Q-8

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. FSC No. 86,098
FLA. 2d DCA 94-01131

JESSE M. MONTAGUE,

Respondent.
_____/

CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT
LAKELAND, FLORIDA

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

[References to trial testimony, which consists of volumes II and III and was numerated separately from the remainder of the record on appeal are cited as "T__". The remainder of the record on appeal, which consists of volume I is cited as "R__".]

Respondent was charged by an amended criminal affidavit with 3 counts of sexual activity with a child 12 years of age or older but less than 18 years of age while in a position of familial or custodial authority (R36-37). The offenses, which consisted of actual sexual intercourse occurred between June 1,1991 and August 31, 1991 (Count 1), between September 1, 1991 and December 19, 1991 (Count 2), and on December 20, 1991 (Count 3) (R36-37).

There was testimony during the trial by the victim that Mr. Montague, her father, had been having sexual intercourse with her since she was in the seventh grade (T 56-59). During the summer of 1991 while she was 14 years old and after she turned 15 years old on August 26, Mr. Montague continued to have sexual relations with her (T59-60). From September and into December of 1991, when she was in the tenth grade he would continue to have sex with her about once or twice a week sometimes more often (T61-62). She specifically remembered having sexual intercourse with her father on November 1, 1991 (T62-63). She stated that the last time she had sexual intercourse with her father was on December 20, 1991 (T64-66). She was not feeling well that day

and was having stomach cramps (T65). While he was having sexual intercourse with her she kept saying that it hurt because her stomach was hurting (T65).

The victim testified that she went to the hospital in January of 1992 because she had been bleeding alot from her vagina and did not know what was wrong (T63-64). The respondent testified that the victim had been bleeding for over a week before she was taken to the hospital (T247). On January 3, 1992, Dr. Lerner testified that the victim was about six weeks pregnant when he examined her at the hospital, determined that she was having a miscarriage and performed a D&C (Dilation and Curettage) to remove the remaining tissue from the uterus; the tissue was chronic villas meaning that it was the product of conception, part of a pregnancy and not just the tissue of the uterus (T30-33).

Mr. Montague was found guilty of all three counts by a jury (R67-69, T278-279). The guidelines scoresheet reflected 120 points for victim injury checked as "moderate or penetration" with the word "penetration" circled and the notation "x3" next to it in the preceeding line of "slight or contact but no penetration". (R79). Mr. Montague was sentenced to 25 years imprisonment concurrent on all three counts (R 70-79, T285-286). The scoring of victim injury was not objected to by the defense at the trial level.

The only issue raised on direct appeal to the Second District Court of Appeal was a challenge to the sentence imposed

on the ground that the trial court erred in assessing victim injury points relying upon Karchesky v. State, 591 So.2d 930 (Fla. 1992). Montague v. State, 20 Fla. L. Weekly D1158 (Fla. 2d DCA May 12, 1995). The District Court ruled that the failure of the defendant to raise a contemporaneous objection does not preclude independent review by the appellate court of this issue. Id. at D1159. The District Court found that the record on appeal was barren as to the trial court's basis for concluding that the victim suffered physical injury or trauma as a result of the defendant's acts. Id. The court remanded the case for a De Novo sentencing hearing for the state to put on evidence regarding the extent of victim injury which may have been other inadmissible in the defendant's trial because victim injury is not an element of the crime. Id.

On motion for rehearing, the District Court denied the respondent's argument that the decision of the Florida Supreme Court in Pinacle v. State, 20 Fla. L. Weekly S196 (Fla. Apr. 27, 1995) implicitly affirmed Perryman v. State, 608 So.2d 528 (Fla. 1st DCA 1992) Review Denied, 621 So.2d 432 (Fla. 1993), which held that in the absence of an appropriate objection, a Karchesky issue is not preserved for appeal contrary to the opinion of the Second District in Singleton v. State, 620 So.2d 1038 (Fla. 2d DCA 1995). The District Court noted that in Linkous v. State, 618 So.2d 294 (Fla. 2d DCA 1993), Review Denied, 626 So.2d 208 (Fla. 1993), it certified conflict with Perryman on this exact same issue. Montague v. State, 20 Fla. L. Weekly D1483 (Fla. 2d

DCA June 23, 1995). The District Court certified the following question as one of great public importance:

> 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?

Petitioner timely filed its notice invoking the discretionary jurisdiction of the Florida Supreme Court to review the decision of the second district court which certified a question to be of great public importance.

Pursuant to the order of this Court rendered July 21, 1995, postponing its decision on jurisdiction and setting a briefing schedule, petitioner files this initial brief on the merits.

SUMMARY OF THE ARGUMENT

The answer to the certified question is a qualified yes. A contemporaneous objection is necessary to preserve a Karchesky issue if that error is not apparent or determinable from the face of the record on appeal.

In the instant case, the record on appeal establishes a factual basis for scoring victim injury points as to Counts 2 and 3. As to Count 1 any error in scoring victim injury points involves factual matters not apparent or determinable from the record on appeal; therefore, any error as to the scoring of such points as to Count 1 is not properly preserved for appeal because there was no contemporaneous objection. However, respondent would be entitled to raise such an issue by motion for post-conviction relief if the error is not harmless.

Regarding the points scored for Counts 2 and 3, the record reflects that if properly scored on these two counts alone, appellant would fall into the same sentencing range and therefore any error as to the scoring of victim injury as to Count 1 was harmless.

ARGUMENT

CERTIFIED QUESTION

> 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?

The answer to the certified question as phrased by the Second District Court of Appeal must be a "qualified" yes. Petitioner must acknowledge that this Court has stated in no uncertain terms that the contemporaneous objection rule applies to preclude appellate review of an alleged sentencing error under the guidelines where the error claimed involves factual matters that are not apparent or determinable from the record. Dailey v. State, 488 So.2d 532 (Fla. 1986); State v. Whitfield, 487 So.2d 1045 (Fla. 1986); Merchant v. State, 509 So.2d 1101 (Fla. 1987).

Petitioner submits, therefore, that a contemporaneous objection is necessary to preserve a Karchesky error where that error is not apparent from the face of the record. Petitioner submits that absent such an objection, respondent's remedy is not a direct appeal to the district court, but rather to seek post-conviction relief and to appeal any denial of such relief.

The decision in Perryman, supra., was based upon this court's ruling in Dailey, supra. There is no indication from the opinion in Perryman as to whether any Karchesky error, which was

not objected to at the trial level, was apparent from the face of the record. In Linkous, the defendant was appealing the denial of a motion to correct an illegal sentence. The trial court was given the opportunity to hear the appellant's argument that the victim injury points were improperly scored on the ground that there was no actual physical trauma suffered by the victim. The trial court was in error for summarily denying the motion.

In the instant case, respondent sought a direct appeal on the ground that the trial court erred in scoring victim injury points. Yet not only did the respondent fail to object to this alleged scoresheet error at the time of sentencing; he never raised this alleged scoresheet error in any post-conviction action.

Contrary to the opinion of Second District Court of Appeal, the record on appeal does not indicate that there was any harmful error in the scoring of victim injury points. The issue is not whether the record is barren as to any basis for the trial court to determine that the victim suffered physical injury or trauma as a result of the respondent's acts; the issue is whether it is apparent from the face of the record that there was no such injury. See Dailey, supra, Whitfield, supra., and Merchant, supra.

In the instant case, the record clearly establishes that there was a basis for scoring victim injury points. As the court stated in Karchesky, 591 So.2d at 933, "Of course, any specifically identified physical injury of trauma that occurs as a result of the episode may be scored as victim injury."

The record reflects that at the time of the third charged incident of sexual intercourse, which took place on December 20, 1991, she felt sick with stomach cramps and while they had intercourse she kept telling her father that it hurt because her stomach was hurting (T64-66). The record further reflects that as a result of her becoming pregnant from her father, she suffered a miscarriage and had been bleeding for over a week prior to the doctor performing a D & C procedure at the hospital on the evening of January 3-4, 1992 (T30-33, 63-64, 247). Petitioner summits that respondent's causing the victim physical pain during the sexual intercourse on December 20, 1991, and the miscarriage she suffered in January or 1992, constitutes physical injury or trauma that occurred as a result of Appellant's criminal offenses.

Petitioner submits that physical injury includes the inflection of physical pain. Such pain is not "psychic injury" which the court held to be unscorable in Karchesky, 591 So.2d at 932. Section 794.011(g), Fla. Stat. (1991) defines "serious personal injury as "great bodily harm or pain, permanent disability, or permanent disfigurement." Clearly the legislature has implicitly recognized from such a definition that injury includes pain. In the instant case, therefore, we have not only physical contact and penetration but physical pain. Webster's Third New International Dictionary (1986) defines injury as, "an act that damages, harms or hurts; an unjust or underserved infliction of suffering or harm."

Additionally, it was held in Fenelon v. State, 629 So.2d 955 (Fla. 4th DCA 1994), that pregnancy and childbirth equate with physical injury. The fact that victim injury is not an element of the crime for which the defendant is convicted no longer prevents the scoring of victim injury points. As the court in Fenelon, 629 So.2d at 956 noted:

> As the court pointed out in Karchesky, 591 So.2d at 932, the guidelines were changed in July 1987 to authorize points for physical trauma, even where the injury is not an element of the crime.

Indeed, the rule of criminal procedure applicable at the time of respondent's offenses which were committed in 1991 (R36-37), Fla. R. Crim. Pro. 3.701(d)7, committee note (1991) states:

> This provision implements the intention of the commission that points for victim injury be added for each victim injured during a criminal transaction or episode. THE INJURY NEED NOT BE AN ELEMENT OF THE CRIME FOR WHICH THE DEFENDANT WAS CONVICTED, BUT IS LIMITED TO PHYSICAL TRAUMA. (emphasis added)

The Second District adopted the reasoning on Fenelon in its Montague opinion. Montague v. State, 20 Fla. L. Weekly at D 1159.

If there is any error in the scoring of victim injury points in the instant case it is not whether or not victim injury should or should not be scored but rather what the total amount of victim injury points should be. Respondent submits that pursuant to the above argument it was proper to assess victim injury

points for the pain suffered by the victim during the Appellant's intercourse with her on December 20, 1991 (Count 3) and for her pregnancy and miscarriage.

There may have been error in scoring victim injury points for the sexual intercourse which took place during the months of June through August of 1991 (Count 1), since there was no evidence adduced at trial that the victim suffered any pain during this sexual union nor can it be deduced that she became pregnant as a result of this particular sexual union. However, as the Second District properly noted in its opinion, victim injury is not an element of the offenses. Montague v. State, 20 Fla. L. Weekly at D1159 n. 3. Since it was not an element of the offenses, the state was not required to prove such an injury during the trial in chief. An evidentiary hearing is necessary to establish whether, in fact, the victim suffered physical injury or trauma as to Count 1. This error requires a contemporaneous objection because the error claimed involves factual matters not apparent or determinable from the record on appeal. See Dailey, supra, Whitfield, supra, and Merchant, supra. We do not know whether the victim suffered any physical injury or trauma from the sexual activity alleged in Count 1 because she was never questioned at trial regarding any such injury.

The record reflects that she was approximately six weeks pregnant when she suffered her miscarriage on the evening of January 3-4, 1992 (T32). This would correspond to the victim's

testimony of her having intercourse with he father during the fall of 1991 (Count 2 - between September 1 and December 19, 1991) [T 61-63]. She suffered pain during the sexual union which occurred on December 20, 1991 (Count 3) [T64-66]. Appellee submits that it was proper to score victim injury for Counts 2 and 3 based upon the legal analysis and the facts as set forth above.

Petitioner submits that the that the proper scoring of victim injury, under this analysis, in the instant case would be to score 85 points for serious injury as a result of her pregnancy and miscarriage suffered as a result of the intercourse which took place during September to December 1991 (Count 2) and at least 40 points for slight injury for the pain she suffered as a result of the sexual union which took place on December 20, 1991 (Count 3). The correct total of victim injury points under this analysis would be 125. The total points would then be 447 points instead of 442 points as reflected on the scoresheet (R79). Appellant would still fall with the same sentencing range and the sentences imposed would still be legal as within the permitted range. Therefore, in addition to the fact that any error in scoring victim injury as to Count 1 is not properly preserved because there was no contemporaneous objection and the error is not apparent from the face of the record, there remained a factual basis on the record for scoring victim injury points as to Counts 2 and 3, and if those injury points were properly calculated as set forth above, the error as to the scoring of victim injury points as to Count 1 amounted to harmless error.

Even if this court should determine that the decision of the second district is proper, upon remand the trial court would have the right to consider the imposition of a departure sentence if after reconsidering the appropriate amount of victim injury points the point total results in a lower sentencing cell, since it is clear that at the initial sentencing, it was not the court's intent to impose a departure sentence. State v. Betancourt, 552 So.2d 1107 (Fla. 1989); Hood v. State, 603 So.2d 643 (Fla. 5th DCA 1992).

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the certified question should be answered with a qualified yes for the reasons set forth above. The judgment and sentence should be affirmed.

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 to Julia Diaz, Esq., Assistant Public Defender, P. O. Box 9000 Drawer PD, Bartow, Florida 33830, on this 14 day of August 1995.

OF COUNSEL FOR PETITIONER