

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2008

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. 2007AP851-CR

Cir. Ct. No. 2005CF1697

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. DAVY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Richard Davy appeals from a judgment convicting him of armed robbery contrary to WIS. STAT. § 943.32(2) (2005-06)¹ and from an order denying his motion for resentencing. Davy argues that the circuit court failed to consider the sentencing guidelines, and he should be resentenced. We conclude that the circuit court failed to consider the sentencing guidelines as required by *State v. Grady*, 2007 WI 81, ¶30, 302 Wis. 2d 80, 734 N.W.2d 364, *clarified on reconsideration*, 2007 WI 125, 305 Wis. 2d 65, 739 N.W.2d 488, then the court's error was harmless, *State v. Sherman*, 2008 WI App 57, ¶¶8-9, ___ Wis. 2d ___, ___ N.W.2d ___, *review denied* (WI June 10, 2008) (Nos. 2007AP899-CR and 2007AP2008-CR). Additionally, the sentencing guidelines did not constitute a new factor requiring resentencing. Therefore, we affirm the circuit court's refusal to resentence Davy.

¶2 Davy pled guilty to armed robbery. The circuit court imposed a fifteen-year sentence (eight years of initial incarceration and seven years of extended supervision). Postconviction, Davy sought resentencing on alternative grounds: (1) a *Grady* violation or (2) the sentencing guidelines constituted a new factor. The circuit court declined to resentence Davy. Davy appeals.

¶3 Davy argues that the circuit court failed to consider the sentencing guidelines for armed robbery. WISCONSIN STAT. § 973.017(2)(a) requires a circuit court to demonstrate on the record that it considered the sentencing guidelines. *Grady*, 302 Wis. 2d 80, ¶30. The sentencing transcript does not indicate that the

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

court considered the sentencing guidelines. Our analysis does not end here, however.

¶4 Because the sentencing in this case occurred prior to September 1, 2007, the circuit court's postconviction response to the claimed *Grady* violation is relevant. *Grady*, 302 Wis. 2d 80, ¶36; cf. *Grady, on reconsideration*, 305 Wis. 2d 65, ¶2. For a pre-September 1 sentencing, it is sufficient if the sentencing court states at a postconviction hearing that it actually considered the guidelines at sentencing. *Grady*, 302 Wis. 2d 80, ¶36.

¶5 Postconviction, the circuit court conceded that it did not complete a sentencing guidelines worksheet.² However, the court noted that even though it no longer prepares guidelines worksheets, the court considers the guidelines factors at all sentencing proceedings. The court further stated that it was aware of the sentencing guidelines, and therefore the guidelines did not constitute a new factor warranting resentencing. We conclude that the circuit court's postconviction ruling that it considers the guidelines factors at all sentencing proceedings was sufficient to show compliance with *Grady*.

¶6 In the alternative, if the circuit court's postconviction ruling was insufficient to demonstrate consideration of the sentencing guidelines and compliance with *Grady*, then the error was harmless. In *Sherman*, 2008 WI App 57, ¶¶8-9 (Nos. 2007AP899-CR and 2007AP2008-CR), we held that a failure to consider the sentencing guidelines can be harmless error. "An error is harmless if

² *State v. Grady*, 2007 WI 81, ¶38, 302 Wis. 2d 80, 734 N.W.2d 364, *clarified on reconsideration*, 2007 WI 125, 305 Wis. 2d 65, 739 N.W.2d 488, does not require completion of a guidelines worksheet.

it does not affect the defendant's substantial rights. WIS. STAT. § 805.18.” *Sherman*, 2008 WI App 57, ¶8.

¶7 To determine whether harmless error occurred, we compare the sentencing transcript and the armed robbery sentencing guidelines worksheet.³ At sentencing, the court considered the gravity of the offense (a “serious assaultive,” “vicious and aggravated” armed robbery of a bar while patrons were present) and the manner in which the offense was committed (with a rifle and concealed identity). The court found that Davy’s drug abuse was a factor in his criminal behavior and the impetus for the robbery. The court considered Davy’s employment history and character, his past criminal offenses, his age, family circumstances, education and expression of remorse, the impact on the victims, and the need to protect the community. The court noted the recommendations of the presentence investigation report author, Davy and the State. The court observed that it had to impose a minimum amount of confinement consistent with the primary sentencing factors of protecting the public and rehabilitating Davy.

¶8 These sentencing considerations are reflected in the categories found on the armed robbery sentencing guidelines worksheet: characteristics of the offense, type of harm, aggravating factors, role in offense, education, employment history, criminal record, alcohol and drug abuse, social factors and attitude. The court’s approach to sentencing echoed the sentencing guidelines worksheet and did not harm Davy’s substantial rights. The court properly exercised its

³ We take judicial notice of the armed robbery sentencing guidelines worksheet for sentencing proceedings occurring on or after July 1, 2005.

sentencing discretion. *Grady*, 302 Wis. 2d 80, ¶31. Therefore, the court’s failure to refer to the guidelines at sentencing was harmless.

¶9 We turn to Davy’s claim that the sentencing guidelines constituted a new factor requiring resentencing.

[T]he phrase “new factor” refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

State v. Michels, 150 Wis. 2d 94, 96, 441 N.W.2d 278 (Ct. App. 1989) (citation omitted). The guidelines were known to the court at sentencing, as the court confirmed postconviction. Therefore, the guidelines were not a new factor relevant to the imposition of sentence.

¶10 If the circuit court’s postconviction ruling was insufficient to show that it considered the guidelines at sentencing, then the error was harmless. The existence of the sentencing guidelines did not constitute a new factor requiring resentencing.

By the Court.—Judgment and order affirmed.

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

