

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 29, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP108-CR

Cir. Ct. No. 2005CF258

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARRY G. SCHMIDT, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Harry G. Schmidt, Jr., appeals a judgment convicting him of first-degree sexual assault of a child under the age of thirteen, and child enticement. The issues are whether he received effective assistance

from trial counsel and whether the sentencing court erred by failing to consider the sentencing guidelines then in effect for the sexual assault charge. We affirm.

¶2 The State charged Schmidt, then seventeen, on evidence that he had sexually assaulted girls aged three and nine years old. During the course of the proceeding, Schmidt underwent several evaluations to determine whether he was competent and whether he had a viable insanity defense. Schmidt subsequently entered a guilty plea on two counts of the information.

¶3 Before sentencing, defense counsel commissioned a psychologist, Dr. Allen Hauer, to evaluate Schmidt and identify any psychological characteristics that might serve to mitigate Schmidt's sentence. Dr. Hauer failed to discover any mitigating characteristics, and his written report concluded:

I regret not being able to offer any opinions and recommendations about Mr. Schmidt that might help you mitigate the recommendations offered to the Court in the Pre-Sentence Investigation report. Mr. Schmidt is certainly a tragic and sympathetic individual but one who, in the absence of adequate internal control over his thoughts, motives, and inhibitions, continues to present what I believe is an unacceptably high risk to others.

Notwithstanding the damaging information and recommendation it contained, Schmidt's counsel filed the report, and both he and the prosecutor addressed Dr. Hauer's findings and conclusion at sentencing. In its sentencing remarks, the court noted that it had considered reports from four psychological evaluators, including Dr. Hauer. At the conclusion of its remarks, the court imposed sentences totaling thirty years of initial confinement followed by twenty-five years of extended supervision. The sentences substantially exceeded the recommendations of the State and the Department of Corrections.

¶4 Schmidt filed a postconviction motion alleging that counsel's decision to file Dr. Hauer's report constituted ineffective representation. The circuit court concluded, however, that the report was not prejudicial to Schmidt because the court did not specifically rely on Dr. Hauer's report or, for that matter, on the reports of the other doctors. The court summarized its sentencing decision as follows:

The sentence, as can be seen from a review of the sentencing transcript, was imposed due to the tender age of the two victims, the damaging and devastating emotional impact the incident had, not only on the two children, but also on their parents; the past offenses of Schmidt involving sexually assaulting a young boy; and also sexually assaulting young girls, these occurring prior to the incident he was being sentenced on, and Schmidt's limited cognitive abilities, impaired judgment, impulsivity, anger and anxiety.

Schmidt appeals that determination and the court's failure to state at the sentencing hearing that it had considered the sentencing guidelines.

INEFFECTIVE ASSISTANCE

¶5 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must establish that his counsel's performance fell below objective standards of reasonableness. *Id.* at 690. The defendant must also show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We need not address both components of the analysis if the defendant makes an inadequate showing on one of them. *Id.* at 697.

¶6 Schmidt failed to demonstrate prejudice from the sentencing court's consideration of Dr. Hauer's report. It is beyond dispute that Schmidt's mental disabilities and resulting behavior were significant aggravating factors in his sentence, and Dr. Hauer's report focused on those disabilities. However, so did the other psychological evaluations before the court, as did the presentence investigation report. In terms of its effect on the sentencing decision, Dr. Hauer's report was, at worst, cumulative. What little new information the report added about Schmidt's inappropriate behavior in presentencing confinement was not mentioned in the sentencing remarks, and we have no basis to infer that it influenced the court's sentencing decision. Indeed, the court unequivocally declared in its postconviction decision that Schmidt would have received the same sentences with or without Dr. Hauer's report in evidence, and Schmidt has provided this court no basis to conclude otherwise.

SENTENCING GUIDELINES

¶7 When Schmidt was sentenced, the sentencing court was required under WIS. STAT. § 973.017(2)(a) (2005-06) to consider the applicable sentencing guidelines for his sexual assault offense and to indicate on the record that it had fulfilled this obligation. *See State v. Grady*, 2007 WI 81, ¶¶2, 44-45, 302 Wis. 2d 80, 734 N.W.2d 364. Schmidt contends that the court's failure to do so at the sentencing hearing entitles him to resentencing. However, after Schmidt commenced this appeal, § 973.017(2)(a) was repealed. *See* 2009 Wis. Act 28, § 3386m (eff. July 1, 2009). This court recently held that the repeal of this section is retroactive, such that defendants no longer have any remedy for a sentencing court's failure to comply with § 973.017(2)(a) and *Grady*. *See State v. Barfell*, 2010 WI App 61, ¶¶9, 14, No. 2009AP1568-CR. Therefore, we need not consider the issue any further.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

