

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP2065-CR

Cir. Ct. No. 2007CF45

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK ALLAN CAMPBELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Judgment affirmed; order reversed; cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. Mark Campbell appeals a judgment of conviction for first-degree sexual assault of a child and an order denying his motion for resentencing. Campbell argues the circuit court erred by not considering the

applicable sentencing guidelines. At a postconviction hearing, the court stated it had considered the same factors as set forth in the guidelines, although it did not consider the guidelines themselves. It further stated consideration of the guidelines would not have changed the sentence. Based on this, the State argues the court's failure to consider the guidelines was harmless error. We disagree and therefore reverse the order denying Campbell's postconviction motion and remand for resentencing.

BACKGROUND

¶2 Campbell pled guilty to first-degree sexual assault of a child, his ten-year-old daughter. Pursuant to a plea agreement, the State recommended a sentence of no more than twenty years, with five to seven years' initial confinement. The presentence investigation (PSI) recommended twenty to forty years' initial confinement and seven to ten years' extended supervision. Campbell asked for a sentence of two to three years, claiming he pled guilty only because his attorney advised him his chances of winning were unlikely. The court stated it was "fully convinced [Campbell] committed the offense charged," and concluded the PSI's sentencing recommendation was "more on mark" than the State's or Campbell's. It then sentenced Campbell to forty years, including thirty years of initial confinement.

¶3 The court thoroughly analyzed on the record various factors influencing the sentence. It discussed the serious effect of the crime on Campbell's daughter, noting she attempted suicide because of the extraordinary trauma caused by the abuse. It examined Campbell's danger to the public, observing he had a criminal history that included three prior felonies, one of which was an assaultive crime. The court also determined the evidence indicated

Campbell completely lacked boundaries for his sexual behavior and concluded the offense was part of a pattern of sexual abuse. It examined Campbell's job, residential, and relationship histories, concluding all were unstable. The court was also troubled by Campbell's lack of remorse, empathy, or responsibility for his actions, which would make treatment difficult. In light of these considerations, the court determined Campbell presented a high risk of reoffending and that the appropriate sentence was thirty years of initial confinement and ten years' extended supervision.

¶4 We commend the court for what was otherwise a model explanation of the sentence it imposed. However, it omitted one critical and mandatory consideration: the sentencing guidelines. WISCONSIN STAT. § 973.017(2) provides:

When a court makes a sentencing decision concerning a person convicted of a criminal offense committed on or after February 1, 2003, the court shall consider all of the following:

(a) If the offense is a felony, the sentencing guidelines adopted by the sentencing commission created under 2001 Wisconsin Act 109

¶5 Campbell filed a postconviction motion, arguing this omission entitled him to be resentenced. The court denied his motion. It acknowledged it did not consider the sentencing guidelines, but asserted, "There is nothing in the ... guidelines that [it] did not consider in the sentencing of the defendant." Campbell appeals.

DISCUSSION

¶6 Both parties agree this appeal requires us to determine whether the circuit court's failure to consider the sentencing guidelines was harmless error.

This is a question of law we review independently. *State v. Harrell*, 2008 WI App 37, ¶37, 308 Wis. 2d 166, 747 N.W.2d 770 (citation omitted). To demonstrate an error is harmless, the State must prove beyond a reasonable doubt the sentence would have been the same had the court considered the guidelines. *See id.*

¶7 Our analysis of whether the court’s failure to consider the sentencing guidelines was harmless is bound by the parameters described by our supreme court in *State v. Grady*, 2007 WI 81, 302 Wis. 2d 80, 734 N.W.2d 364. In that case, the circuit court “gave a detailed explanation of [its] reasoning for imposing Grady’s sentence,” but did not refer to the applicable sentencing guidelines. *Id.*, ¶¶6, 10. Grady moved for resentencing. At the motion hearing, the court stated it had considered the guidelines but forgot to mention this during sentencing. *Id.*, ¶11. The supreme court agreed the sentencing court had considered the guidelines, but held:

For sentencing hearings occurring after September 1, 2007, a circuit court satisfies its [WIS. STAT.] § 973.017(2)(a) obligation when the record of the sentencing hearing demonstrates that the court actually considered the sentencing guidelines and so stated on the record.

Id., ¶3. Thus, *Grady* articulates two requirements: (1) the court must actually consider the guidelines, *and* (2) it must say so on the record. *Id.*, ¶30.

¶8 Here, the circuit court acknowledged it neither actually considered the sentencing guidelines nor mentioned them on the record. The State argues this error was harmless because the court considered the same factors required by the guidelines and later clarified it would have imposed the same sentence even if it had considered them. We are unable to reconcile this argument with *Grady*.

¶9 While we agree the factors the court considered closely tracked the factors in the sentencing guidelines, *Grady* requires more than this. *Grady* explicitly held that courts must mention the guidelines on the record. If it is not enough after *Grady* for the court to actually consider the guidelines but not say so on the record, it is certainly not enough for the court to concede it never in fact considered the sentencing guidelines. To hold otherwise would eviscerate the requirements of *Grady*.¹

¶10 *Grady* determined this procedure was necessary for courts to discharge the obligation imposed by the legislature's enactment of WIS. STAT. § 973.017(2). The statute makes consideration of applicable sentencing guidelines mandatory: "the court *shall consider* ... the sentencing guidelines." *Id.* (Emphasis added).

¶11 This mandatory obligation entails more than simply examining the same factors as those listed in the guidelines. The guidelines also contain tables recommending sentence ranges based on the severity of the offense and the risk posed by the defendant. While WIS. STAT. § 973.017(2)(a) "does not require a court to make a sentencing decision that is within any range or consistent with a recommendation specified in the guidelines," *Grady*, 302 Wis. 2d 80, ¶40, the range does provide guidance to the court.

¹ In *State v. Sherman*, 2008 WI App 57, 310 Wis. 2d 248, 750 N.W.2d 500, we held the court's failure to consider sentencing guidelines was harmless error under very narrow circumstances. There, Sherman was convicted of two offenses. One was a guideline offense and the other was not. The court imposed a shorter, concurrent sentence for the guideline offense. Because the longer non-guideline sentence remained valid, the failure to consider the guidelines on the shorter sentence had no effect on the overall time Sherman would serve. This situation is not applicable here.

¶12 We also reject the State’s contention that the court would have imposed the same sentence even had it considered the guidelines. As proof for its argument, the State asserts the court confirmed considering the guidelines would not have changed its decision. However, *Grady* precludes consideration of evidence beyond the sentencing hearing. *Id.*, ¶36 (“Hereafter, supplementing the record with evidence beyond the sentencing hearing will be insufficient.”). Therefore, we cannot accept the court’s retrospective statement as proof that consideration of the guidelines would not have altered the sentence it imposed.

¶13 The State nevertheless asserts that *Grady* only prohibits evidence of whether the court considered the guidelines, not evidence of whether its failure to do so would have changed the sentence. We disagree. While the court’s sentencing analysis was considered and thoughtful, *Grady* requires courts to actually consider applicable sentencing guidelines and mention them on the record. A court cannot eliminate these requirements simply by saying complying with them would not have changed the result.

By the Court.—Judgment affirmed; order reversed and cause remanded with directions.

Recommended for publication in the official reports.

