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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 86,098

JESSE M. MONTAGUE, :

Respondent. :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent, Jesse M. Montague, accepts Petitioner's Statement of the Case and Facts with the following exceptions and additions:

Petitioner states in his Facts that the victim was hurt during the last time she had sexual intercourse with Mr. Montague. Although the Petitioner acknowledges that the victim was not feeling well and was having stomach cramps, Petitioner goes on to state: "While he was having sexual intercourse with her she kept saying that it hurt because her stomach was hurting." Petitioner's brief, p.2. Petitioner then argues in the issue that the act of intercourse is what hurt the victim. Petitioner's brief, pp. 8, 10, 11. What the victim actually said was:

> I remember feeling really sick. My stomach was cramping up, and I didn't feel well at all.
>
> * * *
>
> And he came out there, and I said that my stomach was hurting and everything, and he said that he was going to rub it and make it feel better.
>
> And then he told me to lay down on the bed. I guess I was in the bedroom of the motor home. And he told me to lay down on the bed, and he started rubbing my stomach, and his hands went everywhere else. And he had sex with me.
>
> And I kept saying it hurt, because my stomach was hurting. (T65)

The victim in this case never specifically stated that while having sex it hurt. The victim kept saying it hurt, but the record does not reflect that it was the sexual activity which was causing the pain. However, there is more than ample evidence to support the

victim was in pain because of her stomach and not as a result of the sexual activity.

SUMMARY OF THE ARGUMENT

A Karchesky issue does not require a contemporaneous objection, because it is the trial court's responsibility to make a finding of specifically identified physical injury that occurred apart from penetration. The trial court's failure to make such a factual finding--readily ascertainable from the face of the sentencing hearing--constitutes fundamental error.

In regard to the merits of the Karchesky issue, 80 points for victim injury need to be stricken from Counts I and III inasmuch as there was no evidence presented at trial of victim injury apart from penetration. As to Count II, the fact that the victim became pregnant as a result of the incident does not mean victim injury has occurred. This Court has approved a district court decision in which the resulting pregnancy was not found to be an injury, and the points for victim injury were struck. If this Court should find that pregnancy resulting from sexual battery constitutes an injury separate and apart from penetration, then the 40 points initially assessed by the trial court for slight injury must stand. This Court cannot increase the trial court's assessment of injury.

ARGUMENT

HAS PINACLE V. STATE, 20 FLA. L. WEEKLY S126 (FLA. APR. 27, 1995), OVERRULED LINKOUS V. STATE, 618 So. 2d 294 (FLA. 2d DCA), REVIEW DENIED, 626 So. 2d 208 (FLA. 1993), AND ADOPTED THE HOLDING OF PERRYMAN V. STATE, 608 So. 2d 528 (FLA. 1st DCA 1992), REVIEW DENIED, 621 So. 2d 432 (FLA. 1993), SO THAT IN ORDER TO PRESERVE A KARCHESKY SENTENCING ISSUE FOR APPELLATE REVIEW A CONTEMPORANEOUS OBJECTION MUST BE MADE AT THE TIME OF SENTENCING TO THE ADDITION OF VICTIM INJURY POINTS?

In reality, the Petitioner is arguing two issues in this case--whether the Karchesky[1] issue requires a contemporaneous objection and whether pregnancy constitutes injury under Karchesky. Respondent will address both of these issues and show that the answer is "no" to both of these issues in this case.

Petitioner claims the answer to the first question--whether a contemporaneous objection is required in a Karchesky issue--is a qualified "yes" depending on the face of the record. Mr. Montague disagrees with this qualification. Adding points for victim injury in a case involving sexual activity occurring prior to the effective date of §921.001(8), Fla. Stat. (Supp. 1992), which abrogated the holding of Karchesky, required an actual finding of specifically identified physical injury or trauma that occurred as a result of the episode over and above penetration. See Karchesky, 591 So. 2d at 932, 933. The failure to make such

[1] Karchesky v. State, 591 So. 2d 930 (Fla. 1992).

specific findings is readily ascertainable from the face of any record merely by examining the sentencing transcript. In the situation of habitual offender imposition during the time when the trial court was specifically required to make findings upon which it based its decision to extend a defendant's sentence, the failure to make such findings was fundamental error. Walker v. State, 462 So. 2d 452 (Fla. 1985). Karchesky has placed the same factual-finding requirement on the trial court for adding victim injury points. Unlike the situation in a habitual offender sentence where the State puts on evidence of priors and it is up to the defendant to rebut that evidence less a harmless error analysis be applied to the failure to make such ministerial findings, State v. Rucker, 613 So. 2d 460 (Fla. 1993), the State cannot get victim injury points without supporting evidence. Yet, that is exactly what has happened at Mr. Montague's sentencing hearing--points were assessed for victim injury without any discussion as to any specifically identified physical injury other than penetration (T280-286). These factual findings--not merely ministerial findings--were the burden of the State and the trial court, not Mr. Montague.

In State v. Rhoden, 448 So. 2d 1013 (Fla. 1984), this Court pointed out that the contemporaneous objection rule was fashioned primarily for trial proceedings so that the trial court can address and correct errors during trial. The contemporaneous objection rule also prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial in case the

first trial goes adversely to the defendant. See also Simpson v. State, 418 So. 2d 984 (Fla. 1982), cert.denied, 459 U.S. 1156, 103 S. Ct. 801, 74 L. Ed. 2d 1004 (1983); State v. Cumbie, 380 So. 2d 1031 (Fla. 1980); Clark v. State, 363 So. 2d 331 (Fla. 1978). In cases of sentencing errors, there can be no claims of defense trial tactics or ambushing in the hopes of getting the defendant a better result with a second chance. There can be no reason for a defense counsel to allow his client to be sentenced to a harsher sentence than is appropriate; and if a defense attorney has allowed such an action to occur, then the appellate courts can also find that trial counsel was ineffective on the face of the record in a direct appeal. See Loren v. State, 601 So. 2d 271 (Fla. 1st DCA 1992).

Of course, one might ask how could such a sentencing error go unnoticed by defense counsel, the prosecutor, and the trial court. That answer is also apparent from the face of the record. Scoring victim injury underwent several drastic changes over a short period of time. People in the criminal legal profession needed a scorecard to keep track of when victim injury could or could not be scored. Karchesky was decided on January 16, 1992, and was promptly superseded by the legislature on April 8, 1992, by §921.001, Fla. Stat. (Supp. 1992). The charges in this case occurred in 1991, but the trial did not take place until March 1994. After having lived with the legislative change for the last two years, it is easy to see how Karchesky could have been overlooked. If you combine the above-noted changes to the rule and time periods with the fact that sentencing occurred immediately

after the jury came back with a verdict,[2] it would have been more unusual if anyone at sentencing would have realized the application of Karchesky. The obscure nature of this issue, however, does not change the fundamental error nature of this sentencing issue.

It is to be noted that this Court's opinion in Pinacle v. State, 654 So. 2d 908 (Fla. 1995), did not have to reach this issue of whether a Karchesky issue is fundamental error because it found the issue preserved. Also, the Second District, in the motion for rehearing in the case sub judice, noted that even though Pinacle was reviewed based on direct conflict with Linkous v. State, 618 So. 2d 294 (Fla. 2d DCA), review denied, 626 So. 2d 208 (Fla. 1993), there is nothing in this Court's Pinacle decision that decided the conflict between the Third District (it is not fundamental error) and the Second and Fifth Districts (it is fundamental error) by specifically overruling any of the cases. Although this Court has had other opportunities to address this issue--Perryman v. State, 608 So. 2d 528 (Fla. 1st DCA 1992), review denied, 621 So. 2d 432 (Fla. 1993) (Karchesky issue is not fundamental error), and Linkous--it has yet to address this issue. Although the issue is not an easy one, the fact that Karchesky clearly placed the burden of establishing physical injury on the fact-finder places this error into the fundamental error category.

The Petitioner in this case does not go so far as to suggest that the record is totally void in this issue. Because

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[2]Mr. Montague's attorney didn't have an opportunity to see the scoresheet until the prosecutor let defense see the State's copy in the middle of sentencing (T281, 282).

there was some evidence of what might be considered physical injury separate from penetration, Petitioner appears to be admitting that a contemporaneous objection was not needed in this case and argues the merits of the Karchesky issue. Mr. Montague, however, disagrees with Petitioner's conclusion that evidence of physical injury does exist in this case.

In regards to Count I, Petitioner does not claim the existence of specifically identified physical injury. Indeed, the victim in this case could not recall specific instances in regard to this count, but could only recall having sex during the summer in various locations (T58-60).[3] The 40 points assessed here for victim injury was a Karchesky violation.

In regards to Count III, the victim recalled the date of the incident because she was experiencing bad cramps and it was the last time she had sex with her father (T64-66). Contrary to Petitioner's argument that the victim suffered specifically identified physical injury as a result of the episode over and above the penetration, there is no evidence of such an injury in the record. The victim did not suffer a separate injury due to the

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[3]The Second District seemed concerned that injury may have been caused but not admissible at trial, hence leaving the reviewing Court with an incomplete record. Inasmuch as the victim had no specific recollections of individual incidents as to Count I, the possible existence of "other" evidence as to injury seems doubtful. Since the trial court allowed in all of the other references (being in pain at the time of Count III, getting pregnant, having a miscarriage), it is doubtful anything was not mentioned due to an admissibility problem. Any injury other than mere penetration would have been relevant as to identifying a specific incident. In addition, there is nothing in the record which refers to such a problem.

sexual act, but clearly stated she was in pain at the time of the act due to bad stomach cramps. She "kept saying it hurt, because...[her] stomach was hurting" (T65). The victim never claimed that the sexual activity hurt or caused her pain. Each reference to pain was clearly a reference to her already being in pain due to the cramps. Thus, the 40 points assessed here was also a violation of Karchesky.

It is Count II with the resulting pregnancy and miscarriage that presents the biggest problem. The problem is twofold in that there is first the issue of whether pregnancy constitutes an injury separate and apart from penetration pursuant to Karchesky; and if it is a scoreable injury, what the points should be.

The first hurdle of whether or not pregnancy constitutes a scoreable injury was indirectly addressed by the Second District in Thompson v. State, 483 So. 2d 1 (Fla. 2d DCA 1985). In Thompson, Mr. Thompson was accused by his step-daughter of fondling and having sexual intercourse when his step-daughter was eleven years old. As a result of these relations, his step-daughter became pregnant and eventually gave birth to a son. The defendant was convicted of having sexual relations with his step-daughter and assessed points for victim injury based on the penetration. The Second District found the assessment of victim injury points by the trial court to be incorrect. The Second District reasoned that victim injury points were improperly assessed because victim injury was not an element of the offense of carnal intercourse in section 794.05 of the Florida Statutes. The Court found this error to be

harmful since the points placed Mr. Thompson in a higher category. The Court further stated, "While points for victim injury may not be included on the scoresheet, physical or mental trauma of the victim may be cited as a reason for departure from the guidelines." Id. at 2. Since the Court ruled the victim injury points were improperly assessed, this implicitly implied that the penetration and the pregnancy did not amount to physical injury for which victim injury points could be assessed. When this Court issued its opinion in Karchesky, it decided the conflict issue between the Fifth District and the Second District by approving Thompson. Karchesky, 591 So. 2d at 931, 932, 933.

When Fenelon v. State, 629 So. 2d 955 (Fla. 4th DCA 1993), issued its opinion finding that pregnancy did constitute a separate physical injury, it noted in footnote 3 that Thompson did not discuss pregnancy as an injury. Thus, the Fenelon court did "not read Thompson as expressing any decision on the precise issue" of pregnancy as an injury. Fenelon, 629 So. 2d at 956. In its May 12, 1995, Montague decision, the Second District three-panel court adopted that footnote in Fenelon in order to avoid intradistrict conflict with its Thompson decision. That attempt to "fix" the Thompson decision, however, is unsatisfactory. If a court is examining victim injury points in a sexual battery case for injury apart from mere penetration and it knows that the victim got pregnant as a result of the sexual battery, how can it claim not to be addressing the issue of pregnancy as an injury? The court in Thompson threw out those 40 victim injury points even though the

victim got pregnant, and this Court approved the Thompson decision. Clearly neither the Thompson court nor this Court thought enough of the pregnancy to address it and to declare it an injury separate and apart from the penetration in order to assess victim injury points. Based on Thompson and this Court's approval of Thompson in Karchesky, the 40 points assessed for victim injury in Count II should also be stricken.

If this Court, however, believes it never really addressed the issue of pregnancy as injury or wishes to reconsider that issue, then there is the additional problem of how many points to assess. The Petitioner has asked this Court to re-evaluate the points the trial court assessed by increasing the victim injury on Count II from 40 points to 85 points (slight injury to serious injury). Inasmuch as the trial court, as fact-finder, has already assessed the points for victim injury and only awarded 40 points, this Court cannot alter that assessment upwards to Mr. Montague's detriment. The amount of points assessed is for the trial court as the fact-finder and cannot be altered in the absence of a clear abuse of that discretion. See Morris v. State, 605 So. 2d 511 (Fla. 2d DCA 1992) (determining extent of victim injury and appropriate points to be assessed up to trial court). Petitioner does not claim such an abuse of discretion, and the record clearly supports the trial court's decision of finding only "slight" injury--a miscarriage occurring during the sixth week of pregnancy (T31, 32).

In addition, the trial court could have assessed the additional/harsher points for this injury, but failed to do so. To allow the addition of more points now would be a violation of double jeopardy. In Harris v. State, 645 So. 2d 386 (Fla. 1994), this Court held that a defendant's sentence could be increased from a nonhabitual sentence to a habitual sentence because the trial court had made a mistake on a legal question as to sentencing. However, this Court specifically noted:

> In the instant case the trial judge's decision to forego habitualization was the result of an error of law and not a discretionary judgment based on the facts. We agree with the district court that the habitual offender sentence was imposed in this instance "pursuant to the mandate of [the district court, and] was effected without a scintilla of the vindictiveness focused upon in North Carolina v. Pearce."

Harris, 645 So. 2d at 388 (emphasis added). Because this situation sub judice does involve the discretionary judgment of the trial court, it cannot be said that increasing the points to a heavier sanction would not involve a "scintilla of vindictiveness." To allow such an increase would be a violation of double jeopardy under North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

If all 120 points are dropped from the scoresheet, then Mr. Montague's guidelines score drops to 322 points and goes down two ranges (from 17-22/12-27 to 9-12/7-17). If only 80 points are dropped, then the guidelines score drops to 362 points and goes down one range (to 12-17/9-22). In either case, Mr. Montague's range changes; and he must be resentenced.

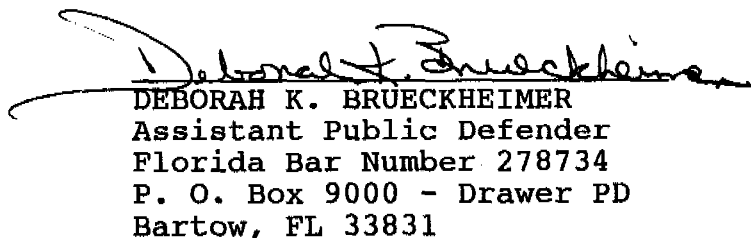
CONCLUSION

Based on the foregoing arguments and authorities, this Court should uphold the Second District's finding that a Karchesky issue is fundamental error. In light of the facts on the face of the record, however, all or almost all of the victim injury points must be dropped; and Mr. Montague must be resentenced.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 5th day of September, 1995.

Respectfully submitted,



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