COURT OF APPEALS
DECISION
DATED AND RELEASED

October 26, 1995

No. 94-2868-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LESLIE M. PIRK,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

VERGERONT, J. Leslie Pirk appeals from a judgment convicting him of two counts of first-degree sexual assault, contrary to § 940.225(1)(d), STATS., 1985-86,[1] and from an order denying his postconviction motion for

[1] Section 940.225(1)(d), STATS., 1985-86, provided that whoever has sexual contact or sexual intercourse with a person twelve years of age or younger is guilty of first-degree sexual assault.

modification of his sentence or, alternatively, for resentencing. He was sentenced to twenty years on one count and twenty years concurrent probation on the other count.

Pirk raises three issues on appeal. First, he contends the trial court erred in not considering applicable experimental sentencing guidelines and in not stating on the record its reason for deviating from them as required by § 973.012, STATS.[2] Second, he contends that even if consideration of the experimental guidelines is not required by the statute, the court's mistaken notion that there were no guidelines deprived him of a sentence based on correct information. Third, he contends that he was entitled to modification of his sentence because the postconviction report and proffered testimony of Dr. Lloyd Sinclair, an individual affiliated with the Midwest Center for Psychotherapy and Sex Therapy, demonstrate a new factor. Because we resolve each of these issues against Pirk, we affirm the judgment of conviction and the postconviction order denying sentence modification and resentencing.

Pirk was charged with five counts of first-degree sexual assault for sexual contact with a person twelve years of age or under in violation of § 940.225(1)(d), STATS., 1985-86. He pled no contest to two counts in exchange for the State's agreement to dismiss the three other counts and to recommend no more than a combined sentence of twenty years; it was agreed the three dismissed counts could be considered for purposes of sentencing.

The presentence report did not contain a sentencing matrix. The author of the report stated there was none because she had asked her supervisor whether she needed one and looked through the matrixes in her office and did

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[2] Section 973.012, STATS., provides:

> A sentencing court, when imposing a sentence, shall take the guidelines established under s. 973.011 into consideration. If the court does not impose a sentence in accordance with the recommendations in the guidelines, the court shall state on the record its reasons for deviating from the guidelines. There shall be no right to appeal on the basis of the trial court's decision to render a sentence that does not fall within the sentencing guidelines.

not find one for child sexual assault. The prosecutor stated that the presentence report author had told her that the sentencing commission had discontinued sentencing guidelines for sexual assault of a child. Defense counsel produced a matrix for sexual assault of a child but that matrix stated it applied to offenses on or after July 1, 1991. The offenses of which Pirk was convicted occurred before that date.

The trial court's clerk checked the court's files and contacted the commission during the sentencing hearing but was unable to determine that there were guidelines for child sexual assaults committed before July 1991. The trial court stated that it would proceed to sentence Pirk without a matrix on the theory that none was applicable to the offenses.

The trial court heard the testimony of Pirk, his wife, and his daughter, the victim of the offenses. The trial court also considered the twenty-page presentence report, letters to the court from Pirk, and the argument of counsel. Pirk's counsel argued for a lengthy period of probation with no prison term. The prosecutor urged the court to follow the sentence recommendation in the presentence report--twenty years on the first count and twenty years concurrent probation on the second count. The trial court concluded that the appropriate sentence was that recommended in the presentence report.

In reaching this sentencing decision, the court commented at length on the seriousness of the offenses and the damaging, long-term effects on Pirk's daughter. The court explained that while punishment was a factor, there was also a real need to protect the community from Pirk. The court emphasized its concern that Pirk was not accepting responsibility for what he had done to his daughter, either for the acts themselves or their impact on his daughter. Pirk was convicted of three felonies involving sexual deviancy in the 1960's. Although the court acknowledged the length of time that had passed since, the court considered that those prior offenses, together with the sexual assaults of his daughter when she was only nine and his failure to accept responsibility for his conduct--both the current offenses and the prior ones--demonstrated that he was a serious risk to any young girl with whom he might have contact.

Pirk's postconviction motion alleged trial court error and ineffective assistance of counsel because of the failure to consider certain

experimental sentencing guidelines for child sexual assault offenses. These guidelines were attached to the motion. The motion also alleged that Pirk's amenability to treatment constituted a new factor for the court's consideration in sentencing.

At the hearing on Pirk's postconviction motion, Pirk's counsel made an offer of proof that an employee of the public defender's office would testify that there was an experimental sentencing guideline for child sexual assault in effect at the time Pirk was sentenced. The court did not permit this testimony, sustaining the prosecutor's objection on hearsay grounds. However, the court did permit the witness to testify on how she completed the score sheet for the experimental guideline, and her testimony was that the experimental guideline called for a sentence of between seven and nine years for Pirk.

Pirk also presented Dr. Lloyd Sinclair as a witness. Dr. Sinclair is an expert in sex offender treatment and was hired by the defense to evaluate Pirk. He first met Pirk more than two years after sentencing. The court sustained the State's objection to Sinclair's testimony on the grounds of relevancy, but permitted him to testify in an offer of proof.

Sinclair testified that since Pirk's incarceration, Pirk had come to realize that maybe he was a sex offender and would therefore benefit from treatment. In Sinclair's opinion, Pirk would benefit from sex offender treatment and the best program would be the one at Oshkosh Correctional Institution. However, generally inmates may not participate in that program until they are five years or less from their mandatory release date.

In its posthearing brief, the State argued that even if the court had considered the experimental guidelines before sentencing, the sentence would have been the same because of the aggravating circumstances of Pirk's offenses. It also contended that trial counsel was not deficient in not presenting to the court the experimental guidelines and, even if he was, there was no prejudice. Finally, the State argued that Pirk's amenability to treatment, developed after sentencing, was not a new factor justifying modification of the sentence.

The trial court adopted the rationale of the State's brief in denying Pirk's motion and added: "However, the Court stresses that the aggravating factors in Mr. Pirk's case are significant. Thus, even if the sentencing guidelines had been used, there would be no difference in the sentence Mr. Pirk received."

The first and second issues Pirk raises on appeal--both involving the court's failure to consider the experimental sentencing guidelines[3]--are disposed of by the supreme court's recent per curiam decision in ***State v. Elam***, No. 94-1050-CR, 1995 WL 583406 (Wis. Oct. 4, 1995).

Elam presented the issue whether § 973.012, STATS., prohibits a defendant from basing an appeal on a sentencing court's failure to take sentencing guidelines into consideration. The supreme court had accepted jurisdiction on a petition to bypass the court of appeals, but was equally divided on whether to affirm or reverse the judgment of the trial court. ***Elam***, slip op. at 1. However, the supreme court did not remand to the court of appeals for its consideration, as it typically does on a petition to bypass when the supreme court is equally divided. Instead, the supreme court affirmed the trial court because it determined that this court had already decided the issue in ***State v. Halbert***, 147 Wis.2d 123, 432 N.W.2d 633 (Ct. App. 1988). In ***Halbert***, we ruled that a sentencing court's failure to consider the sentencing guidelines is not subject to appellate review.

The supreme court in ***Elam*** concluded that ***Halbert*** is precedential and was not overruled by ***State v. Speer***, 176 Wis.2d 1101, 501 N.W.2d 429 (1993), a case on which Pirk relies. ***Elam***, slip op. at 1. In ***Speer***, three justices opined that ***Halbert*** should be overruled and three concluded ***Halbert*** was good law. ***Speer*** does not overrule ***Halbert*** because a majority of the supreme court did not agree on that point. ***Elam***, slip op. at 1. Based on ***Elam*** and ***Halbert***, we conclude that, even assuming the experimental guidelines were applicable to Pirk's offenses, the trial court's failure to consider them is not subject to appellate review.

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[3] We refer to the guidelines Pirk attached to his postconviction motion as "experimental guidelines" because that is how the parties referred to them. However, in doing so, we do not intend any conclusion as to the status or applicability of those guidelines, since that is not necessary to a resolution of this appeal.

We recognize that Pirk attempts to challenge the trial court's failure to consider the experimental guidelines on two different grounds: a violation of § 973.012, STATS., and a violation of a defendant's constitutional right to be sentenced based on true and correct information. Pirk implicitly acknowledges that if ***Halbert*** controls, the first issue must be resolved against him. But he contends that the constitutional violation remains. However, the two cases Pirk cites as authority for this argument do not address sentencing guidelines at all, but instead affirm the general proposition that the sentencing court must base its decision on facts of record and articulate the basis for its decision. ***State v. Borrell***, 167 Wis.2d 749, 772, 482 N.W.2d 883, 891-92 (1992); ***Bruneau v. State***, 77 Wis.2d 166, 175-76, 252 N.W.2d 347, 351-52 (1977). Pirk has presented no cogent explanation of how the trial court's failure to comply with § 973.012, STATS., assuming that occurred, implicates a constitutional right, particularly in view of this court's ruling in ***Halbert***.

In his discussion of the sentencing guidelines, Pirk also argues that his trial counsel was deficient for not bringing the experimental guidelines to the trial court's attention at sentencing. Although this is not identified as a distinct issue, as it should be,[4] we address it nonetheless.

In order to prevail on a claim for ineffective assistance of counsel, Pirk has the burden of proving the trial counsel's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).[5] The ultimate determinations of whether counsel's performance was deficient and prejudicial to the defense are questions of law that this court reviews independently. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). Prejudice occurs when there is a reasonable

[4] Section 809.19(1)(b) and (e), STATS., requires that the appellant's brief contain a statement of the issues presented for review and an argument, arranged in order of the statement of the issues presented, that is preceded for each issue by a one-sentence summary of the argument.

[5] For purposes of resolving the ineffective assistance claim, we assume, without deciding, that although a defendant may not base an appeal on a trial court's failure to consider sentencing guidelines, a defendant may base an appeal on a claim that there was ineffective assistance of trial counsel because trial counsel failed to bring the applicable sentencing guidelines to the court's attention and that the failure prejudiced the defendant.

probability that, absent the deficient performance, the result would have been different. ***Strickland***, 466 U.S. at 694.

We do not decide whether there was deficient performance by Pirk's trial counsel because we conclude there was no prejudice. The trial court concluded that application of the experimental guidelines would not have resulted in a different sentence because of the aggravating factors in Pirk's case. Pirk argues that we cannot accept this determination, but must ourselves determine whether the sentence imposed is "objectively reasonable." However, it is Pirk's burden to show that there is a reasonable probability that the trial court would have reached a different result. He has not met this burden.

The trial court need not have applied the guidelines, whether experimental or not, even if the guidelines were provided to the court at sentencing. "It is important to note that the guidelines [are] just that: guidelines, not edicts.... [T]he responsibility of the trial court will continue to be to sentence within the range of the penalties established by the legislature." ***Halbert***, 147 Wis.2d at 131, 432 N.W.2d at 636 (*quoting* ***In re Judicial Administration: Felony Sentencing Guidelines***, 120 Wis.2d 198, 207, 353 N.W.2d 793, 798 (1984)). The sentencing decision is within the trial court's discretion. ***McCleary v. State***, 49 Wis.2d 263, 277, 182 N.W.2d 512, 519 (1971). A trial court properly exercises its discretion in sentencing when it engages in a reasoning process that depends on the facts of record and reasonable inferences from those facts, and reaches a conclusion based on a logical rationale founded upon proper legal standards. ***Id.*** at 277, 182 N.W.2d at 519.

The primary factors a court must consider in fashioning a sentence are the gravity of the offense, the character of the offender and the need for public protection. ***McCleary***, 49 Wis.2d at 276, 182 N.W.2d at 519. The court may also consider, among other things, the defendant's criminal record; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; vicious or aggravated nature of the crime; degree of culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the need for close rehabilitative control; the rights of the public; and length of pretrial detention. ***State v. Iglesias***, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178, *cert. denied*, 115 S. Ct. 641 (1994).

The trial court considered the appropriate factors in sentencing Pirk. It placed emphasis on the three primary factors--the seriousness of the offenses, the need for protection of other young girls and Pirk's character. It also considered and discussed all the permissible factors that had a basis in the record. The court considered no impermissible factors. It explained its reasoning based on the facts of record. The maximum sentence for the two offenses combined was forty years' imprisonment. The court's sentence was half of that, plus twenty years concurrent probation. We conclude the trial court properly exercised its discretion in sentencing Pirk. Pirk has not shown that the sentence would have been less had the experimental guidelines been presented to the court before sentencing.

We now turn to Pirk's argument that a new factor justified a modification of his sentence. Pirk argues that the sentencing process was frustrated because Pirk's amenability to treatment was not known at the time of sentencing. According to Pirk, given his present willingness to accept responsibility and participate in treatment, a lengthy prison term is neither appropriate nor necessary because it serves to delay his participation in the sex offender treatment program.

A trial court may modify a defendant's sentence when a new factor is presented. ***State v. Franklin***, 148 Wis.2d 1, 8, 434 N.W.2d 609, 611 (1989). Whether a fact or set of facts constitutes a new factor is a question of law we review *de novo*. ***Id.*** A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Id.*** A new factor "must be an event or development which frustrates the purpose of the original sentence. There must be some connection between the factor and the sentencing -- something which strikes at the very purpose for the sentence selected by the trial court." ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). The defendant bears the burden of establishing the existence of a new factor by clear and convincing evidence. ***Id.*** at 97, 441 N.W.2d at 279. We conclude that Pirk has not met this burden.

Contrary to Pirk's suggestion, there was no confusion at sentencing about his amenability to treatment. Pirk's lack of amenability to treatment was not mentioned by the court as a factor in the sentencing. The

court did consider Pirk's failure to accept responsibility for his conduct and its consequences. Dr. Sinclair's testimony, in the form of an offer of proof, is evidence that Pirk's attitude has improved during his incarceration. But a defendant's progress toward rehabilitation in the prison system is not a new factor justifying modification of a sentence. ***State v. Krueger***, 119 Wis.2d 327, 335, 351 N.W.2d 738, 742 (Ct. App. 1984). The trial court properly excluded Dr. Sinclair's testimony as irrelevant and properly denied Pirk's motion for sentence modification based on a new factor.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.