IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. FSC NO. 86,098

JESSE M. MONTAGUE,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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COUNSELS FOR PETITIONER

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SUMMARY OF THE ARGUMENT

A contemporaneous objection is necessary to preserve a Karchesky sentencing issue for appeal in those cases where any error in the scoring of victim injury points is not apparent or determinable from the record on appeal. In the instant the Second District Court of Appeal acted improperly in exercising direct appellate review. The proper remedy was for Appellant to seek a motion for post conviction relief and to have an evidentiary hearing on the factual issue of whether victim injury points could properly be scored and what the correct number of points should be for each separate offense. The trial court is not required to make any mandatory factual findings regarding victim injury points unless the defense objects to the scoring of such points at the time of sentencing.

Assuming for purposes of argument that the Karchesky sentencing issue is properly preserved upon remand the proper procedure is to have a de novo sentencing hearing at which time the parties may debate the extent of actual injury. The trial court would not be bound by the state's prior scoring of 40 points for penetration or slight injury for each count . The decision of how much to score for victim injury is a matter of discretion to be determined by the trial court. There is no double jeopardy issue because the state is not seeking a harsher penalty but only to justify the sentence previously imposed. The

trial court may score victim injury points for sexual intercourse which results in pregnancy and a miscarriage.

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. 19930, 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? (RESTATED)

Respondent argues in his answer brief that, "Petitioner appears to be admitting that a contemporaneous objection was not needed in this case and argues the merits of the Karchesky issue." (Respondent's answer brief at p. 8). To the contrary, petitioner has not and does not admit that a contemporaneous objection was not necessary in the instant case. Petitioner's position has been and continues to be that the contemporaneous objection rule applies to preclude appellate review of an alleged sentencing error under the guidelines where the claimed error involves factual matters that are not apparent or determinable from the record. Dailey v. State, 488 So.2d 532 (Fla. 1986).

It is the position of the petitioner that in the instant case the claimed error in the assessment of victim injury points is a factual matter which is not apparent from the face of the record. Therefore, the appellate court erred in accepting

direct appellate review and the proper remedy was for the respondent to seek an evidentiary hearing with the trial court in a post-conviction action to correct an illegal sentence. Dailey, Id.

It should be noted that in Dailey, one of the grounds that the defendant asserted on direct appeal was that there was no supporting evidence for victim injury scoring. Id. at 533. This Court went on to say:

> In the instant case, however, the errors sought to be asserted on appeal (1) were not objected to below, and (2) are not determinable from the record before us. There was no failure of the trial court to make affirmative findings required by law. It is incumbent upon defense counsel to raise, at the trial level, any objections to underlying factual matters supporting the factors on the scoresheet. Here counsel did not object to either of the issues now asserted, there is no ruling by the trial court, there is no record supporting either the pro or con of Appellant's contentions on appeal. Sentencing errors may be reviewed on appeal, even in the absence of a contemporaneous objection, if the errors are apparent from the four corners of the record. Thus such errors as those in Rhoden, supra, Walker, supra, and Snow, supra, involving the trial court's failure to make an affirmative finding required by the mandate of a statute, appear on the face of the record and are subject to appellate review. The errors asserted here require an evidentiary determination and may not be initially raised in this court. (Emphasis added). Id. at 533-534.

The reasoning of this Court in Dailey as set forth above negates the argument of respondent that the statutory law

mandates that the trial court make factual findings regarding the appropriate scoring of victim injury points. Respondent relies upon State v. Rhoden, 488 So.2d 1013 (Fla. 1984). However, this Court in Dailey, as cited above, distinguished Rhoden and determined that, "it is incumbent upon defense counsel to raise, at the trial level, any objections to underlying factual matters supporting the factors on the scoresheet." (Emphasis added), Dailey, 488 So.2d at 533.

As Petitioner stated earlier in its initial brief, 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, Id.

The Second District in its opinion in this case, noted that as a result defense counsel's failure to make a contemporaneous objection to the inclusion of victim injury points, "has been to leave the record barren as to the trial court's basis for concluding that the victim suffered physical injury or trauma as a result of Appellant's acts." Montague v. State, 20 Fla. L. Weekly D1158, 1159 (Fla. 2d DCA May 12, 1995). Petitioner submits that if the record is barren of any basis for the trial court to conclude that the victim suffered physical injury, the appropriate remedy under Dailey, supra, was for the appellate

court to deny appellate review because of the failure to raise a contemporaneous objection without prejudice to respondent to raise the same issue in a motion for post-conviction relief.

Petitioner argued the merits of the Karchesky issue (Karchesky v. State, 501 So.2d 930 (Fla. 1992)) only for the purpose of pointing out to this court, that even if the Second District Court of Appeal was correct in reaching the merits of the Karchesky issue, that there were arguments to be made to justify the scoring of victim injury points. Respondent takes exception to the scoring of victim injury points. Regarding the scoring of victim injury points as to counts 1 and 3, petitioner will rely upon the argument as set forth in its initial brief on the merits at pages 8-10.

Regarding the scoring of victim injury points as to Count 2 where the victim became pregnant and suffered a miscarriage as a result of her having sexual intercourse with her father, respondent takes the position that this Court's decision in Karchesky, Id. at 932, approving Thompson v. State, 483 So.2d 1 (Fla. 2d DCA 1995), makes the scoring of victim injury points improper in a case where a minor child becomes pregnant from having sexual intercourse with her father and then gives birth.

Respondent's argument is without legal merit. In Thompson, the Second District held that it was improper to 85 victim injury points in that case because victim injury was not an element of

the offense for which the defendant was convicted. As this Court noted in Karchesky, 591 So.2d at 931-932, prior to July 1, 1987, victim injury points could not be scored unless such injury was an element of the crime charged; however, subsequent to July 1, 1987 victim injury could be scored even if it is not an element of the crime. This Court in Karchesksy then went on to say:

> We find that the Thompson, decision correctly applies the rule in concluding that 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. The Thompson decision also correctly points out that, while points for a victim's physical injury may not be included in the scoresheet for intercourse which does not cause physical injury when the defendant is charged with this type of offense, the mental or psychic trauma to the victim may be cited as a reason to depart from the guidelines. 483 So.2d at 2. Of course, any specifically identified physical injury or trauma that occurs as a result of the episode may be scored as victim injury. Id. at 932-933.

Respondent takes the position that this reasoning in Karchesky means that victim injury points cannot be assessed when a victim, a minor child becomes pregnant due to sexual intercourse with her father and subsequently suffers a miscarriage. This argument lacks legal merit. The court in Thompson never reached any decision regarding this factual issue. The court in Thompson never held that pregnancy and child birth or a miscarriage as a result of unlawful sexual activity did not

constitute physical injury. The Thompson decision was based entirely upon the legal prohibition against scoring victim injury points when victim injury is not an element of the crime for which the defendant is charged. As this Court noted in Karchesky, 591 So.2d at 932, this legal ban was removed effective July 1, 1987 when the rules were amended to delete any requirement that victim injury be an element of the offense. This Court in Karchesky, in approving Thompson, never considered whether pregnancy and childbirth or a miscarriage could constitute physical injury nor did the Thompson court ever consider the issue.

It was only in the case of Fenelon v. State, 629 So.2d 955 (Fla. 1993) that this issue was ruled upon for the first time. In Fenelon, as in the instant case, the defendant was charged with the same offense as respondent, sexual activity with a child by a person in familial authority. The court in Fenelon held that pregnancy and childbirth constitute physical injury. The court distinguished Thompson:

> **Although the Thompson court mentions that the victim became pregnant and delivered a child in its account of the background facts, it never discussed whether that pregnancy/ childbirth constitutes physical injury within the meaning of the pre- 1987 version of Rule 3.701(d)(7). That omission is unsurprising because that injury to does not constitute an element of the offense of carnal intercourse with a child under 18. Hence we do not reread Thompson as expressing any decision on the precise issue presented in the case we review today. Id. at 956 n. 5.**

The decision of the Second District court of Appeal in Montague v. State, 20 Fla. L. Weekly at D1159, specifically held that:

> **[P]regnancy followed by a miscarriage resulting from an unlawful sexual act constitutes physical injury or trauma which may be scored as victim injury under the sentencing guidelines. See Fenelon v. State, 629 So.2d 955 (Fla. 4th DCA 1993).**

In relying upon the Fenelon case, the Second District noted:

> **To avoid any possibility of intradistrict conflict, we specifically agree with the Fenelon court's analysis that our earlier case of Thompson v. State, 483 So.2d 1 (Fla. 2d DCA 1985), approved, Karchesky v. State, 591 So.2d 930 (Fla. 1992), is distinguishable and does not conflict with this ruling.**

This Court should adopt the reasoning in Fenelon.

Respondent argues that if this case should be remanded to the trial court for resentencing, the trial court is bound by the previous scoring of 40 points for each count. Petitioner submits that this argument is without merit. To the contrary, if this case were to be remanded to the trial court for resentencing both the defense and the state would be entitled to a de novo sentencing hearing at which time each party may debate the extent of actual physical injury. This procedure is what this Court held to be proper in Morris v. State, 605 So.2d 511, at 514 (Fla. 1992), and was properly reiterated by the Second District in its original decision in Montague v. State, 20 Fla. L. Weekly at D 1159. It is the trial court judge who must make a

determination as to the extent of victim injury points that are appropriate, and his decision on such a matter cannot be appealed absence an abuse of discretion. See Patchin v. State, 544 So.2d 282 (Fla. 4th DCA 1989).

Respondent argues that the fact finder has already determined that victim injury points were limited to 40 points for each count. First of all, petitioner would point out that the 40 points for each count were was not a factual finding made by the trial court. The trial court made no findings on this issue. The score sheet was prepared by the State Attorney's Office. The court made no factual findings and, assuming for purposes of argument that the issue of the scoring of victim injury points was properly preserved even without a contemporaneous objection (the certified question), the State is not bound by its prior scoresheet calculation.

There is no double jeopardy issue because the state is not seeking to enhance respondent's sentence beyond sentence already imposed by the court but only to justify the sentence previously imposed. Cf. Preston v. State, 607 So.2d 404, at 409 (Fla. 1992) (Resentencing should precede de novo on all issues bearing on the proper sentence.)

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the certified question should be answered with a qualified yes. The judgment and sentence of the trial court should be affirmed without prejudice for Appellant to seek an evidentiary hearing pursuant to a motion for post conviction relief.

Respectfully submitted,

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COUNSELS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33831, on this 20th day of September, 1995.

OF COUNSEL FOR RESPONDENT