

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 94-1050-CR

STATE OF WISCONSIN

:

IN SUPREME COURT

State of Wisconsin

Plaintiff-Respondent,

v.

John Fitzgerald Elam

Defendant-Appellant.

FILED

OCT 4, 1995

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

APPEAL from a judgment and order of the circuit court for Milwaukee County, Jeffrey A. Wagner, Judge. *Affirmed.*

PER CURIAM. The court is equally divided on whether to affirm or reverse the judgment of the circuit court for Milwaukee County, Jeffrey A. Wagner, Judge. Chief Justice Roland B. Day, Justice Donald W. Steinmetz and Justice Janine P. Geske would affirm. Justice Shirley S. Abrahamson, Justice William A. Bablitch and Justice Ann Walsh Bradley would reverse. Justice Jon P. Wilcox did not participate.

This court accepted jurisdiction over this appeal on a petition to bypass. Wis. Stat. § (Rule) 809.60 (1993-94). We have previously stated that when a tie vote occurs in this court on a bypass or certification, "justice is better served in such an

instance by remanding to the court of appeals for their consideration." State v. Richard Knutson, Inc., 191 Wis. 2d 395, 396-397, 528 N.W.2d 430, (1995).

We do not remand this appeal to the court of appeals because the court of appeals has already decided the issue presented in this appeal, namely whether Wis. Stat. § 973.012 (1993-94) prohibits a defendant from basing an appeal on a sentencing court's failure to take sentencing guidelines into consideration.

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 court of appeals has referred to the sentencing guideline portion of the Speer decision a number of times. In no case has the court of appeals stated that Speer overruled Halbert.

In State v. Miller, 180 Wis. 2d 320, 325, 509 N.W.2d 98 (Ct. App. 1993), the court of appeals cited the Speer case for the rule that "[w]hile the sentencing guidelines may have indicated that probation with or without jail time was the presumptive sentence for Miller, the trial court is not required to impose that sentence as long as the court considers the guidelines and explains its reasons for deviating from them."

In State v. Smet, 186 Wis. 2d 24, 30-31 n.2, 519 N.W.2d 697 (Ct. App. 1994), the court of appeals did not consider whether Speer is binding precedent because the record indicated that the circuit court considered the guidelines in that case.

In State v. Fenderson, No. 94-0044-CR (Wis. Ct. App. June 5, 1995), the court of appeals held that Halbert "remains the controlling law" that "a sentencing court's failure to sentence within the sentencing guidelines is not a matter for court of appeals jurisdiction." Id. at 1.

For the reasons set forth, the judgment and order of the circuit court are affirmed.

Justice Jon P. Wilcox did not participate.

SUPREME COURT OF WISCONSIN

Case No.: 94-1050-CR

Complete Title
of Case: State of Wisconsin,
Plaintiff-Respondent,
v.
John Fitzgerald Elam,
Defendant-Appellant.

ON BYPASS FROM THE COURT OF APPEALS

Opinion Filed: October 4, 1995
Submitted on Briefs:
Oral Argument: September 7, 1995

Source of APPEAL
COURT: Circuit
COUNTY: Milwaukee
JUDGE: JEFFREY A. WAGNER

JUSTICES:
Concurred:
Dissented:
Not Participating: WILCOX, J., did not participate

ATTORNEYS: For the defendant-appellant there were briefs and oral argument by *Richard D. Martin*, assistant state public defender.

For the plaintiff-respondent the cause was argued by *Paul Lundsten*, assistant attorney general, with whom on the brief was *James E. Doyle*, attorney general.