

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2007

NICKY GRUENBAUM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 4D06-3048

[March 21, 2007]

KLEIN, J.

Gruenbaum has filed a petition alleging ineffective assistance of appellate counsel for failing to file a rule 3.800(b)(2) motion to correct a sentencing error where the scoresheet erroneously included points for sexual penetration. Gruenbaum, who is over fifty years old, argues that, under *Blakely v. Washington*, 542 U.S. 296 (2004), because the jury did not find penetration, his seventy-two year sentences for multiple convictions of sexual battery should be reduced to sixty-five years.

Because Gruenbaum confessed to sexually penetrating the victim, did not contest the issue of penetration at trial, and acknowledged having a sexual relationship with the victim, a child, at sentencing, we conclude that the lack of a finding of penetration by the jury was harmless error. Our supreme court recently came to the same conclusion in *Galindez v. State*, Fla. L. Weekly S89 (Fla. Feb. 15, 2007), which involves strikingly similar facts, as well as the same error, lack of a jury finding of penetration. In *Galindez* the court relied on *Washington v. Recuenco*, 126 S. Ct. 2546 (2006), which held that harmless error analysis does apply to error under *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The test applied by the Florida Supreme Court in *Galindez*, based on *Recuenco*, was whether it was clear beyond a reasonable doubt that a rational jury would have found the defendant guilty of penetration. We conclude that the error is harmless under this test and accordingly deny the petition.

STONE and HAZOURI, JJ., concur.

* * *

Petition alleging ineffective assistance of appellate counsel to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Marc H. Gold, Judge; L.T. Case No. 02-17513 CF10A.

Nicky Gruenbaum, Okeechobee, pro se.

Bill McCollum, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for respondent.

Not final until disposition of timely filed motion for rehearing