

IN THE SUPREME COURT OF FLORIDA

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MARCUS KARCHESKY, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
STATE OF FLORIDA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

CASE NO.: 76,907

ON REVIEW FROM A QUESTION CERIFIED  
TO BE OF GREAT PUBLIC IMPORTANCE  
FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 0377228  
112 Orange Avenue, Suite A  
Daytona Beach, Florida 32114  
Phone: 904/252-3367

ATTORNEY FOR PETITIONER

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CASE NO.: 76,907

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

Petitioner was charged in 1985 by information with three counts of carnal intercourse with an unmarried person under 18 years of age and seven counts of lewd, lascivious or indecent assault upon a child. (R 1-6) Following a jury trial he was adjudicated guilty of all the charges. (R 7-13)

On appeal to this Court six of Petitioner's convictions were reversed and three were explicitly affirmed. Karchesky v. State, 509 So.2d 403 (Fla. 5th DCA 1987).

When the case returned to circuit court for resentencing the judge noted that the appellate opinion affirmed three counts and reversed six counts but failed to mention one count at all. The Court and the state took the position that the unmentioned count was implicitly affirmed. Petitioner was thus resented on three counts of carnal intercourse with an unmarried person under 18 years of age (Section 794.05, Florida Statutes) and one count of lewd, lascivious or indecent assault or act upon

a child (Section 800.04(1), Florida Statutes) (SR 1-7) The sentences were affirmed on direct appeal without opinion. Karchesky v. State, 534 So.2d 413 (Fla. 5th DCA 1988). On January 13, 1989 Appellant filed a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). (R 16-24) Among the allegations made in the motion was Appellant's claim that victim injury points were improperly counted in computing his recommended sentence under the Florida sentencing guidelines. (R 20) In his original motion Appellant argued points could be scored for "contact but no penetration", but not for the more severe "penetration or slight injury". However in a supplement to his original motion Petitioner asserted that no points for victim injury were proper. (R 30)

Petitioner's motion was denied by C. Vernon Mize, Jr., Circuit Judge, in an order dated September 6, 1989. (R 34-36) As to the claim that victim injury points were improperly scored, the Court ruled:

When the defendant was sentenced after his direct appeal, this issue was raised. Victim injury was scored over the objection of the defense attorney. This issue could have or should have been raised on direct appeal.  
(R 35)

Timely notice of appeal was filed, Petitioner was adjudged insolvent and the Office of the Public Defender was appointed for appeal. (R 37, 41)

The Fifth District Court of Appeal affirmed Petitioner's sentences. Karchesky v. State, 15 FLW D2456 (Fla.

5th DCA October 4, 1990). The Court agreed Petitioner could properly raise the alleged scoring error in a motion filed pursuant to Rule 3.800(a). However, the Court held that victim injury was in fact an element of the offense of unlawful intercourse with an unmarried person under the age of eighteen years. The Court acknowledged conflict with the Second District's decision in Thompson v. State, 483 So.2d 1 (Fla. 2d DCA 1985), and certified the following question to the Supreme Court:

WHETHER POINTS MAY BE ASSESSED FOR  
PENETRATION UNDER VICTIM INJURY IN  
CALCULATING THE SENTENCING GUIDELINES  
SCORESHEET FOR "CATEGORY 2: SEXUAL OFFENSES"  
FOR A CONVICTION OF THE OFFENSE OF CARNAL  
INTERCOURSE WITH AN UNMARRIED PERSON UNDER  
THE AGE OF EIGHTEEN YEARS, SECTION 794.05,  
FLA.STAT.

SUMMARY OF ARGUMENT

Victim injury is not an element of the offense of "unlawful carnal intercourse" therefore victim injury cannot be scored under the sentencing guideline rule in effect at the time of Petitioner's offense.

ARGUMENT

WHETHER POINTS MAY BE ASSESSED FOR  
PENETRATION UNDER VICTIM INJURY IN  
CALCULATING THE SENTENCING GUIDELINES  
SCORESHEET FOR "CATEGORY 2: SEXUAL OFFENSES"  
FOR A CONVICTION OF THE OFFENSE OF CARNAL  
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THE AGE OF EIGHTEEN YEARS, SECTION 794.05,  
FLA.STAT.

At the time of Petitioner's offenses the rule pertaining to scoring "victim injury" on the sentencing guidelines scoresheet was as follows: "Victim injury shall be scored if it is an element of any offense at conviction." Fla.R.Crim.Proc. 3.701(d)7 (1985) Three of Petitioner's four convictions were for violations of Section 794.05, Florida Statutes (1985), which is defined as follows:

(1) Any person who has unlawful carnal intercourse with any unmarried person, of previous chaste character, who at the time of such intercourse is under the age of 18 years, shall be guilty of a felony of the second degree. . . .

As stated above, until a recent amendment, victim injury points could not be scored unless victim injury was an element of the offense to be scored. Since victim injury is not an element of the offense of carnal intercourse, the trial court erred in assessing forty points for each of three counts of that offense. Thompson v. State, 483 So.2d 1 (Fla. 2nd DCA 1985).

Furthermore, the Court erred in ruling that this guidelines scoring error could not be raised in a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). Many Florida cases hold that a computational

error, that is error that is apparent without reference to the facts of the case, is fundamental and may be raised on appeal for the first time or in a motion filed pursuant to Rule 3.800(a). Scharffa v. State, 508 So.2d 755 (Fla. 4th DCA 1987); Ellis v. State, 538 So.2d 118 (Fla. 1st DCA 1989). The type of scoresheet error which must be raised at sentencing or on direct appeal is typified by Lamont v. State, 506 So.2d 1141 (Fla. 2nd DCA 1987). Lamont alleged in a post-conviction motion that his guidelines scoresheet was in error because it showed he had been convicted of three prior felonies and he claimed he had only one such conviction. The appellate court affirmed the denial of Lamont's motion because the scoresheet error was not apparent from the face of the record.


In the instant case the District Court of Appeal agreed that a motion filed pursuant to Rule 3.800(a) was a proper method of raising the error alleged below. However, in acknowledged conflict with Thompson v. State, supra., the Court held that victim injury was an element of the offense of unlawful intercourse with an unmarried person under the age of eighteen years. Petitioner can add nothing to the rationale expressed by the Second District in Thompson and by the Fifth District Court in Karchesky. Petitioner merely asserts that the better position is that advance by the Second DCA in Thompson. Therefore, Petitioner requests that this Court answer the certified question in the negative.

CONCLUSION

Based on the arguments and authorities cited herein, Petitioner respectfully requests that this Court answer the certified question in the negative and reverse his sentences with directions that Petitioner be resentenced with a corrected guidelines scoresheet.

Respectfully submitted,

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT



DANIEL J. SCHAFER  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 0377228  
112 Orange Avenue, Suite A  
Daytona Beach, FL 32114  
Phone: 904/252/3367

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal and mailed to: Marcus Karchesky, #103642, P.O. Box 333, Raiford, FL 32083-0333, this 6th day of December, 1990.



DANIEL J. SCHAFER  
ASSISTANT PUBLIC DEFENDER