

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2010

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. 2009AP1602-CR

Cir. Ct. No. 2006CF477

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON M. PAVIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed.*

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

¶1 PER CURIAM. Aaron Pavin appeals from a judgment resentencing him¹ and from an order denying his motion challenging the new sentence.² The circuit court granted Pavin’s motion for a new sentencing hearing because it failed to consider the sentencing guidelines during the original sentencing. We affirm the judgment and order because the circuit court properly exercised its discretion at resentencing when it considered the original sentence, the sentencing guidelines and new information.

¶2 Pavin pled guilty to first-degree sexual assault while using a dangerous weapon. At the original sentencing, the circuit court noted that Pavin had prior sexual assault offenses as a juvenile, Pavin posed a threat to the community, the offense was severe (particularly, the planning and premeditation that went into the offense, the use of a weapon, the invasion of the victim’s home, and the terrorizing of the victim during the assault), previous sex offender treatment failed, and Pavin lacked remorse. Pavin also had mental health and some drug issues. The court found that incarceration was required due to the seriousness of the offense and the need to protect the public. The court imposed a thirty-five year sentence consisting of twenty years of initial confinement and fifteen years of extended supervision.

¶3 Pavin moved the circuit court for resentencing because the court did not consider the sentencing guidelines as required by WIS. STAT. § 973.017(2)(a), and *State v. Grady*, 2007 WI 81, ¶30, 302 Wis. 2d 80, 734 N.W.2d 364, *clarified*

¹ The judgment was entered in June 2008.

² The order denying Pavin’s WIS. STAT. RULE 809.30 (2007-08) motion was entered in June 2009. All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

on reconsideration, 2007 WI 125, 305 Wis. 2d 65, 739 N.W.2d 488. The circuit court agreed that it had not considered the sentencing guidelines and granted Pavin's motion for resentencing.

¶4 At the resentencing hearing, the circuit court stated that it had reviewed the sentencing guidelines. The State and Pavin then argued the significance of the guidelines for resentencing Pavin. Pavin expressed remorse for his conduct, which the court found to be sincere. The court stated that it reviewed the presentence investigation report, the defense presentence investigation report, Pavin's mother's statement, and the transcript of the original sentencing. The court found that its remarks at the original sentencing touched upon the considerations set out in the guidelines. The court did not see the need to repeat what was said at the original sentencing hearing, and the court incorporated those remarks into the resentencing proceeding. The court noted the severity of the offense, the need to protect the public, and Pavin's inability to control his impulses to the detriment of public safety. The court discussed the guidelines, found that the original sentence was appropriate, and resented Pavin to the previously imposed thirty-five year sentence.

¶5 Post-resentencing, Pavin sought relief under WIS. STAT. RULE 809.30 from the new sentence because the circuit court only inquired into the appropriateness of the original sentence and did not sentence Pavin anew. Pavin also claimed that he was abused as a child and this circumstance should have weighed more heavily in the circuit court's decision at resentencing.

¶6 The circuit court denied Pavin's challenge to his new sentence. The court noted that although it imposed the same sentence, it considered all appropriate factors in light of all of the information before the court, both at the

original sentencing and at resentencing. The court rejected Pavin's suggestion that information that he had been abused led the court to increase the sentence.

¶7 On appeal, Pavin argues that the resentencing proceeding was flawed because the circuit court should have started anew and not harkened back to any of its remarks at the original sentencing. The law does not require what Pavin suggests.

¶8 *Grady* holds that the sentencing court's obligation to consider the sentencing guidelines is satisfied "when the record of the sentencing hearing demonstrates that the court actually considered the sentencing guidelines and so stated on the record." *Grady*, 302 Wis. 2d 80, ¶30. In pre-September 2007 sentencings,³ the circuit court may supplement the record postconviction to show consideration of the guidelines. For such sentencings, the *Grady* court did not contemplate that a sentencing court would ignore the original sentencing and the rationale expressed at that time for the sentence. Rather, the *Grady* court spoke in terms of supplementing the record with consideration of the guidelines. The circuit court did that here after considering the original sentencing and the additional information presented at the resentencing, including the sentencing guidelines and Pavin's expression of remorse.

¶9 The circuit court's approach is sanctioned in *State v. Carter*, 208 Wis. 2d 142, 158, 560 N.W.2d 256 (1997) (at resentencing, the circuit court should consider all relevant information, including information of which the sentencing court was unaware at the original sentencing or that occurred after the

³ The original sentencing in this case occurred in October 2006.

original sentencing), and *State v. Setagord*, 211 Wis. 2d 397, 419-421, 565 N.W.2d 506 (1997) (supreme court approved circuit court's approach at resentencing: adopting comments from original sentencing, adding additional comments and considering sentencing factors). Because the court did not improperly weigh the sentencing factors at the original sentencing, it was reasonable for the court to consider its original sentencing remarks. *See id.* at 421-22.

¶10 Pavin argues that the circuit court considered the abuse he allegedly suffered as an aggravating factor or failed to consider it at all at sentencing. As to the former, the circuit court expressly denied that it had done so, and we do not see support in the record for Pavin's contention. As to the latter, the circuit court acknowledged Pavin's contention that he had experienced abuse, but the court weighed other factors more heavily at the resentencing (Pavin's past and present criminal conduct, the severity of the offense, and the risk to the public posed by Pavin).

¶11 Pavin makes far too much of the fact that the circuit court did not change his sentence on resentencing. The weight of the sentencing factors was within the circuit court's discretion. *State v. Steele*, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. The resentencing was a proper exercise of sentencing discretion. *See id.*, ¶9. The thirty-five year sentence was appropriate.

By the Court.—Judgment and order affirmed.

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

