IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,238

OTIS MCCALISTER

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This is the brief on the merits of the petitioner/defendant Otis McCalister based on conflict jurisdiction from the decision of the Third District Court of Appeal. Citations are abbreviated as follows:

(R) - Clerk's Record on Appeal, containing state's appendix to response to motion to vacate illegal sentence

(A) - Appendix attached hereto

STATEMENT OF THE CASE AND FACTS

The petitioner/defendant was charged by information on April 6, 1988, with ten counts (counts 1-10) of sexual battery in violation of §794.041(2)(b), Florida Statutes (1987), and one count (count 11) of lewd and lascivious act in violation of §800.04. (R: App.A1-12)

On August 25, 1988, the defendant was convicted as charged of ten counts of sexual battery and one count of lewd assault. (R: App.B; A: 2) A sentencing guidelines Category 2 scoresheet for sexual offenses was prepared on which the defendant was scored 40 points for victim injury for "penetration or slight injury" for each of the ten counts of sexual battery, for a total of 400 points for victim injury. (R: App.F; A: 2) At his sentencing hearing, the defendant did not object to the assessing of victim injury points. (A: 2) The defendant scored out to a total of 854 points with a recommended sentence of life in prison. (R: App.F)

On October 18, 1988, the defendant was sentenced to 30 years in prison on each of the sexual battery counts, counts 1 through 10, to run consecutive to each other. (R: App.C; A: 2) The defendant received a 15 year sentence on the lewd and lascivious, count 11, to run consecutive, for a total sentence of 315 years. (R: App.C; A: 2)

The defendant appealed his case to the Third District Court of Appeal and the

Third District affirmed his convictions and sentences per curiam, without written opinion. (A: 2) The defendant did not raise the issue of victim injury points on appeal. (A: 2)

On November 26, 1990, the defendant filed a motion for post conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure and did not raise the issue of victim injury points. (R: App.D; A: 2)

On January 16, 1992, this Court handed down the decision of Karchesky v. State, 591 So.2d 930 (Fla. 1992), holding that based on then-existing Florida Rule of Criminal Procedure 3.701(d)(7) (1985), victim injury sentencing points could not be scored solely for victim penetration without some accompanying physical injury or trauma. (A: 2) The defendant then filed in the trial court a motion to correct sentence pursuant to Rule 3.800, Florida Rules of Criminal Procedure, alleging that under Karchesky, it was improper for the trial judge to assess points for victim injury penetration on the scoresheet when there was no ascertainable physical injury. (A: 2) The trial judge denied the defendant's motion to correct sentence and the defendant appealed to the Third District. (A: 2)

On December 20, 1995, the Third District issued its decision affirming the trial court's denial of the motion to correct sentence. (A: 1-2) The Third District observed the defendant did not object to the assessing of victim injury points at trial, did not raise the issue on direct appeal, and did not raise the issue in the previously filed Rule 3.850 motion for post conviction relief. (A: 2) The Third District concluded that this Court's decision in Pinacle v. State, 654 So.2d 908 (Fla. 1995) (citing Perryman v. State, 608 So.2d 528 (Fla. 1st DCA 1992), rev.den., 621 So.2d 432 (Fla. 1993)), required a contemporaneous objection to preserve a Karchesky issue. (A: 2) The Third District noted the contrary holding from the Second District in Montague v. State, 656 So.2d 508 (Fla. 2d DCA 1995), for which this Court granted review on October 17, 1995, as Case No: 86,098. (A: 2)

The Third District then followed Pinacle and Perryman and held that since the defendant failed to preserve his Karchesky issue, the order denying the motion to correct sentence would be affirmed. (A: 2) The Third District concluded that under the preservation reasoning, it need go no further in analyzing the defendant's remaining points on appeal. (A: 2)

SUMMARY OF ARGUMENT

The defendant submits the decision of the Third District Court of Appeal in this case requiring a contemporaneous objection to preserve a Karchesky issue for appellate review must be quashed where the improper assessing of victim injury points for penetration which does not cause ascertainable physical injury under Karchesky v. State, 591 So.2d 930 (Fla. 1992), is fundamental error ascertainable on the record for which a contemporaneous objection is not required, and where the scoresheet itself is fundamentally flawed for which a contemporaneous objection is not required.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE REQUIRING A CONTEMPORANEOUS OBJECTION TO PRESERVE A KARCHESKY ISSUE MUST BE QUASHED WHERE THE IMPROPER ASSESSING OF VICTIM INJURY POINTS UNDER KARCHESKY V. STATE, 591 SO.2D 930 (FLA. 1992), IS FUNDAMENTAL ERROR ASCERTAINABLE ON THE FACE OF THE RECORD FOR WHICH A CONTEMPORANEOUS OBJECTION IS NOT REQUIRED.

The Third District's decision in the present case conflicts with the decisions from the Second District in Montague v. State, 656 So.2d 508 (Fla. 2d DCA 1995), rev. granted, 662 So.2d 933 (Fla. Oct. 17, 1995, Case No: 86,098); Linkous v. State, 618 So.2d 294 (Fla. 2d DCA 1993); Singleton v. State, 620 So.2d 1038 (Fla. 2d DCA 1993); and Morris v. State, 605 So.2d 511 (Fla. 2d DCA 1992); and the Fifth District's decision in Hood v. State, 603 So.2d 642 (Fla. 5th DCA 1992). As noted, this Court has granted review in Montague, which is still pending in this Court.

The underlying issue is whether a contemporaneous objection is necessary to preserve a Karchesky issue for review. In Karchesky v. State, 591 So.2d 930 (Fla. 1992), the defendant filed a Rule 3.800(a) motion to correct sentence claiming the victim injury points were incorrectly scored on his Category 2 sexual offenses sentencing guidelines scoresheet. This Court held 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. Id., at 932. This Court further held that points for a victim's physical injury cannot be scored on the Category 2 sexual offenses guidelines scoresheet for penetration that did not cause physical injury. Id., at 932.[1]

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[1]The Florida Legislature subsequently abrogated the holding of Karchesky when it added subsection (8) to section 921.001, stating that "sexual penetration must receive the score indicated for penetration or slight injury, regardless of whether

In Perryman v. State, 608 So.2d 528 (Fla. 1st DCA 1992), the First District held the Karchesky issue was not preserved for appellate review when the defendant did not raise an objection to the victim injury scoring in the trial court. In Pinacle v. State, 625 So.2d 1273, 1274 (Fla. 3d DCA 1993), the Third District relied on Perryman and also held that the Karchesky issue was not preserved for appellate review where the defendant never made a specific objection to the addition of points for victim injury penetration. However, at the time that Pinacle was decided, both the Second District and the Fifth District had held that a contemporaneous objection was not necessary to preserve a Karchesky issue for review. See Linkous v. State, 618 So.2d 294 (Fla. 2d DCA 1993); Singleton v. State, 620 So.2d 1038 (Fla. 2d DCA 1993); Morris v. State, 605 So.2d 511 (Fla. 2d DCA 1992); Hood v. State, 603 So.2d 642 (Fla. 5th DCA 1992).

This Court then accepted review of Pinacle based on conflict with Linkous and Hood. In Pinacle v. State, 654 So.2d 908, 910 (Fla. 1995), this Court found that Pinacle did make a sufficient objection to the addition of points for victim injury, and that although the objection was not as specific as it might have been, it was nonetheless sufficient to preserve the Karchesky issue for review.

In the decision in the present case, the Third District concluded that this Court's decision in Pinacle required a contemporaneous objection to preserve a Karchesky issue. (A: 2) The defendant submits the Third District is incorrect and that this Court should quash the decision.

First, this Court's decision in Pinacle v. State, 654 So.2d 908 (Fla. 1995), did not hold that a contemporaneous objection was necessary to preserve a Karchesky issue. This Court did not address this specific issue in Pinacle because the parties

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there is evidence of any physical injury." This amendment was not effective until April 8, 1992. Chapter 92-135, §1, Laws of Fla.; Pinacle v. State, 654 So.2d 908, n.1 (Fla. 1995).

had sufficiently preserved the Karchesky issue for appellate review. 654 So.2d at 910. Moreover, although Pinacle was reviewed by this Court on direct conflict with Linkous v. State, 618 So.2d 294 (Fla. 2d DCA 1993), this Court did not decide the conflict between the Third District (objection necessary to preserve) and the Second and Fifth Districts (objection not necessary to preserve) and did not overrule any of the cases. As the Second District stated in Montague v. State, 656 So.2d 508, 510 (Fla. 2d DCA 1995), rev. granted, 662 So.2d 933 (Fla. Oct. 17, 1995, Case No: 86,098), Pinacle did not overrule Linkous and did not hold that a contemporaneous objection is necessary to preserve a Karchesky issue for appellate review.

Second, a contemporaneous objection should not be necessary to preserve a Karchesky issue for review because the adding of victim injury points for penetration on a Category 2 sexual offenses scoresheet (prior to the effective date of April 8, 1992, of section 921.001(8), Fla. Stat. (1992 Supp.)) because the inclusion of such points is fundamental error. In Taylor v. State, 601 So.2d 540, 542 (Fla. 1992), this Court reiterated the long-standing rule that "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." Karchesky requires an actual finding of specifically identified physical injury or trauma that occurred as a result of the offense over and above penetration. The failure to make such a specific finding is readily ascertainable from the face of any record merely by examining the guidelines scoresheet or the sentencing transcripts and is thus reviewable on appeal despite the absence of an objection below.

In the similar situation of habitual offender sentencing 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 fact-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 score victim injury points without supporting evidence.

Moreover, a contemporaneous objection is not necessary because unlike scoresheet errors that raise factual disputes not readily apparent from the record itself, these errors involving the scoring of victim injury points in sexual offense cases are readily ascertainable from the face of the record and are therefore correctable despite the absence of an objection below. In Morris v. State, 605 So.2d 511 (Fla. 2d DCA 1992), the court stated: "This is so because the error, although to some extent fact-bound, results from a methodology of scoring now discredited. In other words, the scoresheet itself is fundamentally flawed regardless of the facts of the case." See also Weckerle v. State, 626 So.2d 1038 (Fla. 4th DCA 1993) (fact that defendant did not object at sentencing to points assessed for victim injury did not bar defendant from seeking postjudgment relief under Karchesky); Singleton v. State, 620 So.2d 1038 (Fla. 2d DCA 1993) (defendant's appellate attack on trial court's assessment of victim injury points not barred for lack of contemporaneous objection). Thus, the use of the fundamentally-flawed scoresheet is error on its face and the issue is not barred by lack of objection.

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 a hedge to provide a defendant with a second trial in case the first trial goes adversely. See also Simpson v. State, 418

So.2d 984 (Fla. 1982); 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 defense counsel to allow his client to be sentenced to a harsher sentence than is appropriate for some strategy reason; indeed, if counsel allowed such an action to occur, the appellate courts can find trial counsel ineffective on the face of the record in a direct appeal. Loren v. State, 601 So.2d 271 (Fla. 1st DCA 1992).

In sum, Karchesky placed the burden of establishing physical injury on the state and the court before points for victim injury penetration could be assessed on the guidelines scoresheet and the improper assessing of such points is fundamental error reviewable by the appellate courts without regard to the contemporaneous objection rule. This Court should quash the Third District's decision in this case.

CONCLUSION

For the foregoing reasons, the defendant requests that this Court quash the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the Office of the Attorney General, Criminal Division, P.O. Box 013241, Miami, Florida 33101, this 31st day of May, 1996.

By: Marti Rothenberg
MARTI ROTHENBERG #320285
Assistant Public Defender

Otis McCALISTER, Appellant,

v.

The STATE of Florida, Appellee.

No. 93–1945.

District Court of Appeal of Florida, Third District.

Dec. 20, 1995.

Defendant who was convicted for ten counts of sexual battery and one count of lewd assault, and received consecutive sentences totalling 315 years, filed motion to correct sentence. The Circuit Court, Dade County, Barbara S. Levenson, J., denied motion, and defendant appealed. The District Court of Appeal held that defendant failed to preserve for review issue of whether points were improperly scored on sentencing score sheet.

Affirmed.

Criminal Law ⇐998(3, 21)

Defendant, who was convicted of ten counts of sexual battery and one count of lewd assault, and received consecutive sentences totalling 315 years, could not for first time on motion to correct sentence challenge sentencing score sheet on which defendant received 400 points in category of victim impact for penetration or slight injury, where defendant failed to object to assessing of victim injury points at trial, failed to raise issue on direct appeal, and failed to raise issue in previously denied motion to for post-conviction relief. West's F.S.A. RCrP Rules 3.988(b), 3.701(d)(7), 3.800, 3.850.

Bennett H. Brummer, Public Defender and Marti Rothenberg, Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Paulette R. Taylor, Asst. Atty. Gen., for appellee.

although the wife had a law degree, she had only been sporadically employed throughout the parties' marriage and had permitted her husband's career and raising of the minor children to take priority over her career goals. Although there was no evidence in *Kanouse* that the wife was incapable of reestablishing herself in the marketplace, we acknowledged that it would take time and money for this to occur. Although *Kanouse* involved the issue of rehabilitative alimony, the guiding principle is the same under the circumstances presented here because the trial court has assumed that the former wife has the immediate ability to become partially self-supporting.

Thus, similar to the philosophy we expressed in *Kanouse*, under the circumstances of this case, the trial court should have provided a reasonable period before implementing the modification to provide the former wife with an opportunity to search out available employment opportunities in the legal field. This is particularly so in light of the trial court's finding in this case that "the former wife was not obligated by the property settlement agreement to rehabilitate herself." After a reasonable period of time, the burden would then be on the former wife to show that she is unemployed or underemployed as a result of any number of factors unrelated to her own efforts to secure employment, including her state of health or the realities of the job market.

Accordingly we reverse the trial court's order. Upon remand, since over one year has passed since the trial court entered the final order granting petition for modification, the trial court may find it appropriate to hear additional testimony bearing on the issue of the former wife's employability based on subsequent events.

We find no abuse of discretion in the trial court's denial of the former wife's request for attorney's fees.

REVERSED AND REMANDED.

WARNER and SHAHOOD, JJ., concur.

APPENDIX : 1

Before NESBITT, COPE and LEVY, JJ.

PER CURIAM.

The defendant was convicted of ten counts of sexual battery and one count of lewd assault. A sentencing scoresheet was prepared on which the defendant received 400 points in the category of victim impact for "penetration or slight injury." *See* Fla. R.Crim.P. 3.988(b). The defendant received consecutive sentences totaling 315 years. He appealed to this court, and we affirmed his convictions and sentences per curiam, without written opinion. *McCalister v. State*, 557 So.2d 56 (Fla. 3d DCA 1989).

On January 16, 1992, the Florida Supreme Court handed down *Karchesky v. State*, 591 So.2d 930 (Fla.1992), holding that based on then-existing Florida Rule of Criminal Procedure 3.701(d)(7) (1985), sentencing points could not be scored solely for victim penetration without some accompanying physical injury or trauma. Relying on *Karchesky*, the defendant filed a motion to correct sentence pursuant to Florida Rule of Criminal Procedure 3.800. That motion was denied, and the defendant now appeals.

The defendant here failed to object to the assessing of victim injury points at trial, failed to raise the issue on direct appeal, and failed to raise the issue in a previously denied Rule 3.850 motion. Because we conclude that *Pinacle v. State*, 654 So.2d 908 (Fla.1995) (citing *Perryman v. State*, 608 So.2d 528 (Fla. 1st DCA 1992), *review denied*, 621 So.2d 432 (Fla.1993)), requires a contemporaneous objection to preserve a *Karchesky* issue, we affirm the order under review. *Contra Montague v. State*, 656 So.2d 508 (Fla. 2d DCA), *review granted*, 662 So.2d 933 (Fla.1995). Under this reasoning, we need go no further in analyzing defendant's remaining arguments to conclude that the trial court's denial of the motion was proper.

Affirmed.

Kent Harrison ROBBINS, Appellant,

v.

CITY OF MIAMI BEACH, Appellee.

No. 95–1612.

District Court of Appeal of Florida, Third District.

Dec. 20, 1995.

Landowner brought action challenging city resolution calling for "streetscape improvement project," which would have constricted street bordering landowner's property. The Circuit Court, Dade County, Juan Ramirez, Jr., J., dismissed complaint with prejudice, and landowner appealed. The District Court of Appeal, Green, J., held that: (1) resolution was not "development order" that could be challenged under statute creating cause of action permitting aggrieved or adversely affected party to challenge development order as being inconsistent with municipal comprehensive land-use plan, but (2) landowner could challenge resolution in action for declaratory relief, injunctive relief or petition for statutory writ of certiorari, provided he could demonstrate standing.

Reversed and remanded.

1. Zoning and Planning ⇐570

City resolution calling for "streetscape improvement project" that would have restricted portion of street from three lanes to two lanes was not "development order" that could be challenged under statute creating cause of action permitting aggrieved or adversely affected party to challenge development order as being inconsistent with municipal comprehensive land-use plan; project involved work within boundaries of city's right-of-way. West's F.S.A. §§ 163.3215, 380.04(1), (3)(a).

See publication Words and Phrases for other judicial constructions and definitions.

APPENDIX: 2