COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1276-CR **Cir. Ct. No. 2006CF35**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT M. GALVIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

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

¶1 NEUBAUER, J. Robert M. Galvin appeals from a judgment of conviction for hit and run causing great bodily harm contrary to WIS. STAT.

§ 346.67(1)[1] and a trial court order denying his postconviction motion for resentencing. Galvin contends the presentence investigation report (PSI) author's review of the district attorney's confidential work product file resulted in bias, causing the author to include inaccurate information in the PSI. Galvin argues that his due process rights were violated when the trial court then sentenced him based on that inaccurate information. Galvin argues that the PSI author's review and recommendation resulted in a breach of the plea agreement. Galvin further argues that he is entitled to a new sentencing in the interests of justice due to the improper communication of the district attorney's notes. We reject Galvin's arguments.

¶2 We uphold the trial court's finding that the PSI writer was not biased, and we conclude that the trial court did not rely on inaccurate information in sentencing Galvin. We conclude that the information imparted to the PSI author by the district attorney's office does not warrant a new sentencing in the interest of justice and that there was no breach of the plea agreement. We affirm the judgment of conviction and the trial court order denying Galvin's postconviction motion for resentencing.

BACKGROUND

¶3 On January 18, 2006, the State filed a criminal complaint against Galvin alleging hit and run causing great bodily harm, obstructing an officer, and first-offense operating after revocation (OAR). The charges stemmed from an accident that occurred on November 18, 2005. Galvin's truck was found at the scene and he was later identified by a witness as having been the driver involved.

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

The witness observed Galvin exit the vehicle, throw unopened beer cans into a ditch, and then walk away from the scene. The driver of the other vehicle involved suffered serious injuries to his leg. The police did not have contact with Galvin until Galvin called the Kenosha sheriff's department on November 20, 2005, to discuss the hit-and-run accident and to explain that another man had been driving his vehicle at the time of the accident.

¶4 The notes from the arraignment hearing on March 21, 2006, reflect that Galvin pled not guilty to the charges and that "[t]he State's offer is extended until the PTC," or pretrial conference. Following negotiations at two subsequent pretrial conferences, on June 7, 2006, Galvin pled no contest to the charge of hit and run causing great bodily injury and the other charges were dismissed. Galvin's counsel represented that "at the time of sentencing the State will be making a recommendation of probation, free on length of probation and conditions of probation. However, they will cap any jail recommendation at 30 days. The defense is free to argue." The trial court ordered a presentence investigation which was completed on July 18, 2006. The PSI author recommended that Galvin "be imprisoned for a period of 3 to 4 years" followed by "2 to 3 years [of] extended supervision."

¶5 On September 25, 2006, the circuit court entered a corrected judgment of conviction[2] sentencing Galvin to three years in prison followed by five years of extended supervision for a total sentence length of eight years.

[2] The original judgment of conviction entered on August 15, 2006, provided for seven years of extended supervision which exceeded the sentencing maximum of five years of extended supervision for a Class E felony.

¶6 On March 23, 2007, Galvin filed a motion for resentencing requesting the preparation of a new presentence report by an independent and neutral agent in a different county followed by a resentencing in front of a different judge. In support of his motion, Galvin alleged that when his appellate counsel reviewed his file at the Division of Community Corrections, his counsel "discovered that the PSI author relied on work product of the District Attorney's Office when preparing the PSI … includ[ing] notes from Assistant District Attorney Shelly Rusch stating, 'this guy is scum' and 'this guy needs a high felony and to go to prison for a long time.'"[3] None of these comments were explicitly repeated in the PSI report. Nevertheless, Galvin alleged that, in light of the PSI writer's "obvious bias" in filling out the PSI Risk Assessment sheet[4] and in dedicating more than a page of the report to his ex-wife's comments, the district

[3] Galvin's motion contained a summary of the notes in the district attorney's file provided from memory. The handwritten notes made by various individuals included:

> [Defendant] is scumbucket obviously driving drunk—causes accident + great bodily harm to 17-yr. old kid—jumps out of his truck & dumps his beer cans + runs—2 days later—after BAC down—he contacts [Kenosha sheriff's department] and lies.
>
> [T]he gear I'm in is Felony—High.
>
> Very worried about this [defendant] getting prison.

[4] The Risk Assessment sheet was described by the PSI author at the postconviction hearing:

> [I]t's a tool that's been implemented…. [T]here's several questions here and then each question gets a score and then the score is totaled. We do it on the computer and then it gives basically the risk of recidivism whether it be low, medium or high. Then you cross reference the level of recidivism or risk with the type of felony and that then indicates to the presentence writer where the recommendation should be, whether it be a probation recommendation or it could be a probation or prison recommendation or it's a prison recommendation in and of itself.

attorney office's "inflammatory ex parte communication" contributed to the recommendation of prison instead of probation.

¶7 The court held a motion hearing on May 4, 2007, at which the presentence investigator testified. The court found that the PSI author was not biased and that the trial court had not relied on any inaccurate information provided in the PSI report in sentencing Galvin. The court found that there was no breach of the plea agreement. The court denied Galvin's motion for resentencing and entered an order to that effect on May 28, 2007. Galvin appeals.

DISCUSSION

¶8 Galvin's appellate argument again focuses on the bias of the presentence investigator which he argues resulted from the provision of the district attorney's notes. Galvin argues that the bias resulted in the presentation of inaccurate and embellished information in the PSI, violating his due process right to a fair sentencing hearing.

1. Disclosure of the District Attorney's Work Product File and Breach of the Plea Agreement

¶9 Galvin requests resentencing in the interests of justice pursuant to WIS. STAT. § 752.35.[5] He contends that the sharing of the district attorney's work

[5] WISCONSIN STAT. § 752.35 provides:

(continued)

product notes from Galvin's file with the Division of Community Corrections gave rise to a miscarriage of justice. He also contends that the district attorney expressed a sentencing desire in breach of the plea agreement. The PSI writer in this case testified that it is standard procedure for the district attorney's office to provide their file to the PSI writer and she is not aware that any editing or purging of the file is done. She also testified that she would have seen the notes left by the district attorney in this case, although she did not have a specific memory of reading them. The notes included, among other things, a district attorney's opinion that Galvin was a "scumbucket" who was "obviously driving drunk," and a mention of a "high felony."

¶10 Galvin cites to ***State v. Perez***, 170 Wis. 2d 130, 140, 487 N.W.2d 630 (Ct. App. 1992), in which we explained that "[t]o safeguard the accuracy of the PSI, the probation and parole agent preparing the report must be neutral and independent of either the prosecution or the defense." Galvin argues that there was "absolutely no insulation of the PSI writer … in the present case" as the PSI writer was exposed to the "uncensored thoughts and opinions" of the district attorney's office, including those thoughts and opinions underlying the plea deal.

Discretionary reversal. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

¶11 The State contends that the PSI author can have contact with the prosecutors in gathering information for the PSI and there is no requirement that the information provided be shared with others. The presentence investigation report is governed by WIS. STAT. § 972.15 and WIS. ADMIN. CODE § DOC 328.27 (Dec. 2006). Pursuant to § 972.15(2m), "The person preparing the report may ask any appropriate person for information." The PSI writer may obtain input from the defense, the prosecution, and the victim. *See* ***State v. Howland***, 2003 WI App 104, ¶34, 264 Wis. 2d 279, 663 N.W.2d 340; ***State v. Suchocki***, 208 Wis. 2d 509, 519, 561 N.W.2d 332 (Ct. App. 1997), *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. Pursuant to § DOC 328.29(1)(a), "All sources of information relied upon for an investigation and report shall be identified in writing in the presentence report unless otherwise ordered …." When the court receives the presentence investigation report, "the judge shall disclose the contents of the report to the defendant's attorney and to the district attorney prior to sentencing." Sec. 972.15(2). The defendant may contest any of the factual matters in the PSI with a hearing where evidence may be presented regarding the issue in controversy by the state or the defendant. ***Suchocki***, 208 Wis. 2d at 515; s*ee also* ***Perez***, 170 Wis. 2d at 141.

¶12 Galvin relies on our decision in ***Howland*** to support his argument that the PSI writer's access to the district attorney's notes gave rise to a miscarriage of justice and effected a breach of the plea agreement. The issue in ***Howland*** was whether the district attorney's office's contact with the probation and parole office to complain about an agent's recommendation for probation instead of incarceration constituted a material breach of the plea agreement. ***Howland,*** 264 Wis. 2d 279, ¶1. The terms of the plea agreement included a provision that the state would make no specific sentence recommendation. ***Id.***, ¶2.

Following the complaints of the district attorney's office, an amended PSI was submitted recommending incarceration. ***Id***., ¶1.

¶13 The communications in ***Howland*** consisted of (1) a conversation between the assistant regional chief for the Division of Community Corrections and the Kenosha county deputy district attorney following a community meeting at which the district attorney indicated that her office had an issue with the PSI and that she would be in contact; (2) a conversation between a probation and parole agent, who was in the district attorney's office copying files for other cases, and the Kenosha county district attorney during which the district attorney commented on the appropriateness of the PSI recommendation; and (3) a conference call with the assistant regional chief for the Division of Community Corrections initiated by the deputy district attorney, also involving the district attorney and assistant district attorney. ***Id.***, ¶¶7, 10, 12.

¶14 This court in ***Howland*** found that the prosecutor's repeated complaints to the Division of Community Corrections constituted an "end run" around the no-sentence recommendation of the plea agreement. ***Id***., ¶31. Here, the act of leaving attorney notes in the Kenosha county district attorney's file is simply not comparable to the active lobbying to change the PSI recommendation in ***Howland***. The direct communications in ***Howland*** followed the initial PSI recommendation and ran contrary to the plea agreement pursuant to which the State would make no sentencing recommendation. ***Id***., ¶2. In this case, we have no indication that the district attorney's office was attempting to influence the PSI writer in a direction contrary to the plea agreement.

¶15 As the trial court found, the State lived up to the plea agreement at the sentencing hearing and the comments in the district attorney's notes did not

reflect a "concrete indication" that the State's position was contrary to the plea agreement. As we discuss below, the record supports the trial court's finding that the comments did not result in bias by the PSI writer or a sentencing based on inaccurate information. We therefore reject Galvin's request for resentencing based on the disclosure of the district attorney's work product.

¶16 We do however, take this opportunity to question the practice—if it is ongoing—of providing the PSI author with the district attorney's confidential work product and echo the trial court's concern that it could be used as an end run around a plea agreement. With respect to this procedure, the trial court noted the logistical and procedural issues that could arise from continuing a practice where the PSI writer has access to the district attorney's entire file, including its work product, stating: "I don't see how their work product has any real relevancy to the preparation of a presentence report." If this is in fact a continuing practice, we likewise fail to see why the district attorney's work product is left in a file accessed by the PSI author.

¶17 The importance of the PSI to the sentencing process is well established.

> The securing of a PSI is an integral part of the sentencing function and is solely within the judicial function. The purpose of a PSI is to assist the judge in selecting the appropriate sentence for the individual defendant. The Division of Community Corrections does not function as an agent of either the State or the defense in fulfilling its role but as an agent of the trial court in gathering information relating to a specific defendant.

Howland, 264 Wis. 2d 279, ¶32 (citations omitted). "The integrity of the sentencing process requires that the PSI be accurate, reliable and objective." ***Suchocki***, 208 Wis. 2d at 518. We therefore caution district attorneys to review

whether this is in fact a practice within their department and the wisdom of continuing this practice in the future.

2. *Alleged Bias of the PSI Writer and Reliance on Inaccurate Information*

¶18 We next turn to Galvin's contention that the PSI writer became biased as a result of the district attorney's notes in the defendant's file and that her bias resulted in the presentation of inaccurate and embellished information in the PSI violating his due process right to a fair sentencing hearing.

¶19 When claiming bias taints a PSI, the defendant must demonstrate that the writer actually was biased, resulting in inaccurate information, and, second, that the sentencing court actually relied on inaccurate information. ***Tiepleman***, 291 Wis. 2d 179, ¶31.

¶20 Whether the PSI writer was biased against Galvin presents a mixed question of law and fact. *See* ***Suchocki***, 208 Wis. 2d at 515. When reviewing mixed questions, the trial court's factual findings relevant to the issue will not be reversed on appeal unless clearly erroneous. ***Id***. However, propositions of law applied to these factual findings are applied without deference to the trial court's determination. ***Id***.

¶21 Galvin points to two aspects of the PSI that indicate a bias on the part of the PSI writer: (1) the PSI author's answers on the Risk Assessment form placed Galvin in the category of "medium risk to reoffend", and (2) the PSI author devoted one and one-half pages to the statements of Galvin's ex-wife.

¶22 On the Risk Assessment form, the PSI author scored Galvin a "2" for having a change of address within the last twelve months based on his incarceration for four days. The author also characterized Galvin as a "frequent

abuser of alcohol with serious disruption," which Galvin argues is inconsistent with his award of primary placement of his children and his employment at Abbott Laboratories since 1991. Finally, the author characterized Galvin's attitude as "rationalize[d] behavior, negative; not motivated to change." Based in part on these scores, Galvin fell into the "medium risk to reoffend" category on the Risk Assessment form.

¶23 After hearing the testimony of Galvin's PSI author at the postconviction motion hearing, the trial court found that the PSI author's explanations for the scores on the Risk Assessment form were rational and not evidencing of bias. The court stated:

> The testimony in this case, first of all, as relates to the scoring grid doesn't demonstrate to the Court that there was a bias presented, at least into that where rational and reasonable explanations given how the score was arrived at. For example, if you have two prior OVWI convictions you automatically hit a number four. She came out and she gave good explanations as to how it was calculated. The residence aspect, whenever you're out of the home whether it's one day, two days, et cetera, for any type of incarceration that can bring you up to another number plus other things. So I don't see any inaccuracy there or demonstrated bias where she tried to pad it so to speak.

While the PSI author had arrived at a recommendation of prison as opposed to probation, the court noted her testimony that "she chose prison giving the reasons for it, primarily based on the seriousness of the injuries to the victim in terms of the offense which she said weighed heavily in terms of her recommendation." The court also noted the PSI author's testimony that part of her determination was based "on her observations of the defendant as to his attitude and demeanor while at the Department of Probation and Parole."

¶24 The court's findings as to the PSI author's responses on the Risk Assessment form are supported by the author's testimony. With respect to the address changes, the PSI author testified that when completing the Risk Assessment form, the "scoring guide" instructs that if the defendant has had a period of jail confinement in the past twelve months then it would "rank as a two." As to Galvin's alcohol issues, the PSI author testified that if a defendant has two or more OWI convictions, he or she will rank as a "four." Finally, with respect to attitude and the author's score of "five," the author testified that the score was based on several factors: (1) her impression that he was evasive, (2) he had an arrogant demeanor and was hostile during the interview, and (3) her impression that he was not completely truthful. These factors warranted a score of five, the highest score possible for attitude.

¶25 We conclude that the trial court's finding with regard to the PSI author's lack of bias in preparing the risk assessment is supported by the record and as such is not clearly erroneous. Two of the challenged scores were supported by the scoring instructions, and the third was supported by the PSI writer's testimony at the postconviction hearing. Because Galvin has not shown that the author was biased in preparing the risk assessment, we need not consider whether the sentencing court actually relied on inaccurate information.

¶26 We next turn to whether the PSI author's inclusion of Galvin's ex-wife's statements were motivated by bias and resulted in the trial court sentencing Galvin on inaccurate information in violation of his due process rights. The court did not address Galvin's argument as to bias, but instead addressed whether any alleged bias or inaccuracies had influenced the sentencing procedure. We focus our inquiry on whether the trial court actually relied on the inaccurate information in the sentencing.

¶27 A defendant has a constitutionally protected due process right to be sentenced upon accurate information. ***Tiepelman***, 291 Wis. 2d 179, ¶9. Whether this right has been denied is a constitutional issue that we review de novo. ***Id***. "A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing 'must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.'" ***Id***., ¶26 (citing ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998)). Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless. ***Tiepelman***, 291 Wis. 2d 179, ¶26. The test for actual reliance is "whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (citing ***United States ex rel. Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

¶28 At the postconviction motion hearing, the trial court stated that it had relied on Galvin's ex-wife's statements for "the fact that the spouse gave some corroboration as to the drinking problem. I don't see that as inaccurate information." The court referenced its earlier statements at the sentencing hearing that it had "no illusions concerning [Galvin's] soon to be ex-wife as to statements she made to the presentence writer, whether it's about domestic abuse, whether it's about how the marriage went and all the other things…. I haven't given any weight to except one thing and that is corroborated, that is the statement that you have an alcohol problem."

¶29 At the sentencing hearing, Galvin's counsel refuted many of the statements made by Galvin's ex-wife in the PSI report; however, her statement as to an alcohol problem was not refuted. Galvin's counsel stated: "[H]e's had two priors so clearly there's an alcohol problem …. There's no question in my mind

that he is in … desperate need of some alcohol counseling…. [O]ne sign of the problem is the denial."

¶30 Given the trial court's statement that it did not rely on any information in the PSI report which was provided by Galvin's ex-wife, with the exception of the general assertion that Galvin has an alcohol problem and the concession by Galvin's attorney at sentencing that the alcohol problem was in fact an issue, we conclude that the inclusion of Galvin's ex-wife's statements in the PSI report did not result in a sentence based on inaccurate information.

CONCLUSION

¶31 We conclude that Galvin is not entitled to resentencing in the interests of justice. We further uphold the trial court's finding that the PSI writer was not biased and there was no breach of the plea agreement. Finally, we are satisfied that the sentencing court did not rely upon inaccurate information when sentencing Galvin. We therefore affirm the judgment and the trial court's order denying his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.