

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 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. 2007AP1566-CR

Cir. Ct. No. 2005CF954

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TODD W. CHARLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Todd W. Charles appeals a judgment sentencing him to sixteen years' initial confinement and sixteen years' extended supervision for first-degree reckless homicide. He also appeals an order denying his postconviction motion for a new sentencing hearing in which he alleged: (1) the

presentence investigation report (PSI) contained inaccurate information; (2) the PSI violated his due process rights because it demonstrated bias by its author; (3) the PSI author's focus on Charles' writings violated his First Amendment rights; and (4) the sentence was unduly harsh and essentially punishes Charles for suffering from a mental disorder. The trial court denied the motion without a hearing and without stating any reasons. Because we conclude the issues relating to the PSI are not properly preserved and none of the issues are meritorious, we affirm the judgment and order.

¶2 During a fight with his best friend, Scott Lemerond, Charles reached in a drawer, pulled out a barbeque fork and stabbed Lemerond in the heart. Charles pled no contest to first-degree reckless homicide. The criminal complaint served as the factual basis for the plea. At sentencing, the court considered the PSI which recited various witnesses' accounts of the incident, Charles' version, and discussed a book or journal Charles wrote that depicts violence and sexual degradation. The PSI also recites Charles' acquaintances' description of his employment record, substance abuse, hygiene problems and his obsessive collection of skulls and bones. The PSI says Charles maintained a relationship with sexual killer Richard Ramierz, whom he was introduced to by another "serial killer groupie." The PSI also noted Charles had been diagnosed with a variety of autism. Much of the report mirrors a report submitted by the defense, authored by Dr. Robert Gordon. The court also considered a written memorandum from defense counsel that discussed Charles notebook/journal. The PSI reflects the strong emotions, fear and disgust expressed by Lemerond's friends and family.

¶3 The trial court stated no reason for denying Charles' motion without a hearing. When faced with inadequate findings, this court may review the record and affirm the trial court's decision if the evidence supports its judgment. *State v.*

Lloyd, 104 Wis. 2d 49, 54-55, 310 N.W.2d 617 (Ct. App. 1981). When reviewing a discretionary decision, we may independently review the record to look for reasons to support the court's exercise of discretion. *Wolnak v. Cardiovascular & Thoracic Surgeons*, 2005 WI App 217, ¶55, 287 Wis. 2d 560, 706 N.W.2d 667.

¶4 Our review of the record confirms the trial court's conclusion that Charles' postconviction motion states no grounds for resentencing. To be sufficient, the motion must allege sufficient facts that, if true, entitle him to relief. The court may deny a motion without a hearing if the record conclusively demonstrates the defendant is not entitled to relief. *See State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

¶5 Charles' postconviction motion does not establish a basis for resentencing for several reasons. First, his claims that he was sentenced on inaccurate information and that the PSI author was biased was not properly preserved for appeal. He did not object at the sentencing hearing to any perceived error in the PSI or any bias by its author. Therefore, these issues are waived. *See State v. Johnson*, 148 Wis. 2d 458, 470, 463 N.W.2d 352 (Ct. App. 1990). In addition, the motion does not identify specific erroneous information the trial court utilized in reaching its sentencing decision. *See State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

¶6 Charles itemizes eleven facts that he contends are erroneous and that the sentencing court relied upon. First, he argues the PSI incorrectly described the details of the fight that led to Lemerond's death. The PSI describes the crime as it was described in the complaint that served as the factual basis for the plea. In addition, the sentencing court was not concerned with the specifics of how Charles used the weapon. It recognized that Charles did not intend to kill his victim.

Rather, it focused on the reckless nature of his conduct. The motion does not establish inaccurate information or that the trial court relied on that information.

¶7 Charles' second allegation involves the conclusion "He cannot adequately explain the reason he sought the weapon." Charles argues he repeatedly explained his behavior. Whether that explanation was "adequate" is a subjective question and the PSI's conclusion is not inaccurate.

¶8 Charles' third allegation is that the PSI incorrectly indicated he had a history of defecating in public. That information comes directly from Dr. Gordon's report and was confirmed by Charles' mother. The court did not mention that factor at sentencing.

¶9 Fourth, Charles alleges that the PSI failed to connect Charles' Asperger's Syndrome to his unusual collection, his writings and his inability to communicate with others. The PSI included diagnosis from two psychological evaluations. The court was informed of Charles' Asperger's Syndrome in Dr. Gordon's evaluation. Charles identifies no inaccurate information regarding Asperger's Syndrome.

¶10 Charles' fifth allegation is that the PSI leaves the impression he was unreliable and a lazy employee who was frequently fired because of drug use. Dr. Gordon's evaluation contained similar facts, and Charles' own explanation of his work history is consistent with that assessment.

¶11 Sixth, Charles alleges that the PSI misrepresented that landlords were not willing to tolerate the smells emanating from apartments Charles rented and that he suffered from poor hygiene. That information was also available in

Dr. Gordon's evaluation and from Charles' mother. The court did not mention Charles' history as a tenant at sentencing.

¶12 Charles' seventh and eighth allegations involve the PSI's comments about his writings. The report describes the writings as "the work products or statements of psychopaths." The PSI suggests Charles suffers from a number of paraphilia and "sexually arousing obsessions to a deviant mindset." The report did not label him as a psychopath or diagnose him with any paraphilia. Rather, the report only included the diagnosis of Dr. Gordon and another psychologist. It noted Charles' denial that he was aroused by his written descriptions of sexually assaulting and killing children, adults and animals. The PSI reflects its author's subjective impressions that are clearly differentiated from facts and medical diagnosis. The sentencing court clearly relied on Dr. Gordon's evaluation regarding Charles' mental health.

¶13 Charles' ninth allegation of incorrect information that affected his sentence consists of the PSI statement that "His fantasies were creations of his will and control, thus stage managing murder." The PSI compared Charles' writings to those of Jeffrey Dahmer and other "serial lust killers." The report did not say that Charles actually "stage managed" a murder or that he was a serial lust killer. The comment refers to the character Charles played in his writing and how Charles enjoyed the expression on other people's faces when they reviewed his work product. The PSI clarified that Charles indicated he had no desire to act on any of his contrivances or fantasies. The court specifically acknowledged that Charles did not intentionally kill his friend and did not plan the fight.

¶14 Charles' tenth allegation is that the PSI erroneously stated his book has an image of "his sister's face and upper torso superimposed with a naked,

shaved vagina of a ‘lean’ female.” The image was actually of Charles’ former girlfriend. The PSI stated “There is no information that he engaged in incest.” The sentencing court did not mention the picture and there is no reason to believe it or any allegation of incest fantasies affected the sentence.

¶15 Charles’ eleventh allegation involving the PSI relates to a statement that he “may have had anal sex with a minor.” The PSI merely repeats an allegation made by another source. There is no reason to believe the information is false. In addition, neither the circuit court nor the parties mentioned it at the sentencing hearing.

¶16 Charles’ argument that the PSI demonstrated bias by its author entitles him to no relief. To succeed on a claim of bias, Charles must demonstrate actual bias in the PSI writer and that the sentencing was influenced by that bias. *See Tjepelman*, 291 Wis. 2d 179, ¶31. Charles’ motion does not allege any preconceived knowledge or opinion by the PSI author. If investigation results in negative feelings toward a defendant, those feelings are not properly considered “bias.”

¶17 The PSI repeated a statement from Lemerond’s girlfriend that she “always believed [he] would kill someone.” Charles complains that the PSI author talked to Lemerond’s son, daughter, mother, girlfriend and two sisters, but only talked to one member of his family. He argues the PSI asserted he “trivialized” his past misdemeanor convictions, and the PSI focused on his skulls and bones collection without attributing them to his Asperger’s Syndrome. He also argues that the PSI manifested an obsession with his sexual behavior and interest in pornography even though he was not charged with a sex crime. Finally, he contends the PSI author was biased as was shown by his recommendation that

Charles' book be burned and the ashes sent to him. The comment about burning the journal reflects Lemerond's girlfriend's statement that she would like it destroyed. The trial court called the PSI author on that statement and it was withdrawn. The remaining statements do not arguably demonstrate actual bias. In addition, much of this information was also presented in Charles' sentencing memorandum and the report from Dr. Gordon. The court considered twenty-four letters submitted on Charles' behalf. The sentencing proceedings cannot be fairly described as one-sided.

¶18 Finally, nothing in the record supports Charles' arguments that his sentence punished him for his writings in violation of his First Amendment rights or that his sentence punishes him for his mental illness. The court emphasized the limited relevance of Charles' writings and made clear it was only sentencing Charles for first-degree reckless homicide. The information regarding Asperger's Syndrome appended to the postconviction motion does not substantially mitigate the offense.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

