COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP343-CR **Cir. Ct. No. 2004CF834**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TOBARUS D. PORTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Lundsten and Storck, JJ.[1]

[1] Circuit Judge John R. Storck is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. Tobarus Porter appeals a judgment of conviction and an order denying his postconviction motion. We reverse and remand for resentencing because it is not clear that the court considered the sentencing guideline.

¶2 Porter was convicted on one count of first-degree sexual assault of a child. He moved for resentencing on the ground that the circuit court did not consider the sentencing guideline for this offense. The circuit court denied the motion.

¶3 On appeal, the parties agree that a sentencing guideline under WIS. STAT. § 973.30(1)(c) (2005-06)[2] exists for this offense and, therefore, the sentencing court was obliged by WIS. STAT. § 973.017(2)(a) to "consider" that guideline. A sentencing court satisfies that obligation when the record of the sentencing hearing demonstrates that the court actually considered the sentencing guidelines and so stated on the record. ***State v. Grady***, 2007 WI 81, ¶¶2, 29-45, 302 Wis. 2d 80, 734 N.W.2d 364. For sentencings after September 1, 2007, the sentencing court's compliance with this requirement must be determined solely from the record of the sentencing hearing. ***State v. Grady***, 2007 WI 125, ¶2, 305 Wis. 2d 65, 739 N.W.2d 488 (on reconsideration). As a result, for sentencings before September 1, 2007, which includes Porter's, a circuit court is obliged to consider the guideline but, if that consideration is not apparent from the sentencing transcript, the court may clarify at a postconviction hearing that the court did, in fact, consider the guideline at the original sentencing. *See* ***Grady***, 302 Wis. 2d 80,

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶36; ***State v. Sherman***, 2008 WI App 57, ¶6, 310 Wis. 2d 248, 750 N.W.2d 500, *review denied*, 2008 WI 115, 310 Wis. 2d 709, 754 N.W.2d 851 (No. 2007AP2008-CR).

¶4 The parties agree that the sentencing transcript in Porter's case does not show that the court considered the sentencing guideline. Porter goes on to argue that the circuit court's statements at the postconviction hearing are not sufficient to show that the court considered the guideline at the original sentencing. We agree.

¶5 At the postconviction hearing, after explaining that it was well aware of the sentencing guidelines and had, in fact, been involved in their development, the circuit court acknowledged that there was no indication in the sentencing record here that the applicable guideline had been considered. The court then stated that it is "very difficult to attempt to clarify the record ... when the verbiage and the precise reference to the guidelines is missing [from the record of the sentencing]." The court went on to repeat its awareness of the guidelines and then, in sum, stated it "was aware of the guidelines and was so aware of them at the time of the sentencing."

¶6 We are uncertain what the circuit court meant when it said that it is very difficult to clarify a sentencing record that makes no reference to consideration of a guideline. Here, for example, we would affirm if the court simply stated, in any words, that its sentencing decision did include consideration of the applicable sentencing guideline. The problem is that the court never said words to that effect, but rather only spoke in terms of being aware of the guidelines at the time of sentencing. Thus, we are unable to say, in the words of

Grady, that "we are satisfied" that the court considered the guideline. *See* ***Grady***, 302 Wis. 2d 80, ¶36.

¶7 We next turn to whether the court's failure to consider the guideline was harmless error. The State argues that a court's lack of consideration of the guideline can be held harmless error. *See* ***Sherman***, 310 Wis. 2d 248, ¶¶8-12. However, the facts in ***Sherman*** that made the error harmless are not present in Porter's case. In ***Sherman***, the defendant was sentenced on multiple offenses, and the count to which a sentencing guideline applied would not have been the controlling sentence, leading to the conclusion that a resentencing would serve no practical purpose.

¶8 In Porter's case, the State argues that the error was harmless because, in sentencing, the court considered the relevant factors listed in the guideline, even if it was not doing so specifically with the guideline process in mind at the time. In other words, the State argues that the court addressed the same mitigating and aggravating factors it would have had it expressly considered the guideline at sentencing, and therefore a resentencing to re-address those same factors is pointless. We disagree. The core feature of sentencing guidelines is that they are designed to provide information to the sentencing court regarding sentences imposed by other courts on similarly situated defendants. This does not occur if a sentencing court simply considers the same mitigating and aggravating factors as those identified in a guideline. Simply put, the consideration of the same factors does not lead to any guidance from the guideline. Accordingly, we cannot accept the State's argument that considering the same factors renders the failure to consider a guideline harmless.

¶9 Moreover, the State's argument would have the effect of holding such error harmless in nearly every sentencing that is sustainable under the standards that sentencing courts are required to meet to make a satisfactory exercise of sentencing discretion. *See, e.g.*, ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. This is true because the factors in guidelines are ones a court would normally consider anyway.

¶10 The parties' briefs also address whether the sentencing court relied on inaccurate information at sentencing. Because we have already concluded that resentencing is necessary, we need not address this issue. On remand, the court shall resentence Porter with consideration of the applicable sentencing guideline.

By the Court.—Judgment and order reversed and cause remanded with directions.

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