

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 16, 1995

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(1), 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. 94-2951

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES D. YODER,

Defendant-Appellant.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

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

PER CURIAM. Charles D. Yoder appeals from an order denying his § 974.06, STATS., motion for review of his sentence on a felony conviction. We conclude that Yoder has failed to show any reviewable basis for challenging his sentence, and therefore affirm.

Section 973.012, STATS., provides that "[a] sentencing court, when imposing a sentence, shall take the guidelines established under s. 973.011 into consideration." If the sentence exceeds the recommendation, "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." *Id.* It is undisputed that the trial court failed to comply with these provisions when it sentenced Yoder, in 1989, to fifteen years in prison. At that time, failure to comply with § 973.012 was not subject to appellate review. *State v. Halbert*, 147 Wis.2d 123, 131-32, 432 N.W.2d 633, 637 (Ct. App. 1988). As a result, Yoder did not file an appeal.

In 1993, the supreme court held, in a three-to-three split decision, that failure to comply with § 973.012, STATS., is an appealable issue. *State v. Speer*, 176 Wis.2d 1101, 1112, 501 N.W.2d 429, 432 (1993). In response to *Speer*, Yoder filed a § 974.06, STATS., motion and raised the issue which *Halbert* prevented him from raising earlier on direct appeal. His appeal is from the trial court's denial of his motion.

In *State v. Elam*, No. 94-1050-CR, slip op. at 2 (Wis. Oct. 4, 1995) (per curiam), the court stated:

In *State v. Halbert*, 147 Wis. 2d 123, 131-32, 432 N.W.2d 633 (Ct. App. 1988), the court of appeals held that a sentencing court's failure to consider the sentencing guidelines is not subject to appellate review.

When this very issue came to this court in *State v. Speer*, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993), three justices, Chief Justice Nathan S. Heffernan and Justices Shirley S. Abrahamson and William A. Bablitch, opined that *Halbert* should be overruled, while three justices, Justices Roland B. Day, Donald W. Steinmetz and Louis J. Ceci, concluded that *Halbert* is good law.

A general principle of appellate practice is that a majority of the participating judges must have agreed on a particular point for it to be considered

the opinion of the court. State v. Dowe, 120 Wis. 2d 192, 194-95, 352 N.W.2d 660 (1984) (Per Curiam) (a concurrence with four votes on an issue represents the majority and controls on the issue). Accordingly, the court concludes that Halbert was not overruled by Speer; Halbert is precedential.

The holding in *Elam* disposes of the guidelines issue.

Yoder also argues that the trial court erroneously exercised its sentencing discretion by relying on a mistaken view of the facts of his crime. Because Yoder could have raised that issue on direct appeal, he cannot subsequently raise it in a § 974.06, STATS., motion. *State v. Escalona-Naranjo*, 185 Wis.2d 168, 185, 517 N.W.2d 157, 164 (1994). Our decision makes it unnecessary to address the other issues raised on appeal.

By the Court. – Order affirmed.

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