COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1472-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HOWARD S. HARMSTON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Trempealeau County: ROBERT W. WING, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Howard Harmston appeals a judgment convicting him of sexually assaulting his granddaughter and sentencing him to ten years in prison consecutive to an unrelated sentence. He also appeals an order denying his postconviction motion to reconsider the sentence. He argues that the trial court failed to comply with § 793.012, STATS., because it gave no consideration to the sentencing guidelines and did not state its reasons for

deviating from them and that the trial court should have requested a corrected presentence report when it found that the matrix relied on false information. He also argues that the court should have allowed Harmston to call witnesses at the postconviction hearing. We reject these arguments and affirm the judgment and order.

Pursuant to a plea agreement, Harmston entered a no contest plea to one count of sexual contact with a minor and the State recommended a three-year sentence, consecutive to an unrelated sentence. At the sentencing hearing, the parties addressed some problems with the presentence report and the sentencing matrix. The prosecutor acknowledged that the matrix was incorrect in two respects: it indicated a criminal history of six when the correct score should have been two and it incorrectly described the severity of the offense, adding two points for intercourse when this offense involved only sexual contact. The trial court indicated that it would not consider the defective matrix. The court then sentenced Harmston noting that he was on probation for an earlier sexual assault when he assaulted his granddaughter, that he was unwilling to accept responsibility for his actions, blamed the victims and others for his crimes, threatened a probation officer, showed no empathy for the victims, had a history of aggression and alcohol abuse, refused to participate in the presentence evaluation, and failed to benefit from prior sexual counseling.

Even if the trial court's failure to consider the sentencing guidelines were reviewable on appeal,[1] the record does not support Harmston's assertion that the trial court failed to consider the guidelines or state its reason for deviating from them. In the process of explaining its reasons for imposing the ten-year sentence, the trial court also stated its reasons for not imposing the sentence suggested by the guidelines. The court rejected the guidelines; it did not fail to consider them. The reasons recited by the court, the vulnerability of the victim and Harmston's attitude, constitute an adequate explanation of the court's reason for deviating from the guidelines.

[1] But *see* ***State v. Halbert***, 147 Wis.2d 123, 129-32, 432 N.W.2d 633, 636-37 (Ct. App. 1988), *aff'd* by an equally divided court in ***State v. Elam***, 195 Wis.2d 683, 685, 538 N.W.2d 249, 250 (1995).

The trial court was not required to adjourn the sentencing and request a corrected presentence report. A defendant has no right to a sentence recommendation by the person who authors a presentence report. ***Wheatherall v. State***, 73 Wis.2d 22, 33, 424 N.W.2d 220, 225 (1976). The trial court ascertained and corrected the errors contained in the presentence report and based its sentencing determination on the correct facts. The court specifically disclaimed any reliance on the recommendation made in the presentence report because it was based on an incorrect matrix. The trial court was not required to seek the recommendation of another presentence report.

The trial court properly refused to allow witnesses to testify at the postconviction hearing. Harmston attempted to call his wife and son, the victim's father, in support of his motion to reconsider the sentence. No hearing was required on this motion. A court should not reduce a sentence simply on reflection or second thoughts. *See* ***State v. Johnson***, 158 Wis.2d 458, 467, 463 N.W.2d 352, 356 (Ct. App. 1990). A sentence may be modified only when new factors are brought to the court's attention or when the court has imposed an unduly harsh or unconscionable sentence. ***State v. Macemon***, 113 Wis.2d 662, 668 n.2, 335 N.W.2d 402, 406 (1983). Harmston disclaimed any reliance on new factors and has never asserted that the circuit court improperly exercised its discretion by imposing the ten-year sentence. Rather, he merely urged the court to "reconsider" the sentence and to "possibly relent a little bit." No hearing is required to deny a motion that fails to state any legitimate basis for relief and the trial court properly refused to take additional evidence at the postconviction hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.