IN THE SUPREME COURT

STATE OF FLORIDA

CASE NO. 82,945

DCA CASE NO. 92-3

DEWAYNE JERMAINE PINACLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPLICATION TO INVOKE DISCRETIONARY
JURISDICTION OF THE SUPREME COURT

BRIEF OF APPELLANT ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Appellant was convicted of three counts of armed burglary, three counts of armed robbery, armed sexual battery and armed kidnapping. He was sentenced to eight concurrent sentences of life imprisonment.

A number of sentencing issues were raised on appeal. In his primary argument, the Appellant, relying on *Karchesky v. State*, 591 So.2d 930 (Fla. 1992), urged that his life sentences were erroneous because the trial court assessed 40 points for victim injury on the sentencing guidelines scoresheet in the absence of any ascertainable physical injury to the victim.

In its decision of October 12, 1993, the District Court of Appeal held that this issue was not preserved for appellate review because of trial counsel's failure to make an appropriate objection to the assessment of these victim injury points. The Appellant's motion for rehearing was denied on November 23, 1993. The Appellant's notice to invoke discretionary jurisdiction of the Supreme Court was timely filed on December 21, 1993.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL HOLDING THAT THE IMPOSITION OF VICTIM INJURY POINTS WAS NOT PRESERVED FOR APPELLATE REVIEW BY AN OBJECTION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN *LINKOUS V. STATE* AND THE FIFTH DISTRICT COURT OF APPEAL IN *HOOD V. STATE* ON THE SAME QUESTION OF LAW.

Karchesky v. State, 591 So.2d 930 (Fla. 1992), held that:

> A penetration, which does not cause ascertainable physical injury, does not result in victim injury as contemplated by

> the rule for which victim-injury points may be assessed.
>
> *Karchesky v. State, supra*, at 932.

Because *Karchesky* was decided two months after the sentencing in this cause, neither the trial court or defense counsel had the benefit of the *Karchesky* decision, therefore, defense counsel did not and could not properly object to the imposition by the trial court of 40 points on the category II (sexual offenses) scoresheet under the category "Victim Injury (physical)" for "Penetration or Slight Injury"./[1]

In finding a waiver of appellate review, the District Court of Appeal relied on *Perryman v. State*, 608 So.2d 528 (Fla. 1st DCA 1992). *Perryman*, however, expressly and directly conflicts with the holdings of the Second District Court of Appeal in *Linkous v. State*, 618 So.2d 294 (Fla. 2d DCA 1993) and of the Fifth District Court of Appeal in *Hood v. State*, 603 So.2d 642 (Fla. 5th DCA 1992)./[2]

In *Linkous v. State, supra*, the defendant was convicted of a sexual offense and sentenced pursuant to a sentencing guidelines scoresheet assessing victim injury points although no actual physical trauma was suffered by the victim. The defendant filed in the trial court a motion to correct his sentence arguing that

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[1]/ These 40 points brought the Appellant's point total to an amount just sufficient to bring him to a permitted range under the sentencing guidelines to 22 years to life imprisonment.

[2]/ *See also Weckerle v. State*, 18 FLW 2391 (Fla. 4th DCA 1993) holding that post-judgment relief was available to a defendant challenging his pre-*Karchesky* sentence notwithstanding the absence of an objection.

Karchesky prohibits the assessment of such victim injury points. The trial court denied the motion on the identical authority cited by this Court, *Perryman v. State, supra*, finding that a contemporaneous objection was necessary to preserve the *Karchesky* issue for appellate review. The court of appeal held that such an objection was not required in light of the holding of the Second District Court of Appeal in *Morris v. State*, 605 So.2d 511 (Fla. 2d DCA 1992). *Morris* held that the *Karchesky* issue may be raised in any case where a "fundamentally flawed" category two scoresheet form was used to calculate the sentence. *Linkous* acknowledged specific conflict between *Morris* and *Perryman*. *Accord Singleton v. State*, 620 So.2d 1038 (Fla. 2d DCA 1993); *Kleshinski v. State*, 620 So.2d 1303 (Fla. 2d DCA 1993).

The Fifth District Court of Appeal is also in conflict with *Perryman*. In *Hood v. State, supra*, the court dealt directly with the issue raised by the Appellant here that *Karchesky*, decided in January, 1992, was simply not the law at the time of sentencing. Hood, prior to the *Karchesky* decision, entered guilty pleas to a number of charges of lewd and lascivious acts upon a child. Victim injury points were assessed which affected Hood's sentence. The state, as in the present case, contended that any objection to Hood's scoresheet was waived because the defendant made no objection at the time of sentencing. The court rejected this contention because Hood, like this Appellant, was sentenced in accordance with then existing law. The court stated:

> Therefore Hood had no basis for an objection at that time. Hood cannot be required to

foresee changes in the law occurring while his appeal was pending.

Hood, supra, at 643./[3]

CONCLUSION

The decision of the Third District Court of Appeal expressly and directly conflicts with the decisions of the Second District Court of Appeal and the Fifth District Court of Appeal. Pursuant to Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., the Appellant respectfully requests the invocation of this Court's discretionary jurisdiction and the review of the decision of the Third District Court of Appeal.

Respectfully submitted,

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[3]/ *Perryman, supra*, relied on by the District Court of Appeal to find waiver of appellate review, is not only in conflict with the holdings of two other districts, but also silent on the question (answered in *Hood, supra*) of how any defendant can be required to make an objection having no basis in law at the time the objection would have to be made.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 28 day of December, 1993, to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida 33128 and to Dewayne Jermaine Pinacle, Belle Glade Correctional Institute.

JEFFERY P. RAFFLE

IN THE SUPREME COURT

STATE OF FLORIDA

CASE NO.

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DEWAYNE JERMAINE PINACLE,

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APPENDIX

PAGE

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1993

DEWAYNE JERMAINE PINACLE,	**	
Appellant,	**	
vs.	**	CASE NO. 92-3
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed October 12, 1993.

An Appeal from the Circuit Court of Dade County, Fredricka G. Smith, Judge.

Jeffery P. Raffle, for appellant.

Robert A. Butterworth, Attorney General and Giselle D. Lylen, Assistant Attorney General, for appellee.

Before NESBITT, FERGUSON and GODERICH, JJ.

PER CURIAM.

The defendant, Dewayne Jermaine Pinacle, appeals the sentences he received as a result of his convictions on various charges. We affirm.

As the victim pulled up to her home, a car occupied by two men pulled up next to her car. The defendant got out, approached her car, put a gun to her head and demanded her jewelry and her purse. The defendant ordered the victim to get into his car and to remove her clothing. Then, they abducted her taking her to another location and both men had forcible intercourse at gunpoint with the victim. While driving, the codefendant loaded the gun in the victim's presence and told her that they were going to kill her. They stopped at an automatic teller machine and forced the victim to withdraw money. Then, they drove her home. While the codefendant accompanied the victim into her home, the defendant ransacked the victim's car. The defendant was charged with and convicted of armed burglary of an occupied dwelling (count I); armed burglary of an automobile (counts II-III); armed robbery (counts IV-VI); armed sexual battery (count VII); armed kidnapping (count VIII); and petit theft (count X).

At the sentencing hearing, the state submitted a sentencing guidelines score sheet totalling 517 points. Defense counsel did not specifically object when the trial court assessed forty points for "penetration or slight injury" rather than twenty points for "contact but no penetration" because the additional twenty points would not affect the sentencing range. Then, the trial court announced that it had discovered a delinquency order issued six weeks prior to the instant offense placing the defendant on a program of community control. Based upon this order, the trial court added another thirty points to the score sheet. This brought the total to 547 points and raised the

recommended range to twenty-seven to forty years and the permitted range to twenty-two years to life imprisonment. Defense counsel objected and requested the opportunity to investigate the circumstances surrounding the delinquency order. The court overruled the objection and denied the request for additional time.

The defendant was sentenced to eight concurrent life sentences on the first eight counts which sentences were to include two consecutive minimum mandatory three year sentences for counts III and VII. The trial court did not consider the sentence as a departure. However, the trial court entered written reasons for departure in the event that the sentences were later to be considered guideline departures. The defendant appealed raising several sentencing issues.

First, the defendant, relying on Karchesky v. State, 591 So. 2d 930 (Fla. 1992), contends that the trial court erred in assessing forty points for victim injury on the sentencing guidelines score sheet where the victim in this sexual battery case did not suffer any ascertainable physical injury, apart from the sexual penetration itself. However, the defendant never made a specific objection to the addition of any points for victim injury. Without the appropriate objection, this issue has not been preserved for appellate review. Perryman v. State, 608 So. 2d 528 (Fla. 1st DCA 1992), rev. denied, 621 So. 2d 432 (Fla. 1993).

Second, the defendant contends that the trial court improperly assessed thirty points on the sentencing score sheet

on the grounds that the defendant was "under legal restraint" at the time of the instant crimes where the defendant challenged the voluntariness of the plea entered in the previous juvenile case, the quality of legal advice provided, and the nature of the order which imposed the community control. We disagree.

The defendant cannot raise questions about the juvenile case during the instant case. The question of voluntariness of the prior plea or effectiveness of counsel for that plea should be raised by an appeal of the juvenile case. Thus, the only issue with regard to the assessment of points is whether the defendant was under legal constraint at the time of the instant offense.

The rules of criminal procedure allow a defendant's sentence to be enhanced based on his juvenile convictions. Fla. R. Crim. P. 3.701 and 3.988; see State v. Young, 561 So. 2d 583 (Fla. 1990); Ingraham v. State, 502 So. 2d 987 (Fla. 3d DCA), rev. denied, 511 So. 2d 999 (Fla. 1987). In the instant case, we find that the trial court properly assessed points for prior restraint where the defendant knew he was under constraint, where he did not deny that the prior conviction existed or contend that the certified prior conviction was erroneous, and where he never moved to have the prior convictions vacated.

Third, the defendant contends that the trial court erred in imposing two consecutive minimum mandatory three year sentences for use of a firearm during a car burglary and a subsequent sexual battery where these offenses constituted a single continuous episode. We disagree.

The trial court appropriately entered consecutive minimum mandatory sentences for armed burglary and armed sexual battery since the crimes were distinct in their elements and occurred at different times and locations. See Ross v. State, 493 So. 2d 1015 (Fla. 1986); Murray v. State, 491 So. 2d 1120 (Fla. 1986).

We do not need to address the defendant's remaining contention since the sentence imposed by the trial court is permissible under the guidelines. Based upon the foregoing arguments, we affirm the sentences imposed below.