

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 22, 2008

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. 2008AP1128-CRNM

Cir. Ct. No. 2006CF823

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. KAPRELIAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 BROWN, C.J. In *State v. Grady*, 2007 WI 81, ¶¶2-3, 302 Wis. 2d 80, 734 N.W.2d 364, *clarified on reconsideration*, 2007 WI 125, 305 Wis. 2d 65,

739 N.W.2d 488, our supreme court construed WIS. STAT. § 973.017(2)(a) (2005-06)¹ to require circuit courts to show that they “actually considered” sentencing guidelines adopted by the sentencing commission under § 973.017(2)(a).² This statute remains on the books even though the legislature no longer funds a sentencing commission, the commission is defunct, its offices are closed and neither it, nor any agency, collects and analyzes the sentencing guidelines worksheets anymore.³ As a result of the commission’s demise, circuit court judges have, with good reason, ignored sentencing guidelines that long ago ceased to be based on any up-to-the-moment data showing sentencing ranges throughout the state. Rather, circuit court judges have, in many instances, developed their own thorough list of factors that they weigh.

¶2 *Grady* basically reminded everyone that, despite the commission’s dissolution, the statute remains in force and will remain in force until and unless repealed. The present circumstances have created problems for this court. In no-

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² WISCONSIN STAT. § 973.017(2)(a) states:

(2) GENERAL REQUIREMENT. 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, or, if the sentencing commission has not adopted a guideline for the offense, any applicable temporary sentencing guideline adopted by the criminal penalties study committee created under 1997 Wisconsin Act 283.

³ See Wisconsin Sentencing Commission, http://wsc.wi.gov/index_print.asp?locid=10 (last visited Sept. 30, 2008).

merit cases, in particular, where an independent review of the record otherwise showed no arguable merit to any potential issue that could be raised on appeal, one vexing detail has appeared again and again—the sentencing court did not mention the sentencing guidelines. This is no doubt due to the inescapable fact that completion and submission of worksheets to the commission is no longer necessary. In those cases, the circumstance required us to initially reject the no-merit report and send it back to counsel to determine if the issue had merit with no guidance given to that attorney whatsoever as to how to make that determination.

¶3 As it happens, in *State v. Sherman*, 2008 WI App 57, ¶¶8-9, ___Wis.2d ___, 750 N.W.2d 500, *review denied* (WI June 10, 2008) (Nos. 2007AP899-CR and 2007AP2008-CR), this court determined that the failure to consider the guidelines may be harmless error in the individual case if the defendant’s substantial rights are not affected. But that opinion rested on the fact that the sentences for the two guideline counts were concurrent and less than the sentence for the controlling count, which was not affected by the guidelines. *Id.*, ¶9.

¶4 We hold here that we may also declare harmless any failure to mention the defunct guidelines if the record shows that the sentencing court considered many of the same things that would have been considered while plotting according to the defunct sentencing guidelines worksheet. With this opinion, it should now be easier for counsel to assess if the failure to mention the guidelines is harmless. First, we will address the sentencing guidelines issue and then the other possible issues we considered and rejected. We accept the no-merit report of counsel and affirm the judgment and order.

BACKGROUND

¶5 Timothy J. Kaprelian appealed from a judgment convicting him of two counts of second-degree sexual assault/use of force (domestic abuse incident) and one count of false imprisonment and from an order denying his postconviction motion for resentencing. Kaprelian's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967), addressing numerous potential appellate issues. Kaprelian filed a lengthy response. We have reviewed both, and we also have exercised our responsibility to independently review the entire record.

¶6 The essentially undisputed facts are taken from the complaint and motion hearing testimony. The State charged Kaprelian with two counts of second-degree sexual assault/use of force and one count of false imprisonment, contrary to WIS. STAT. §§ 940.225(2)(a) and 940.30. The charges arose from an incident in which Kaprelian bound his roommate/former girlfriend, Laurie, with handcuffs and a choke rope and for the next ten hours repeatedly assaulted her sexually and otherwise, made her lick his urine off the floor, thrust his fingers and other foreign objects far into her nose, throat and other body cavities, shaved her head and eyebrows and demanded that she call him "master." Kaprelian videotaped over an hour of the assaults carried out in various locations of the house they shared. Eventually he unbound her and fell asleep.

¶7 Laurie gave the police permission to enter the house and the room where Kaprelian slept. They did not seek a warrant due to concern about possible evidence destruction and because Laurie, who at least one officer believed was the owner, told them she had free access to the entire house. After waiving his

*Miranda*⁴ rights, Kaprelian told an officer he had drunk a considerable amount of alcohol and had gone “too far,” that Laurie shook her head “no” throughout, and that he knew he “made a huge mistake” and had planned to turn himself in.

¶8 Kaprelian moved to suppress the statements and evidence seized from around the house on grounds that police entered his bedroom and arrested him without a warrant, valid consent or exigent circumstances. Concluding that, as a co-occupant, Laurie had the right to consent and that concern over evidence destruction provided exigent circumstances, the trial court denied the motion.

¶9 Kaprelian pled no contest. Before sentencing, the State moved to have the trial court view the part of the assault Kaprelian had videotaped. Kaprelian opposed the motion and successfully argued that if the court viewed that tape, it also should view tapes from prior allegedly consensual encounters.

¶10 The court sentenced Kaprelian to an aggregate sentence of fifty years’ imprisonment—thirty years’ initial confinement and twenty years’ extended supervision—and ordered him to pay \$1600 in restitution to Laurie and \$3991.88 to the crime victim compensation program. *See* WIS. STAT. §§ 973.20(1r), 973.20(9)(a) and 949.03(1)(b). Kaprelian then moved for resentencing on grounds that the court sentenced him on inaccurate information. The court denied the motion without a hearing. Additional facts may be supplied as needed.

⁴ *See Miranda v. Arizona*, 384 U.S. 436 (1966).

ANALYSIS

1. Failure to Consider the Sentencing Guidelines

¶11 As we have pointed out, the trial court did not state on the sentencing record or at the postconviction motion hearing⁵ that it actually considered the sentencing guidelines for second-degree sexual assault in fashioning its sentence. *See* WIS. STAT. § 973.017(2)(a). And, as we have also pointed out, in interpreting the unambiguous statute, our supreme court was constrained to say that this is error, *see Grady*, 302 Wis. 2d 80, ¶¶2-3. But the reality of the present day circumstances is such that, given the demise of the commission and its statutory provisions, most trial judges have fashioned their own highly workable—and perhaps more elaborate—assessments and, as here, the record demonstrates that the sentence was the result of a thoughtful, deliberative process.

¶12 The old guidelines worksheet plotted the severity of the offense against future risk. The sentencing court determined the severity by examining its characteristics, the type of harm caused, the defendant’s role and the victim’s vulnerability, and the future risk by examining the offender’s educational, employment, health, criminal and social background, acceptance of responsibility and show of remorse. That yielded a recommended sentence range, which could be adjusted up or down by the presentence investigation writer’s and counsel’s

⁵ The *Grady* court held that its holding was effective for sentencings occurring after September 1, 2007. For sentencings, like Kaprelian’s, that occurred before September 1, 2007, it is sufficient if the trial court states in a postconviction hearing that it actually considered the guidelines at sentencing. *See State v. Grady*, 2007 WI 81, ¶36, 302 Wis. 2d 80, 734 N.W.2d 364, *clarified on reconsideration*, 2007 WI 125, 305 Wis. 2d 65, 739 N.W.2d 488.

recommendations, the effect of multiple counts, the victim's statement and other factors.

¶13 The sentencing transcript in this case reveals that the trial court considered the severity of the “horrific” and “life-altering” offense, noting that Kaprelian premeditatedly took advantage of Laurie’s fragility, treating her “not [as] a fellow human being, but almost like an inanimate object, a subject of some science experiment,” causing her permanent emotional and physical trauma. The court also considered Kaprelian’s generally “pro-social lifestyle,” consistent employment and supportive family and friends, the psychologist’s assessment that Kaprelian posed a low risk for sexual reoffense, and his acceptance of responsibility by pleading no contest. In addition, the court considered the psychologist’s observation that Kaprelian minimized the significance of his crime, the PSI writer’s observation that Kaprelian’s remorse was due to his incarceration, not the harm to Laurie, and took into account a social worker’s report and statements from Laurie, her friends and family members.

¶14 The court’s analysis tracks that of the sentencing guidelines. Kaprelian’s sentence may be higher than the worksheet’s basic recommended range, but the court found nearly all of the sentence adjustment factors to be aggravating. Beyond that, Kaprelian’s global fifty-year sentence fell well below the eighty-six years he faced. Whether the court actually failed to consider the sentencing guidelines or simply to state on the record that it considered them, Kaprelian’s substantial rights were not affected. The error was harmless. Because the error was harmless, it does not present an issue of arguable merit.

¶15 We suppose it might be argued that “harmless error” presupposes that there was error in the first place. And, if there was error in the first place, the

issue cannot be deemed “wholly frivolous” as that term is set forth in the seminal case of *McCoy v. Court of Appeals*, 486 U.S. 429, 436-38 (1988). And, if it is not wholly frivolous, then that means the issue is not so lacking a basis in fact or law that it would be unethical for counsel to claim error.

¶16 But that argument, though facially logical, would stand common sense on its head. The *McCoy* standard appears to be whether two sides of the argument exist so as to require advocacy briefs. But in this case, where the legislature has gutted the very existence of the sentencing commission, has taken away the very purpose behind the reason why the judges filled out and submitted forms, and has left but an empty and totally meaningless shell remaining on the books, it defies all reason to believe that there are two sides to this question. Therefore, so long as the trial courts in this state have undertaken of their own initiative sentencing structures that closely resemble the old, dead sentencing grids, there are no two sides to this issue.

¶17 Having considered and decided the lead, and in our view, important issue in this case, we now bring up and discuss the numerous issues that either Kaprelian raised, or his counsel raised or we ourselves have raised. This is, we point out, the normal practice in considering and deciding no-merit cases.

2. Plea Taking

¶18 The no-merit report analyzes the adequacy of the plea taking. Kaprelian could not succeed on a motion to withdraw his no contest plea because he knowingly and voluntarily entered it. Before accepting the plea, the trial court established that Kaprelian understood and waived his rights to a jury trial, a unanimous verdict, confrontation and protection against self-incrimination. The court informed Kaprelian of the penalties he faced and verified that he understood

the proceedings and the elements of the charges. It properly relied on Kaprelian's signed plea questionnaire. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The record satisfies us that the court complied with the requirements set forth in WIS. STAT. § 971.08(1)(a); *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Although Kaprelian contends that his plea was not knowingly or intelligently entered because the court failed to advise him that, under truth-in-sentencing, he must serve every day of the sentence imposed, he is wrong. There is no such requirement that he be so advised. *See State v. Plank*, 2005 WI App 109, ¶¶12-17, 282 Wis. 2d 522, 699 N.W.2d 235. No issue of merit exists from the plea taking.

3. Suppression Motions

¶19 Next, the report considers whether the trial court should have suppressed Kaprelian's inculpatory statements as the fruit of an illegal arrest. Kaprelian's response also claims that the court should have suppressed evidence seized from his bedroom and elsewhere in the house. His no contest pleas waived his right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. Suppression issues, however, are not waived by a plea. *See* WIS. STAT. § 971.31(10); *see also State v. Brady*, 2007 WI App 33, ¶5 n.1, 298 Wis. 2d 782, 729 N.W.2d 792.

¶20 The search of the house occurred with Laurie's consent. The court heard testimony, which it found credible, that the responding officers believed that Laurie either owned the house or rented it from her parents and that the room where Kaprelian slept was a jointly used computer room where Laurie kept

clothing and other personal property. The court reasonably could believe that Laurie had authority to consent to a search of the entire premises. Our independent review satisfies us that those findings are not clearly erroneous. *See State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). Laurie’s common authority validated the search regardless of Kaprelian’s consent. *See State v. West*, 185 Wis. 2d 68, 93, 517 N.W.2d 482 (1994); *see also Georgia v. Randolph*, 547 U.S. 103, 106 (2006). Likewise, there is no arguable merit to the related issue Kaprelian raises in his response that the seizure of items from other rooms and the basement was constitutionally invalid.⁶

¶21 Kaprelian’s response further claims that his statements were coerced because when the police awoke him with guns drawn, he was naked, afraid and “things [were] hazy” from having been intoxicated. We also understand him to assert that the court should have refused to allow Laurie and the police officer to testify regarding her consent because the police report referring to that consent was not in the record, contrary to the “best evidence rule.” This point is without merit. The best evidence rule applies only where evidence other than the writing itself is offered for the purpose of proving its terms. *Mitchell v. State*, 84 Wis. 2d 325, 340, 267 N.W.2d 349 (1978). Testimony regarding consent was not offered to prove the terms of the police report, but to establish that Laurie consented to the entry and search. Witnesses may testify on the basis of personal knowledge. WIS. STAT. § 906.02. Laurie, badly bruised and swollen, with ligature marks on her

⁶ Kaprelian’s trial counsel conceded after arguments on the suppression motions that no basis existed to challenge evidence taken from rooms other than Kaprelian’s bedroom. This concession would not support an ineffective assistance of counsel claim because, as discussed above, there would be no merit to an argument that Laurie could not consent to a search of the general premises.

neck and her head shaved, told police Kaprelian assaulted her at the house they shared, that he was in the house and they had her permission to enter. Kaprelian admitted responsibility through his plea. Even if it were error to deny the motion seeking to suppress his statements, there is no reasonable possibility the error contributed to his conviction. *See State v. Armstrong*, 223 Wis. 2d 331, 369, 588 N.W.2d 606 (1999). We see no other potential appellate issues in this regard.

4. Ineffective Assistance of Counsel

¶22 The report next addresses whether Kaprelian’s trial counsel rendered ineffective representation for failing to seek dismissal of the second count of second-degree sexual assault as multiplicitous, and to call Kaprelian as a witness at the suppression hearing. Generally, the lack of a *Machner*⁷ hearing prevents our review of trial counsel’s performance. *See State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Here, however, because appellate counsel asks to be discharged from the duty of representation, we must determine whether an ineffective assistance of counsel claim has sufficient merit to require appellate counsel to file a postconviction motion and request a *Machner* hearing.

¶23 Our review of the record persuades us that Kaprelian could not have established the requisite prejudicially deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The multiple sexual assaults were different in fact because they were of a significantly different nature, *see State v. Eisch*, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980), and each required a new volitional departure. *See State v. Schaefer*, 2003 WI App 164, ¶46, 266 Wis. 2d

⁷ *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

719, 668 N.W.2d 760. We presume a legislative intent to punish both. *See State v. Derango*, 2000 WI 89, ¶30, 236 Wis. 2d 721, 613 N.W.2d 833. Kaprelian would not have prevailed on a motion to dismiss. Therefore, even assuming that counsel deficiently failed to so move, Kaprelian could not show prejudice because an unsuccessful motion could not have influenced his decision to plead.

¶24 Further, if Kaprelian had testified that Laurie had no access to the room he slept in, he could not show prejudice because the police reasonably, if incorrectly, believed that Laurie owned the house and could consent. *See State v. Tomlinson*, 2002 WI 91, ¶25, 254 Wis. 2d 502, 648 N.W.2d 367. We see no merit to any of the other potential claims of ineffectiveness that Kaprelian raises in his response. They either allege insufficient facts to raise a question of fact, present only conclusory allegations, or are unrelated to the charges actually filed. *See State v. Bentley*, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996).

¶25 Lastly, Kaprelian contends his appellate counsel rendered ineffective assistance. That claim is not reviewable on direct appeal. *See State v. Knight*, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). We will consider it only if pursued by a petition for a writ of habeas corpus. *See id.* at 522.

5. Victim Statement Read by Another

¶26 The victim/witness advocate read part of Laurie's impact statement when Laurie felt unable to continue. The no-merit report addresses whether this was error, such that we should vacate the sentence and order resentencing. We agree with appellate counsel that the advocate simply gave voice to the statement allowed to Laurie under WIS. STAT. § 950.04(1v)(m) and that no arguable issue could arise.

6. Reliance on Inaccurate Sentencing Information

¶27 The no-merit report also analyzes whether, as Kaprelian argued in his postconviction motion, the trial court deprived him of due process by relying on inaccurate information in sentencing him. Kaprelian claimed the court mistakenly believed that he did not contribute financially to the household and disputes that Laurie had any prior mental health issues. There is no arguable merit to this claim. The court did note that Kaprelian used Laurie's financial vulnerability as one means of exerting control over her, but it never suggested he contributed nothing or that it relied at all on the parties' financial arrangement. *See State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). The evidence was that Laurie had been in counseling since 1996. Our review of the record persuades us that Kaprelian was sentenced upon a proper consideration of numerous factors.

7. Restitution

¶28 The no-merit report next discusses two issues related to restitution. The court ordered Kaprelian to pay a total of \$5591.88: \$1600 to Laurie and \$3991.88 to the crime victim compensation program in reimbursement for monies paid on Laurie's behalf. *See* WIS. STAT. §§ 973.20(1r), 973.20(9)(a) and 949.03(1)(b). The court heard Laurie's testimony supporting her request for over \$21,000 for medical, dental and psychiatric bills, new locks, security windows, replacement of urine-soaked flooring, jewelry and clothing replacement and veterinary bills.⁸ *See* § 973.20(14)(a). The court considered the proper factors at

⁸ Laurie claimed Kaprelian also injured two of her pets on the night of the assault.

the restitution hearing, including Kaprelian's ability to pay while in prison, and rejected certain claimed damages as inadequately proved or reimbursable through other sources. *See* § 973.20(13)-(14). Any contention that the \$1600 amount is not supported by the evidence wholly lacks merit.

¶29 Likewise, any challenge to the \$3991.88 on grounds that Laurie was improperly compensated while the case was on appeal also lacks merit. Injury from second-degree sexual assault is compensable. WIS. STAT. § 949.03(1)(b). An appealed conviction may not be conclusive evidence that the offense was committed, *see* WIS. STAT. § 949.09, but the statute does not state that a conviction is the sole means of proof. Under the facts of this case, any argument to that effect would be without merit.

8. Sentencing Discretion

¶30 Finally, the report addresses the exercise of sentencing discretion. The record reveals that the court carefully considered and applied the primary sentencing factors, addressing them at length. *See State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. It also allowed the parties' family and friends to speak, and reviewed the presentence investigation report and two professionals' reports. We cannot conclude that Kaprelian's sentence is so excessive or unusual as to shock public sentiment, especially in light of the savagery of the crime. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶31 Our independent review of the record reveals no other issues of potentially arguable merit.

¶32 We close with a plea of our own. We point out once again that, even though the Wisconsin Sentencing Commission is defunct and its offices are closed, even though no agency collects and analyzes the sentencing guidelines worksheets anymore, even though the guidelines, even before their demise, did not set forth new sentencing factors but enabled the commission to monitor statewide sentencing practices, the statute requiring their consideration still exists. *See* WIS. STAT. § 973.017(2)(a). We underscore that the whole purpose of the guidelines was to monitor sentencing activities across the state, to allow the commission to advise sentencing judges about what other sentencing judges were doing with similar information and provide a sentencing range. That purpose is long gone. While some may believe that disparate sentences remain a problem in this state, that in no way justifies keeping an empty shell on the books. We think the legislature should repeal the statute.⁹

¶33 With that statement having been made, we affirm the judgment of conviction and the postconviction motion denying resentencing and relieve Attorney Ellen Henak of representing Kaprelian further in this matter.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

⁹ We note that the director of state courts, in recognition of the repeal of WIS. STAT. § 973.30 (that statute establishing the Wisconsin Sentencing Commission), requested, at some point prior to November 8, 2007, that the legislature also repeal WIS. STAT. § 973.017(2)(a), the offending statute in the case at bar. The director aptly noted that one function of the sentencing commission was to collect and analyze sentencing worksheets completed by circuit court judges. With the repeal of the commission, the director observed that this task no longer was to be performed. For whatever reason, the repeal of these sections did not occur. As a result, as we have noted throughout this opinion, the requirement, empty as it is, still exists even though the commission is no longer there to keep the guidelines current.

