IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: 2011-AP-52
Lower Court Case No: 2011-MM-6925

**ANDRE MCKENZIE**,

Appellant,
vs.

**STATE OF FLORIDA**,

Appellee.
_____/

Appeal from the County Court,
for Orange County, Florida,
Leon B. Cheek, County Court Judge

Robert Wesley, Public Defender and
Kyle Erickson, Assistant Public Defender,
for Appellant

Lawson Lamar, State Attorney and
Dugald McMillan, Assistant State Attorney,
for Appellee

Before POWELL, ARNOLD, and HIGBEE, J.J.

**PER CURIAM**.

**FINAL ORDER AFFIRMING TRIAL COURT**

Appellant McKenzie appeals his sentence after it was found that he had violated his probation. We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320, and affirm.

Appellant contends that the trial judge in imposing the maximum sentence[1] committed reversible error by considering his prior arrests and charges not amounting to conviction. We affirm for the reasons which follow.

Since Appellant did not object at the time of sentencing or file a motion to correct illegal sentence pursuant to Florida Criminal Rule 3.800(b) and Florida Appellate Procedure Rule 9.140(e), he waived the issue and failed to preserve it for appeal. Absent fundamental error, which this was not, "[i]n order for a sentencing error to be raised on direct appeal from a conviction and sentence, it must be preserved in the trial court either by objection at the time of sentencing or in a motion to correct error under Florida Criminal Procedure Rule 3.800(b)." *Hyden v. State* 715 So. 2d 960, 961 (4th DCA 1998); *see also Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), 760 So. 2d 89 (Fla. 2000).

After careful review of the record, the briefs and applicable law, we conclude that no error, fundamental or otherwise, occurred even if Appellant failed to preserve the issue. Section 741.2901(3), Florida Statutes provides as follows:

> **[T]he State Attorney's Office *shall* perform a thorough investigation of the defendant's history, including, but not limited to: prior arrests for domestic violence, prior arrests for non-domestic charges, prior injunctions for domestic and repeat violence listing the defendant as respondent and noting history of other victims, and walk-in domestic complaints filed against the defendant. This information *shall be presented* at first appearance, when setting bond, and *when imposing sentence, for consideration by the court.* (Italics supplied.)**

At sentencing the assistant state attorney presented the relevant history of Appellant as follows:

> **There have been battery cases in the past where this Defendant has battered people who were trying to help the victim. In 2010 he was acquitted on a case that involved those allegations. In any event, he does have a criminal history, Judge. He has two prior batteries other than the case he was acquitted on as well as a prostitution case from I believe 2007.**

[1]Appellant had previously entered a plea to the charge of violating a domestic injunction involving this victim. He had been placed on one year probation with credit for time served. In this proceeding, after a hearing, he was found to have violated that probation and was sentenced to the statutory maximum of one year county jail with credit for 104 days time served.

The judge accorded Appellant his due process rights to respond and offer an explanation or evidence, neither Appellant nor his counsel said anything in response.

Furthermore, Appellant can point to nothing in the record which indicates the trial judge considered anything other than the facts brought out in this hearing and Appellant's prior criminal history as required by the statute. The victim testified that Appellant forced his way into her home, grabbed her, struck her in the face causing injury, and refused to let her leave. Her friend, who was present, testified Appellant had also threatened her saying he would shoot her and shoot up her house if she continued to help the victim. The judge made only a passing reference to Appellant's history All he said was: "...[I]t's a complicated history ... because you continually batter her and her friends". He made it clear that the purpose of his sentence was to safeguard the victim in the future when he said: "...[B]ased upon your testimony...and the testimony of the witnesses, ...I have no other valid way of ensuring the safety of the victim than by incarcerating you...".

Finding no error, the sentence imposed is **AFFIRMED**.

**DONE AND ORDERED** at Orlando, Florida this 18th day of April, 2013.

/S/
**ROM W. POWELL**
**Senior Judge**

/S/
**C. JEFFERY ARNOLD**
**Circuit Judge**

/S/
**HEATHER L. HIGBEE**
**Circuit Judge**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing order was furnished to **Kyle Erickson, Assistant Public Defender**, 435 N. Orange Avenue, Ste. 400, Orlando, Florida 32801; and **Dugald McMillan, Assistant State Attorney,** 415 N. Orange Avenue, Ste. 200, Orlando, Florida 32802-1673, this 18th day of April, 2013.

/S/
Judicial Assistant