

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 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. 2008AP2905

Cir. Ct. No. 2006CF63

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD S. MAYEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gerald S. Mayek appeals from a judgment convicting him of two counts of robbery with threat of force and from the order denying his motion for postconviction relief. He contends he is entitled to a new

sentencing hearing because the circuit court failed to consider the sentencing guidelines for robbery. We agree with the circuit court that in this case the failure to do so was harmless error. We affirm.

¶2 Mayek pleaded guilty to two counts of armed robbery for staging two bank robberies to support his crack cocaine habit. As part of the plea agreement, a charge of operating a vehicle without the owner's consent was dismissed and read in for sentencing.

¶3 At the April 2008 sentencing, the court first considered the seriousness of the offenses. The court noted that the robberies were “ordinary, intermediate, and neither particularly aggravated or mitigated,” and the read-in was “an additional separate and serious crime.” The court next considered Mayek's character. It remarked on his thirty-year criminal history, his cocaine addiction, the “accelerating” pace of offenses over the past decade, his probation failures and, over time, the serious nature of all of his uncharged but read-in offenses. Finally, the court considered the protection of the public. This consideration took “pole position” because Mayek's addiction continued and he had been in and out of jail and prison yet continued to offend, leaving the court doubtful that Mayek had any realistic prospects for rehabilitation. The court concluded that these intermediate-level crimes, with the aggravating factor of the read-in, called for the maximum sentence because “there is no realistic hope Mr. Mayek will quit victimizing the public if he has the opportunity.” Accordingly, the court imposed a fifteen-year sentence on each count—ten years' initial confinement and five years' extended supervision—but ordered them concurrent to each other and consecutive to previously imposed Milwaukee county sentences.

¶4 WISCONSIN STAT. § 973.017(2)(a) (2007-08)¹ provides that when sentencing a person convicted of a felony committed on or after February 1, 2003, the court “shall consider” the sentencing guidelines adopted by the sentencing commission created under 2001 Wis. Act 109. The court here did not.

¶5 Mayek filed a postconviction motion asserting that the circuit court’s failure to consider the guidelines entitled him to resentencing. The court conceded its legal error but concluded it was harmless because it did not interfere with Mayek’s due process rights to have a fair sentencing or prevent consideration of the proper factors. The court denied the motion, and Mayek appeals.

¶6 Mayek contends the failure to consider the guidelines is not harmless because if they had been considered, his sentence would have been less. He argues that even for an offender deemed high risk, the guidelines recommend three to seven and one-half years for an intermediate-level crime, which is how the court categorized his offenses. For several reasons, we are not persuaded.

¶7 A circuit court satisfies its WIS. STAT. § 973.017(2)(a) obligation when the sentencing hearing record demonstrates that the court actually considered the sentencing guidelines and so stated on the record. *State v. Grady*, 2007 WI 81, ¶3, 302 Wis. 2d 80, 734 N.W.2d 364. The failure to consider the sentencing guidelines may be harmless error, however. *See State v. Sherman*, 2008 WI App 57, ¶9, 310 Wis. 2d 248, 750 N.W.2d 500. An error is harmless if it

¹ WISCONSIN STAT. § 973.017(2), as well as § 973.017(10), cited *supra* in the text at ¶9, were repealed effective June 30, 2009. *See* 2009 Wis. Act 28, §§ 3386m, 3387m.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

does not affect the defendant's substantial rights. WIS. STAT. § 805.18 (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). We must be convinced beyond a reasonable doubt that the error was harmless. *State v. Hale*, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637. To determine harmless error, we review the totality of the circumstances. *State v. Harris*, 2008 WI 15, ¶48, 307 Wis. 2d 555, 745 N.W.2d 397.

¶8 The guidelines worksheet for robbery plots the severity of the offense against future risk of reoffending by assessing numerous factors and categorizing them as mitigating or aggravating. The court here considered these factors. It noted that the offenses were serious and increasing in frequency, that Mayek had a troubled youth, was a “career criminal” with a long-term cocaine addiction, had a poor support network, was out of trouble only when confined, had no realistic prospects of being rehabilitated and was highly likely to reoffend. Nothing in the transcript suggests to us that the court would have ordered a lesser sentence had it considered the guidelines’ sentencing recommendation.

¶9 Moreover, the guidelines’ recommendations are a guide, not a mandate. *See State v. Speer*, 176 Wis. 2d 1101, 1126, 501 N.W.2d 429 (1993). A court is not bound to adhere to them. *See Grady*, 302 Wis. 2d 80, ¶16; *see also* WIS. STAT. § 973.017(10). The court’s thorough and reasoned explanation of the sentence convinces us that Mayek’s substantial rights were not affected and that the error was harmless beyond a reasonable doubt.

By the Court.—Judgment and order affirmed.

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

