

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 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. 2008AP1754-CR

Cir. Ct. No. 2004CF3372

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENDEL LABREN THOMAS,

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., Kessler and Brennan, JJ.

¶1 PER CURIAM. Kendel Labren Thomas appeals from a judgment of conviction for one count of armed robbery with use of force, as party to a crime, and from an order denying his motion for postconviction relief. Thomas argues he is entitled to resentencing because the circuit court failed to consider the

applicable sentencing guidelines. We conclude the court appropriately established its consideration of the guidelines. We therefore affirm the judgment and order.

¶2 In July 2004, Thomas was charged with armed robbery for breaking into a home that he and another had mistaken for a drug house. Thomas pled guilty and was sentenced to thirteen years' initial confinement and ten years' extended supervision out of a maximum possible forty years' imprisonment. In June 2008, he moved for resentencing.¹ Thomas alleged that the sentencing court had failed to fulfill its statutory duty under WIS. STAT. § 973.017(2)(a) (2003-04)² to consider sentencing guidelines for armed robbery. The circuit court denied the motion without a hearing, stating in its written order that “[a]lthough this court did not fill out the form with respect to the guidelines, it did consider *all of the factors as set forth in the guidelines* when it sentenced the defendant.” (Emphasis added.) Thomas appeals.

¶3 For felony offenses, “the court shall consider” applicable guidelines adopted by the sentencing commission or the criminal penalties study committee. WIS. STAT. § 973.017(2)(a). A sentencing court fulfills this obligation “when the record of the sentencing hearing demonstrates that the court actually considered the sentencing guidelines and so stated on the record.” *State v. Grady*, 2007 WI 81, ¶30, 302 Wis. 2d 80, 734 N.W.2d 364. However, *Grady* applies only prospectively. See *id.*, ¶45. Thus, for sentencing hearings on or prior to September 1, 2007, “supplementing the record with evidence beyond the

¹ Following a *habeas corpus* petition, we reinstated Thomas's appellate rights by order dated May 20, 2008.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

sentencing hearing” may establish that the court fulfilled its statutory duty, even if the court did not explicitly state at sentencing that it was considering the guidelines. *Id.*, ¶3.

¶4 Here, Thomas does not assert the court erroneously used its order to supplement the record. Indeed, he notes that if the postconviction court “had stated it had considered the guidelines at sentencing, it would have met its statutory obligation.” Instead, Thomas asserts that “considering ‘all of the factors as set forth in the guidelines’ is not the same as considering the guideline itself” and is insufficient to fulfill the court’s statutory burden.

¶5 Thomas’s argument is an exercise in semantics and he does not adequately explain what makes the “guideline itself” different from the “factors as set forth in the guidelines” here. *Grady* identified five sections to the temporary sentencing guideline for armed robbery:³ “offense severity assessment, risk assessment evaluation, armed robbery chart [which utilizes severity and likelihood of re-offense to suggest a sentencing range], adjustments to sentence indicated in chart, and imposition of sentence.” *Id.*, ¶40. On the worksheet, each of these sections identifies multiple considerations. That is, there are multiple factors set forth underlying the five sections constituting the guideline.

¶6 Thomas may be suggesting that the court, by referring to “factors,” meant sentencing factors which, while often overlapping, are technically separate from the guidelines. *See, e.g., State v. Gallion*, 2004 WI 42, ¶43, 270 Wis. 2d 535, 678 N.W.2d 197. If this is Thomas’s argument, however, it is

³ The temporary guidelines for armed robbery were also in effect when Thomas was sentenced.

underdeveloped. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (this court does not consider underdeveloped arguments). Further, such an argument is a strained reading of the court’s order, requiring us to overlook the court’s specific language. The court acknowledged that although it did not complete the guidelines worksheet,⁴ it nevertheless considered the factors as set forth by those guidelines. It is evident the court was attempting to express its compliance with its statutory obligation; we do not perceive an alternate interpretation of the court’s statement and *Grady* does not mandate “magic words.”⁵ *See Grady*, 302 Wis. 2d 80, ¶34.

By the Court.—Judgment and order affirmed.

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

⁴ Completion of the worksheet is not required to demonstrate consideration of the guidelines. *State v. Grady*, 2007 WI 81, ¶38, 302 Wis. 2d 80, 734 N.W.2d 364.

⁵ Alternatively, we would hold there is harmless error, as Thomas has not attempted to demonstrate the likelihood of a different result following remand. *See State v. Harvey*, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189.

