

IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,238

OTIS McCALISTER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, **OTIS McCALISTER**, seeks review of a decision of the Third District Court of Appeal affirming the trial court's denial of his motion to vacate illegal sentence. Petitioner was the appellant in the district court of appeal, and the defendant in the trial court. Respondent, **THE STATE OF FLORIDA**, was the appellee in the district court of appeal, and the prosecution in the trial court. In this brief, the parties will be referred to as they stand before this Honorable Court. The symbol "R" refers to the Clerk's Record on Appeal. All emphasis are supplied unless otherwise indicated. The opinion of the Third District Court of Appeal is reported at *McCalister v. State*, 664 So. 2d 1149 (Fla. 3rd DCA 1995).

STATEMENT OF THE CASE AND FACTS

On April 6, 1988, Petitioner was informed against for ten counts of sexual battery on a minor by one in familial or custodial authority, and one count of lewd assault. (R. 38A, App.A). Petitioner was tried by jury which convicted him as charged. The court adjudicated Petitioner according to the verdict. (R. 38A, App. B). A sentencing guidelines Category 2 scoresheet for sexual offenses was prepared for Petitioner's sentencing. (R. 38A, App. F). The scoresheet reflects that 400 points were assessed for "Penetration or slight injury", and a total score of 854 points, indicating a recommended sentence of life in prison. The court imposed sentence of consecutive 30 years for each sexual battery conviction and consecutive 15 years for the lewd assault conviction; a total of 315 years incarceration. (R. 38A, App. C).

Petitioner appealed his convictions and sentences to the Third District Court of Appeal, which per curiam affirmed Petitioner's convictions and sentences without opinion. *McCalister v. State*, 557 So. 2d 56 (Fla. 3rd DCA 1989). Petitioner then filed a petition for a writ of habeas corpus in the Third District Court of Appeal. That court denied the petition without opinion. *McCalister v. State*, 560 So. 2d 793 (Fla. 3rd DCA 1990). Petitioner thereafter filed a motion for postconviction relief in the trial court. (R. 38A, App. D). That court denied the motion and the Third District Court of Appeal affirmed the denial without opinion. *McCalister v. State*, 605 So. 2d 1274 (Fla. 3rd DCA 1992).

Petitioner next filed a Rule 3.800(a) motion to vacate illegal sentence. (R. 2-17). In that

motion, Petitioner, relying on *Karchesky v. State*, 591 So. 2d 930 (Fla. 1992)¹, claimed that the trial court erred in assessing 400 victim injury points for penetration when there was no trial evidence of victim injury or trauma, physical or psychological, and that the court erred in assessing victim injury points for each count of sexual assault where there was only one victim. The trial court denied that motion without an evidentiary hearing and Petitioner appealed to the Third District Court of Appeal.

On December 20, 1995, the Third District issued its decision affirming the denial of Petitioner's motion. *McCalister v. State*, 664 So. 2d 1149 (Fla. 3rd DCA 1995). The district court noted that Petitioner made no contemporaneous objection to the assessment of the victim injury points at trial, and did not raise the issue on appeal or in his prior postconviction motion. The court 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. denied*, 621 So. 2d 432 (Fla. 1993), requires a contemporaneous objection to preserve the issue for appellate review. Consequently, the court held that Petitioner did not preserve the issue for appeal. The court, however, noted that the Second District Court of Appeal held to the contrary in *Montague v. State*, 656 So. 2d 508 (Fla. 2nd DCA 1995), *rev. granted*, 662 So. 2d 933 (1995). This petition for review followed.

¹In *Karchesky*, this Court held that under then existing Rule 3.701(d)(7), Fla.R. Crim.P. (1985), victim injury points could not be assessed in sexual offenses for victim penetration without some accompanying physical injury or trauma.

QUESTION PRESENTED

WHETHER A CONTEMPORANEOUS OBJECTION IS NECESSARY TO PRESERVE THE *KARCHESKY* ISSUE FOR APPELLATE REVIEW.

SUMMARY OF THE ARGUMENT

This Court's decision in *Pinacle* implicitly affirmed *Perryman*, consequently, the Third District was correct in holding that a contemporaneous objection is necessary to preserve the *Karchesky* issue for appellate review. Petitioner is therefore precluded from challenging the assessment of victim injury points on his sentencing guidelines scoresheet where he made no contemporaneous objection to such assessment.

ARGUMENT

A CONTEMPORANEOUS OBJECTION IS NECESSARY TO PRESERVE THE *KARCHESKY* ISSUE FOR APPELLATE REVIEW.

The question presented in this petition is whether the Third District Court of Appeal correctly interpreted this Court's holding in *Pinacle v. State*, 654 So. 2d 908 (Fla. 1995), that a contemporaneous objection is necessary to preserve the *Karchesky* issue for appellate review. Petitioner contends that the Third District was incorrect because, although jurisdiction in *Pinacle* was premised on conflict between the district courts, this Court did not address the contemporaneous objection issue, and consequently did not resolve the conflict. Petitioner contends further that a contemporary objection is not necessary to preserve the issue because the inclusion of such victim injury points on the scoresheet utilized in this case was fundamental error. Respondent asserts that the Third District correctly interpreted *Pinacle*.

In *Pinacle v. State*, 625 So. 2d 1273, the defendant, relying on *Karchesky v. State*, 591 So. 2d 930 (Fla. 1992), claimed that the trial court erred in assessing victim injury points based solely on the sexual penetration. *Pinacle*, 625 So. 2d at 1274. The Third District found that the defendant did not object to the assessment of the victim injury points at trial. Consequently, relying on *Perryman v. State*, 608 So. 2d 528 (Fla. 1st DCA 1992), *rev. denied*, 621 So. 2d 432 (Fla. 1993), the court found that the defendant did not preserve the issue for appellate review. *Pinacle*, 625 So. 2d at 1274. That court stated, “[w]ithout the appropriate objection, this issue [*Karchesky*] has not been reserved for appellate review.” *Id.* at 1274-1275. [citation to *Perryman*

omitted]. In *Perryman*, the First District Court of Appeal, relying on *Dailey v. State*, 488 So. 2d 532 (Fla. 1986), held that issues as to the sufficiency of the evidence to support assessment of victim injury points must be preserved for appellate review. *Perryman*, 608 So. 2d at 528-529.

This Court granted the defendant's petition for review in *Pinacle* because of a direct conflict with a decision from the Second District Court of Appeal in *Linkous v. State*, 618 So. 2d 294 (Fla. 2nd DCA), *rev. denied*, 626 So. 2d 208 (Fla. 1993), and a decision from the Fifth District Court of Appeal in *Hood v. State*, 603 So. 2d 642 (Fla. 5th DCA 1992).

In *Linkous*, the Second District reversed, in part, a trial court order denying that defendant's motion to correct sentence which was predicated on the *Karchesky* issue. The trial court in that case, relied on *Perryman* in denying the motion. The Second District held that the trial court erred in relying on *Perryman* because in *Morris v. State*, 605 So. 2d 511 (Fla. 2nd DCA 1992), it held that a contemporaneous objection was not necessary to preserve the *Karchesky* issue for review because the issue involved a fundamentally flawed scoresheet. The Second District held that the trial court was bound to follow its own precedent.

Karchesky was decided while *Hood* was pending on direct appeal. The Fifth District Court of Appeal observed that the defendant in *Hood* could not be expected to foresee changes in the law. Consequently, that court held that the defendant's failure to object to the assessment of victim injury points did not waive the issue for appellate review. That court reasoned that since at the time of sentencing victim injury points could properly be assessed without a showing of ascertainable physical injury, the defendant had no reason to object. *Hood*, 603 So. 2d at 643.

This Court accepted review of *Pinacle* based on a direct conflict with *Linkous* and *Hood*. *Pinacle*, 654 So. 2d at 909. However, this Court did not expressly resolve the conflict. Instead,

this Court observed that the defendant did not make a specific objection to the assessment of victim injury points, then stated:

Without the appropriate objection, this issue has not been preserved for appellate review. *Perryman v. State*, ... *Pinacle*, 625 So. 2d at 1273-74.

Pinacle, 654 So. 2d at 909. This Court subsequently found that the Third District erred in concluding that the defendant did not make a specific objection to the assessment of victim injury points. This Court found that “[w]hile we agree that the objection was not as specific as it might have been, we find that it was nonetheless sufficient to preserve the *Karchesky* issue for our review”. *Id.* at 910.

The only reasonable inference that can be drawn from this Court’s citation to the Third District’s decision citing *Perryman*, is that this Court implicitly affirmed *Perryman*, and consequently disapproved *Linkous* and *Hood*. A contrary inference would render the citation to *Perryman* meaningless. This conclusion is buttressed by the fact that although this Court recognized the conflict with *Linkous* and *Hood*, it made no reference to those cases in the decision. The inference here is that by affirming *Perryman*, this Court implicitly overruled the two conflicting decisions.

In *Montague v. State*, 656 So. 2d 508 (Fla. 2nd DCA 1995), the Second District was confronted with the argument that *Pinacle* did in fact overrule *Linkous*. In that case, the defendant raised the *Karchesky* issue on direct appeal. The court initially observed that the defendant did not object to the assessment of victim injury points, but concluded that the lack of contemporaneous objection did not preclude appellate review. That court reversed the

defendant's sentence and remanded for a new sentencing hearing. *Id.* at 509. The state filed a motion for rehearing citing this Court's recent decision in *Pinacle*. The state argued in support of the motion, that this Court's decision in *Pinacle* implicitly affirmed *Perryman*. In response, the Second District noted that although this Court accepted jurisdiction in *Pinacle* based on conflict with its decision in *Linkous*, this Court did not address the specific issue of whether a contemporaneous objection is necessary to preserve the issue, and did not expressly overrule *Linkous*. Thus, that court reasoned, it was bound by its own precedent. That court, however, indicated that it had a "respectful doubt as to whether *Pinacle* in fact overruled *Linkous*." *Id.* at 510. Consequently, that court certified the question to this Court. *Id.* This Court accepted jurisdiction on October 17, 1995; 662 So. 2d 933.

Petitioner's contention that this Court's decision in *Pinacle* did not address the specific issue of whether a contemporaneous objection is necessary to preserve the *Karchesky* issue and did not overrule *Linkous*, is undermined by the fact that this Court went to some length to find that the defendant in *Pinacle* did in fact object to the assessment of victim injury points. This Court observed that "[w]hile we agree that the objection was not as specific as it might have been, we find that it was nonetheless sufficient to preserve the *Karchesky* issue for our review." *Pinacle*, 654 So. 2d at 910. This Court then cited the portion of the transcript of the sentencing hearing where it found that the defendant "put the trial court on notice" of his objection. This Court concluded that the issue was preserved for review. *Id.* Surely, this Court would not have found that the defendant in fact preserved the issue if preservation was not necessary. Indeed, the finding that the defendant in fact preserved the issue would be irrelevant if preservation was not necessary.

Because this Court's decision in *Pinnacle* implicitly affirmed *Perryman*, the Third District was correct in holding that a contemporaneous objection is necessary to preserve the *Karchesky* issue for appellate review. Consequently, Petitioner is precluded from challenging the assessment of victim injury points on his sentencing guidelines scoresheet where he made not contemporaneous objection to such assessment.

Petitioner argues that a contemporaneous objection should not be necessary to preserve the *Karchesky* issue for review because the inclusion of the victim injury points on the scoresheet at issue is fundamental error. Relying on *Taylor v. State*, 601 So. 2d 540 (Fla. 1992), Petitioner argues that because *Karchesky* requires an actual finding of ascertainable physical injury, failure to make such finding is apparent on the face of the record. Thus, Petitioner argues, the error is apparent on the four corners of the record. Petitioner's argument is without merit.

First, the alleged error is clearly not apparent within the four corners of the record before this Court. The record before this Court consists of the documents filed in the Third District Court². There is nothing on the face of this record that either confirms or refutes Petitioner's claim. Although, Petitioner claims that the error is ascertainable by examining the guidelines scoresheet or the transcript of the sentencing hearing, the transcript of the sentencing hearing is clearly not a part of the record before this Court, was not a part of the record before the Third District, and was not a part of the record before the trial court.

Petitioner argues that the error is also apparent on the face of the scoresheet because the scoresheet itself is fundamentally flawed. This argument is without merit because the scoresheet

²See, Index of Clerk's Record on Appeal.

itself is not fundamentally flawed. The error arises only in a situation where victim injury was assessed where the victim in fact suffered no injury. This error is not ascertainable on the face of the scoresheet.

The alleged error is also not apparent on the face of the scoresheet because Petitioner was charged with sexual battery on a minor, a crime that denotes some type of injury. *See, Dailey v. State*, 488 So. 2d at 534. In that case, this Court held that the alleged erroneous assessment of victim injury points was not apparent on the face of the scoresheet where the defendant was convicted of aggravated battery, a crime that denotes some injury. Similarly, in *Whitfield v. State*, 487 So. 2d 1045 (Fla. 1986), this Court held that the error of the assessment of victim injury points on the defendant's scoresheet was apparent on the face of the scoresheet where the defendant was convicted of aggravated assault, a crime not involving victim injury. Thus, Petitioner's argument would have some merit if the victim injury points were assessed for the lewd assault conviction.

Secondly, Petitioner's reliance on *Taylor* is misplaced. In that case, the defendant argued, *inter alia*, that his departure sentence was invalid because the trial court's reason for imposing the departure sentence, an escalating pattern of criminal conduct, was not supported by the record. *Taylor*, 601 So. 2d at 541. This Court rejected the State's argument that the defendant did not preserve the issue for appellate review. This Court found that whether the defendant's prior record evidenced an escalating pattern of criminal activity was ascertainable from the face of the record, therefore a contemporaneous objection was not necessary to preserve the issue for appellate review. *Id.* at 541-542. As argued above, whether the victim in the instant case suffered any ascertainable physical injury to support the scoring of victim injury points is not ascertainable

from the face of the record before this Court.

Nevertheless, *Taylor*, has significance in this case because in that case, this Court reaffirmed *Dailey* and the long established principle that sentencing errors requiring the resolution of factual matters must be preserved for appellate review.

The contemporaneous objection rule ... was fashioned primarily for use in trial proceedings. The rule is intended to give trial judges an opportunity to address objections made by trial counsel in trial proceedings and correct errors.... The primary purpose of the contemporaneous rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a postconviction relief proceeding. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. *State v. Rhoden*, 488 So. 2d 1013, 1016 (Fla. 1984) (citations omitted). Sentencing errors requiring resolution of factual matters not contained in the record are, for obvious reasons, an exception to this practice and cannot generally be raised for the first time on appeal. [citation to *Dailey* omitted].

Taylor, 601 So. 2d at 541-542.

The sentencing error alleged in the instant case presents a classical example of the exception referred to in the above citation. Petitioner claims that the trial court erred in assessing victim injury points on his sentencing guidelines scoresheet where there was no evidence of ascertainable physical injury to the victim. Assuming, for purposes of this point, that Petitioner is correct. Petitioner's remedy is not simply the recalculation of the scoresheet without the victim injury points. The case would have to be remanded to the trial court for a *de novo* sentencing hearing. See, e.g., *Montague and Hood, supra.*; *Morris v. State*, 605 So. 2d 511 (Fla. 2nd DCA 1992); *Wilson v. State*, 648 So. 2d 1219 (Fla. 2nd DCA 1995). "The primary purpose of the

contemporaneous rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a ... postconviction relief proceeding.” *Rhoden*, 488 So. 2d at 1016. Petitioner was convicted and sentenced in 1988 -- 8 years ago. The resolution of Petitioner’s claim would require a hearing 8 years after the fact, in a postconviction proceeding when recollection of the witnesses obviously would not be “freshest”.

Thus, because the error alleged in this case is not apparent on the face of the record, and because Petitioner made no contemporaneous objection to the assessment of the victim injury points, the Third District was correct in holding that the alleged error was not preserved for appellate review. This Court should therefore affirm the decision below.

CONCLUSION

Based upon the foregoing, this Court should approve the decision of the lower Court.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was furnished by mail to, MARTI ROTHENBERG, Assistant Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125, on this 19th day of June 1996.



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