

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 30, 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. 95-1091-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT P. MARANGER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT A. DE CHAMBEAU, Judge. *Affirmed.*

Before Eich, C.J., Vergeront, J., and Robert D. Sundby, Reserve
Judge.

PER CURIAM. Robert P. Maranger appeals from a seven-year sentence entered on a judgment convicting him of second-degree sexual assault, contrary to § 940.225(2)(a), STATS.,¹ as a repeater. Maranger argues that the trial

¹ As discussed further below, Maranger was also sentenced to one year's imprisonment, consecutive, on conviction of battery contrary to § 940.19(1), STATS. He

court's improper completion and scoring of his sentencing matrix prejudiced him and denied him due process. For the reasons set forth below, we affirm.

At the Mifflin Street Block Party in Madison on May 7, 1994, the victim was standing in an alley looking for something when Maranger leaned on her back, bending her over, and squeezed her breasts from the back for one or two seconds. The victim turned, stared at Maranger and attempted to kick him in the groin, but missed and kicked his leg. She then chased him up the alley. Maranger dropped into a football stance and caught the victim in the chest with his shoulder. When the victim fell down, he turned, ran to his bicycle and rode away. Police caught Maranger within minutes, and the victim identified him.

Maranger was charged with second-degree sexual assault and battery. He was found guilty of both charges after a jury trial.

As part of the sentencing process, the trial court completed a sentencing score sheet as required by § 973.012, STATS.² Maranger challenges two entries on the sheet. First, the sheet asks whether the victim suffered "bodily harm." A yes answer adds three points to the defendant's total score. In Maranger's case the answer was yes, which increased the "guideline" sentence recommendation from thirty-six to fifty-four months (three to four and one-half years) to fifty-four to seventy-two months (four and one-half to six years).

(..continued)

does not specifically contest the battery sentence.

² Section 973.012, STATS., reads:

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.

The second entry is the "judge's statement" that the seven-year sentence imposed "agrees with the guidelines as shown on the matrix." However, the matrix ranges from four and one-half to only six years, making the statement untrue and Maranger's sentence one year longer than the guidelines.

Maranger argues this abridges his right to due process because his sentence was based on false and incorrect information contained in the completed form. According to Maranger, he had the right to be sentenced on a correctly completed form because even if the sentence exceeds the guidelines, the guidelines are intended to be the starting point for sentencing.

Maranger attacks the circuit court's use of the sentencing guidelines. When Maranger first appealed, it was unclear whether *State v. Halbert*, 147 Wis.2d 123, 432 N.W.2d 633 (Ct. App. 1988), remained good law. *Halbert* holds that compliance or noncompliance with the sentencing guidelines is not an appealable issue. *Id.* at 130, 432 N.W.2d at 636. This holding tracks the last sentence of § 973.012, STATS., *supra* note 2.

After Maranger brought this appeal, the supreme court held that *Halbert* is good law. *State v. Elam*, 195 Wis.2d 683, 685, 538 N.W.2d 249, 250 (1995). Even apart from the *Halbert* holding, we see no error.

Maranger first argues the circuit court improperly considered the injuries incurred in the battery as part of the scoring for the sexual assault. Specifically, Maranger argues that the sexual assault itself did not cause the victim "bodily harm" because it lasted only two seconds and the victim testified, at most, to discomfort. Because the addition of three points for "bodily injury" raises the upper limit of sentencing from four and one-half to six years, Maranger's implied argument is that he is being twice penalized for the same injury, namely, the "injury" associated with the sexual assault and the injury associated with the knockdown assault.

We reject this argument. As Maranger acknowledges, the transcripts of the motions and sentencing proceedings indicate that the trial court, relying on the jury findings, viewed the victim's discomfort from the

sexual assault as "bodily harm." More importantly, the court indicated it did not place its reliance on the charges brought, but instead understood the entire event as one uninterrupted sequence, and sentenced on that ground. The court indicated that its eight-year sentence, comprised of seven years for the sexual assault and one year for the battery, was made in light of the entire incident. The court's statement undercuts Maranger's assertion that he is being penalized twice for the same injury. This is especially true in light of the circuit court's observations that multi-charging sentencing is made more difficult when some charges, such as sexual assault, have guideline recommendations, while others, like battery, do not.

Maranger also argues that the court erred by indicating on the form that the sentence complied with the guideline. We take judicial notice that the evidence arguably supports the possibility of such error. Before sentencing, the court referred to the upper limit proposed by the guidelines. However, whether a clerical error was made in this case is an issue of fact, and thus not a matter this court can resolve. WIS. CONST. art. VII, § 5(3); see *Wurtz v. Fleischman*, 97 Wis.2d 100, 108, 293 N.W.2d 155, 159 (1980). If Maranger is arguing that the circuit court made a clerical error and meant to sentence him to the top of the guideline scale, which would be seventy-two months, or six years, but erred, because it incorrectly calculated seventy-two months to equal seven years, he should move the circuit court for reconsideration.³ § 806.07, STATS.

Finally, Maranger argues he was denied due process because the guidelines are intended as the starting point of the sentencing calculation and were improperly used here. For the reasons set forth above, there is no merit to this argument. This is especially true because the court clearly indicated the guidelines were not helpful because they were provided for only one of the charges.

The primary factors the trial court considers when sentencing are the gravity of the offense, the character of the offender, and the need for public protection. *State v. Larsen*, 141 Wis.2d 412, 426-27, 415 N.W.2d 535, 541 (Ct.

³ At the time of any such motion, the defendant can request the "incidental relief" of having the term "aggravated battery" changed to "simple battery" in the judgment of conviction.

App. 1987). The weight given to each of these factors is within the trial court's discretion. *Cunningham v. State*, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977). The trial court here clearly indicated that it based Maranger's sentence on his prior record, his inability to remember any details of the incident, the impact on the victim and other like factors. This statement complies with the strictest reading of § 973.012, STATS., as a statement "on the record" of "its reasons for deviating from the guidelines." *Id.*

By the Court. – Judgment affirmed.

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