084, Florida Statutes.

I. THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN SENTENCING DEFENDANT AS THE RECORD DOES NOT SUPPORT THE FINDING HE HAD PREVIOUS CONVICTIONS

The Judge enhanced Mr. Stephenson's sentence by finding he had three previous felony convictions. This finding was apparently based on a presentence investigation report. However, neither certified copies of the previous convictions nor the presentence investigation report were admitted into evidence or made a part of the record.

This Court has held that it is essential for the presentence investigation report to be made part of the record even though there is some indication in the record about the contents of the report. Rodriguez v. State, 547 So. 2d 708 (Fla. 2d DCA 1989). All versions of a presentence investigation report must be made part of the record. McClendon v. State, 589 So. 2d 352 (Fla. 1st DCA 1991). Because there is nothing in the record to support the judge's findings, this Court should reverse and remand for resentencing.

III. THE TRIAL JUDGE COMMITTED FUNDAMENTAL ERROR BY APPLYING THE HABITUAL OFFENDER STATUTE AS THERE WAS NO EVIDENCE THAT MR. STEPHENSON HAD BEEN CONVICTED OR RELEASED FROM PRISON WITHIN FIVE YEARS OF COMMITTING THE OFFENSE.

In Frazier v. State, 595 So. 2d 131 (Fla. 2d DCA 1992), this Court reversed a defendant's sentence as a habitual offender because of the lack of evidence even though the defendant had testified that he had been convicted of a felony twice. This Court stated:

> There was no evidence regarding the date of commission of the felonies or his date of release. The record is inconclusive as to whether certified copies of the prior convictions were in evidence at the trial. The state moved them into evidence but the court never ruled that they were admitted. The nonjury trial data sheet prepared by the clerk lists these certified copies of judgments as exhibits but the clerk never noted if any of the exhibits were received into evidence, and the circuit court did not send this court the trial exhibits. Moreover, the record does not contain a presentence investigation report. 595 So. 2d at 132.

Similarly, in this case neither the certified copies of defendant's previous convictions nor the presentence investigation report were made part of the record. It is clear from the colloquy that there was no competent evidence establishing when Mr. Stephenson had been released from incarceration. For this reason alone his sentence should be reversed. Bell v. State, 596 So. 2d 479 (Fla. 1st DCA 1992).

Furthermore, the record did not reflect that Mr. Stephenson has been released from incarceration within five years of his commission of offense. Bell v. State, 596 So. 2d 479 (Fla. 1st DCA 1992). The Court's finding that Mr. Stephenson had served on parole in the last five years is insufficient to meet the

requirements of section 774.084. See Johnson v. State, 597 So. 2d 353 (Fla. 1st DCA 1992). Section 774.084 provides that the felony must have been committed within five years of the date of the conviction of the last enumerated felony or within five years of the defendant's release from a prison sentence or other commitment. It is clear from the record that the trial court imposed the habitual felony offender statute on the basis that Mr. Stephenson had been released from parole within the previous five years.

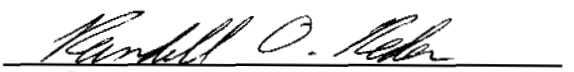
> THE COURT: All right. Under Florida Statute 775.084, Habitual Violent Felony Offender, I'll find that the Defendant has been convicted of two or more enumerated felonies, that being aggravated assault and robbery. The felonies for which the Defendant is to be sentenced were committed within five years of the date of his release from parole on those offenses. (TT. 150-51; App. 7).

Hence, the trial court obviously misconstrued section 775.084. Therefore, this Court should reverse Mr. Stephenson's sentence and remand with directions that he be resentenced.

CONCLUSION

There is nothing in the record to support the trial judge's conclusion that Mr. Stephenson could be sentenced under the Habitual Violent Felony Offender Act. Indeed, Mr. Stephenson does not meet those requirements because he had been released from prison more than five years before the commission of the offense. Therefore, this Court should reverse and remand for resentencing.

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 U.S. mail on this 8th day of September, 1994 to Michelle Taylor, Assistant Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, FL 33607-2366.

Randall O. Reder

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