

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2009

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. 2008AP1173-CR

Cir. Ct. No. 2006CF2691

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAHIR N. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Dahir N. Evans appeals from a corrected judgment of conviction for two counts of possession with intent to deliver, one for cocaine and another for marijuana, each as a subsequent drug offense, and from a postconviction order denying his resentencing motion. We conclude that the trial

court's postconviction explanation, that it considered the sentencing guidelines when it imposed sentence, is supported by its consideration at sentencing of the same factors as those identified in the guidelines. Therefore, we affirm.

¶2 Evans pled guilty to possessing no more than one gram of cocaine with intent to deliver, in violation of WIS. STAT. § 961.41(1m)(cm)1g. (2005-06), and possessing no more than two hundred grams of tetrahydrocannabinols (“marijuana”) with intent to deliver, in violation of § 961.41(1m)(h)1. (2005-06), each as a subsequent drug offense, in violation of WIS. STAT. § 961.48 (2005-06).¹ The presentence investigator recommended concurrent sentences of five to seven years with a three- to four-year period of initial confinement for the cocaine conviction, and five years with a three-year period of initial confinement for the marijuana conviction. The prosecutor recommended a total sentence for both offenses to consist of a five- to six-year period of initial confinement, and defense counsel recommended a two-year period of initial confinement followed by a lengthier unspecified period of extended supervision. The trial court imposed concurrent sentences of ten and five years, comprised of five- and three-year periods of initial confinement, resulting in essentially a ten-year aggregate sentence, comprised of five-year periods of initial confinement and extended supervision, and declared Evans eligible for the Challenge Incarceration Program after he served forty-two months of his initial confinement.

¶3 Evans was sentenced on November 14, 2006. On June 29, 2007, the Wisconsin Supreme Court decided *State v. Grady*, 2007 WI 81, ¶¶2, 29-45, 302

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

Wis. 2d 80, 734 N.W.2d 364, and held that a sentencing court has a mandatory obligation under WIS. STAT. § 973.017(2)(a) to consider the sentencing guidelines, satisfied when the transcript demonstrates that the guidelines were actually considered. The court concluded by stating: “[b]ecause our holding will require different practices by [trial] courts sentencing defendants, this decision will become effective for any sentencing occurring after September 1, 2007.” *Id.*, ¶45. On reconsideration, the supreme court clarified that for sentencing hearings held after September 1, 2007, the sentencing court’s compliance with this requirement must be determined solely from the record of the sentencing hearing. *See State v. Grady*, 2007 WI 125, ¶2, 305 Wis. 2d 65, 739 N.W.2d 488 (on reconsideration). The court further clarified that the prospective application of the above rule did not affect the other parts of the original opinion, and therefore “the opinion’s affirmation of ... the [trial] court’s duty under WIS. STAT. § 973.017(2)(a) to consider any applicable sentencing guidelines ... appl[ies] to all sentencing procedures, retroactively as well as prospectively.” *Grady*, 305 Wis. 2d 65, ¶2.

¶4 Possessing no more than one gram of cocaine with intent to deliver is among the offenses for which there were guidelines. The sentencing transcript does not include any specific reference to the guidelines. Consequently, Evans filed a postconviction motion for resentencing. The sentencing in this case occurred before September 1, 2007; thus, the trial court would have the opportunity to make a record on whether it considered the guidelines. *See Grady*, 302 Wis. 2d 80, ¶45.

¶5 In denying Evans’s resentencing motion, the trial court explained that

[a]lthough this court did not fill out the form with respect to the guidelines, it did consider the guidelines at the time of sentencing. The guidelines did not accurately reflect what the defendant was charged with, i.e. a second or subsequent offense, and therefore, the court did not fill out the forms. The court did, however, consider all of the factors as set forth in the guidelines when it sentenced the defendant. Resentencing is not warranted.

The trial court did not mention the guidelines when it imposed sentence, and Evans contends that this court should not rely on its postconviction claim that it had considered those guidelines.

¶6 The trial court did not expressly refer to the guidelines at sentencing. In its postconviction order, however, it stated that it had considered those guidelines, and had considered the same factors that are identified in the guidelines. We compare the trial court’s express sentencing considerations with those factors identified in the guidelines.

¶7 The first major category in the guidelines is the severity of the offense, including its characteristics, the defendant’s role, the aggravating factors, and the applicable penalty enhancers.² The trial court recited the amounts **(weight)** of cocaine and marijuana involved, Evans’s “desire to make some money,” **(dealing for profit)** accomplished by his “willing[ness] to go out and sell drugs,” and the effect of drug dealing, namely that “[d]rugs are [w]re[a]king havoc throughout our community **(extreme negative impact on neighborhood)**. They are destroying the lives of individuals, of families, of children. So many of the other crimes we see in court everyday are drug-related crimes.” The trial court was very careful to mention that “there [wa]s no indication that guns were used

² The bolded words and phrases are factors identified by the sentencing guidelines for convictions of offenses in violation of WIS. STAT. § 961.41(1m)(cm)1g.

here.” It did, however, emphasize the strong link between guns and drug dealing, and elaborate on the many violent scenarios that frequently occur as a result of drug dealing (**proximity to weapons and/or other drugs**). The trial court also emphasized the devastating effect drugs have on children; although it referenced Evans’s young child as an example, it did not say that Evans was dealing drugs to children (**vulnerability of intended recipient**).

¶8 The trial court did not consider whether possessing drugs was **to accommodate another person**, whether a **fortified drug house** was involved, whether Evans’s **conduct was more serious than the offense**, or whether Evans sold **drugs in exchange for sexual activity**. The trial court did not consider any of these aggravating factors; none of them were relevant to these convictions.

¶9 The trial court explained that, although it considered the guidelines when it sentenced Evans, it did not use the form because it did not accurately reflect that Evans was charged with these offenses as subsequent drug offenses, in violation of WIS. STAT. § 961.48. The guidelines do provide for penalty enhancers, particularly for repeat drug offenders, in violation of § 961.48. Nevertheless, at sentencing the trial court commented that Evans had committed a similar offense previously. The trial court explained to Evans at sentencing that “it’s an aggravated circumstance because you have a prior delivery of marijuana conviction in 2003. You were on probation at the time that this occurred. You’ve had resources from the juvenile system that ha[ve]n’t convinced you to turn your life around.”

¶10 The other major category of the guidelines involved risk factors. The trial court commented that Evans had not completed high school (**education**). The trial court did not address Evans’s **employment history**, or his **mental and**

physical health, although nothing favorable or remarkable has been mentioned. The trial court commented on Evans's prior history (**criminal record**), particularly because he was convicted of delivering marijuana while he was on probation for a recent drug conviction. The trial court was mindful that Evans had a young daughter, and referenced Evans's role as a father as a stark reminder of his responsibilities and of the dangers of drug dealing (**social factors**).³ The trial court was also aware of the resources that Evans had squandered in the juvenile system (**alcohol and drug abuse, prior treatment**).

¶11 The trial court is obliged to consider the relevant guidelines; it is not obliged to explain how each guideline fits the sentencing objectives and influences the sentence. *See Grady*, 302 Wis. 2d 80, ¶42. The trial court considered many of the same sentencing factors that are identified by the guidelines. The trial court addressed the seriousness of these offenses, explained the danger that drug dealing poses to the community, and commented on Evans's character and his background as a repeat drug offender. The sentencing transcript supports the trial court's postconviction explanation that it considered the sentencing guidelines. Under these circumstances, the *Grady* requisites were met. *See id.*

¶12 Evans contends that the trial court failed to consider his particular role in these offenses, to "analyze" the amounts of cocaine and marijuana involved, and to consider the sentencing recommendations of the prosecutor and defense counsel before it imposed sentence. Anticipating a harmless error

³ The trial court explained, "[a]nd if you don't sell drugs to kids, you sell them to their parents, and then their parents get addicted, and they don't take care of their children like your mother didn't take care of you."

analysis, Evans contends that these cumulative failures cannot be harmless, and that he is entitled to resentencing.

¶13 We recently held that failure to consider the sentencing guidelines may be harmless error. *See State v. Sherman*, 2008 WI App 57, ¶9, 310 Wis. 2d 248, 750 N.W.2d 500. “An error is harmless if it does not affect the defendant’s substantial rights. WIS. STAT. § 805.18. The defendant has the initial burden of proving an error occurred.” *Sherman*, 310 Wis. 2d 248, ¶8. Evans has not shown that the trial court’s failure to fill out the guidelines form, or consider the factors that it did not expressly mention in its sentencing remarks affected his substantial rights. Although the trial court is not bound by any of the sentencing recommendations, Evans was essentially sentenced consistent with the State’s negotiated recommendation of five to six years of initial confinement because the trial court imposed concurrent periods of initial confinement of five- and three-years. *See State v. Bizzle*, 222 Wis. 2d 100, 105-06 n.2, 585 N.W.2d 899 (Ct. App. 1998) (the trial court is not obliged to consider any of the sentencing recommendations, much less be bound by them). Evans has not shown that the trial court erred, much less that any alleged failure to consider the sentencing guidelines affected his substantial rights.

By the Court.—Judgment and order affirmed.

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

