COURT OF APPEALS DECISION DATED AND FILED

September 29, 2010

A. John Voelker
Acting 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. 2009AP1347-CR

Cir. Ct. No. 2007CF65

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTINE L. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Christine L. Williams appeals from a judgment convicting her of one count of child neglect resulting in death and three counts of forgery and from an order denying her postconviction motion for resentencing.

Williams contends that her sentence—longer than either side recommended—resulted from the trial court's reliance on numerous inaccuracies in the presentence investigation report (PSI) which collectively skewed the court's impression of her conduct and character. Because Williams fails to establish that any of the complained-of information was materially inaccurate, we affirm the judgment and order.

¶2 In September 2003, Williams' five-month-old daughter, Kora, died from aspirating formula while drinking a bottle in her crib. The matter was investigated but no charges were filed at the time. The investigation was reopened in 2005 when Williams' second child, five-month-old Zoey, became the subject of a CHIPS petition due to allegations of maltreatment/neglect. As a result of the investigation, the Green Lake county district attorney filed a criminal complaint in April 2007 charging Williams with one count of child neglect resulting in death. The basis of the complaint was that Williams had put Kora in the crib with her bottle and placed pillows on either side of the baby so she could not roll over. When police arrived, they found Kora "wedged" between the pillows with the bottle apparently propped on pillows or held in place by a sash tied to the crib.

¶3 Williams consented to consolidating fourteen unrelated Waushara county felony forgery charges with the case.[1] She entered no-contest pleas to the neglect charge and to three of the forgery counts; the remaining forgery counts were dismissed and read in for sentencing and restitution. On the neglect charge, the parties agreed that each would be free to argue sentence length with the State

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[1] Williams forged fourteen checks at Green Lake and Waushara county bars and restaurants in December 2006. The sentence on the forgery charges is not at issue on this appeal.

free to argue for up to the twenty-five-year maximum, and to ask that the sentence be imposed and stayed. Both sides also agreed to six years' conditional probation. A PSI was ordered.

¶4 The PSI writer did not cast Williams in a very favorable light. He opined that she appeared not to have a "normal" mother's attachment to her children and lacked "any normal response emotionally" to Kora's death. The report touched on Williams' abusive childhood and noted that her follow-through with treatment for her recently diagnosed depression and bi-polarity was sporadic.

¶5 The PSI writer stated that Williams told him she had read through the criminal complaint and agreed with its contents. The PSI repeated items from the complaint, among them that Williams watched a movie while being questioned on the day Kora died and, at the detective's request to turn it off, lowered the volume but continued watching. It also noted that Williams told the detective in the reopened inquiry that the hospital provided her with no infant care information and that she used stuffed animals to prop Kora's bottle.

¶6 The PSI also described a statement Debra Swadish, Williams' aunt, gave to police in the first investigation. According to the statement, Swadish said she told Williams to consider letting her adopt Kora after Williams told Swadish she "hated being a mother." On June 25, 2003, Williams left two-month-old Kora in her care. On July 4, Swadish "began to wonder" where Williams was and suspected that she went to Florida. Swadish tracked her down and learned she was with Kora's father. They picked Kora up on July 6.

¶7 The PSI described a similar incident where Williams went to Florida and left Zoey with a friend without making suitable arrangements, "[s]eemingly as

though she left the child in a basket and rang the door bell and left quickly." The PSI writer opined in the "Agent's Impressions" section:

> Christine Williams does not appear to have any attachment to her children like a normal mother would. Child nurturing is inherent in all humans and animals and it is glaringly apparent that Christine Williams lacks this ability. In fact, any human being other that Christine Williams would seem to have more innate nurturing capabilities for any child than she does her own. To her[,] child nurturing, child care[,] is a burden.

In contrast to the imposed-and-stayed sentences the parties requested, the PSI recommended five to seven years' initial confinement and three to four years' extended supervision.

¶8 At sentencing, the court asked if there were any corrections to the PSI. The State noted four "essentially typographic corrections." Defense counsel indicated she had reviewed the PSI with Williams and that they "noted some of the same corrections." She added that they had no additional corrections, but had "some updates" they would cover in the sentencing argument.

¶9 Defense counsel offered these "updates." She stated that the PSI writer's broad assumptions and conclusions about the presence or depth of Williams' "normal" nurturing instincts failed to consider Williams' difficult childhood and her own mental health issues. She pointed out that Williams' father was absent, her abusive, bi-polar mother died when Williams was sixteen, and she gave birth to Kora when she was eighteen. Counsel also noted that the PSI interview occurred on the heels of terminating her parental rights to Zoey and just three days after giving birth to her third child.

¶10 The court then made its comments. It stated that it had read the PSI and the criminal complaint, listened to the victim impact statements and the

arguments of counsel, and "ponder[ed]" what had been said. Addressing the three felony forgeries first, the court noted that each carried a potential six-year penalty:

> All of that for $982 worth of bad checks written primarily for the purpose of your own entertainment…. We can diminish the significance of the forgeries, but the exposures to 18 years in prison for food and drink totaling $982 is just yet a further example of the degree of responsibility that you've chosen to accept in your life. You can say a lot about the neglect charge occurring a while back, but the forgery charges occurred … approximately a year ago. So there's no question, from whatever source we go for confirmation, that your ability to make good decisions is certainly questionable.

¶11 Turning its attention to the charge of neglect of a child causing death, the court observed that "neglect" "suggest[s] something pretty benign … [b]ut when we address the rest of it, causing the death of a child, that's criminal neglect." The court expressed its dismay that "[m]ost everything I heard was about you, and yet we are here because a 5-month-old baby died." It continued:

> So what I heard about you was primarily that due to perhaps some mental health issues, some challenges that you may have faced as a child growing up, should be taken into account and should rationalize, possibly justify, possibly even excuse the fact that you lacked the skills to be a mother who would safeguard and protect her baby. I find all of that incomprehensible. Motherhood, by its very nature, definition, as alluded to in the [PSI], brings with it some natural or presumptively natural bonding and protective characteristics.

¶12 The court found it necessary to "significantly deviat[e]" from the parties' sentencing recommendations. It imposed a thirteen-year prison term, bifurcated as seven years' initial confinement and six years' extended supervision.

¶13 Williams moved postconviction for resentencing or sentence modification alleging inaccuracies in the PSI.[2] She argued that the sentencing court relied on the PSI's incorrect implications and conclusions about her character and conduct and about "normal" mothering instincts. Specifically, Williams sought to show that she never had been instructed about the dangers of bottle-propping, to challenge the assumption that its hazards are commonly known, to dispute suggestions in the PSI and complaint that she tied, rather than propped, the bottle to hold it in place, and to show that she did not "abandon" Kora and Zoey when she left the babies with others.

¶14 The trial court disagreed that it relied on the alleged inaccuracies. Noting that it had read "many, many dozens" of PSIs over the years, the court stated that to accept without question everything in a PSI would be to abdicate its judicial responsibilities to the PSI writer. The court noted that it tests the accuracy of PSI statements against other sources of information and once more at the sentencing hearing where the two sides can address any inaccuracies or differing viewpoints. The court concluded that here any claimed inaccuracies were "not a factor or at least not a significant factor" in its consideration. It denied Williams' motion, and she appeals.[3]

¶15 A defendant has a due process right to be sentenced upon materially accurate information. ***State v. Spears***, 227 Wis. 2d 495, 508, 596 N.W.2d 375

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[2] Williams later affirmatively abandoned the sentence modification request.

[3] The trial court granted the State's request under WIS. STAT. § 972.15(4) to obtain a copy of the PSI and disclose its contents in the State's brief. *See* ***State v. Parent***, 2006 WI 132, ¶50, 298 Wis. 2d 63, 725 N.W.2d 915.

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

(1999). To establish a due process violation, the defendant must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. If the defendant is successful, the burden shifts to the State to show that the inaccuracy was harmless. ***Id.*** Whether a defendant has been denied this due process right is an issue that we review de novo. ***Id.***, ¶9.

¶16 Williams again argues that the court sentenced her based on several pieces of materially inaccurate information: the statement that she is without "normal" maternal nurturing abilities; the repeated references to her tying Kora's bottle in place; the claims that she unexpectedly left Kora in Swadish's care and left Zoey virtually in a basket on a doorstep; and the assertions that she lied about propping the bottle and not being instructed on and knowing the dangers of bottle propping. Williams' challenges fail for several reasons.

¶17 As part of the due process right to be sentenced on reliable information, Williams had the right to rebut evidence admitted by a sentencing court. *See* ***Spears***, 227 Wis. 2d at 508. She did not. Instead, she asserted the now-claimed inaccuracies only after receiving a sentence we surmise she did not expect. It is not an erroneous exercise of discretion for a court to sentence a defendant on facts in a PSI that the defendant does not challenge or dispute. *See* ***Handel v. State***, 74 Wis. 2d 699, 704, 247 N.W.2d 711 (1976); *see also* ***State v. Johnson***, 158 Wis. 2d 458, 470, 463 N.W.2d 352 (Ct. App. 1990).

¶18 More to the point, Williams has not shown that the information to which she objects is inaccurate. As one example, Williams points to the PSI writer's comment that she lacks a "normal" mothering instinct such that "any human being other than Christine Williams would seem to have more innate

nurturing capabilities for any child than she does her own." This is the author's subjective opinion—plus hyperbole. It is not an objective "fact" capable of being accurate or inaccurate. *See* ***State v. Saunders***, 196 Wis. 2d 45, 51, 538 N.W.2d 546 (Ct. App. 1995). Indeed, the comment is in the PSI section entitled "Agent's Impressions." Thus, what Williams really disputes are not the facts, but the subjective conclusions drawn from them.

¶19 Along those same lines, Williams has not shown the inaccuracy of the essential facts cited to demonstrate her lack of attachment. She does not claim that she was not watching a movie during the initial interview, for instance, or did not leave Kora and Zoey for lengthy periods when they were just months old. Defense counsel sought in her sentencing remarks to soften the impression left by those facts. The failed effort does not render the facts inaccurate, however.

¶20 The record also does not bear out Williams' claim that her sentence was based on an incorrect belief that she tied Kora's bottle into place. The complaint incorporated the report of Detective Patti Crump, who interviewed Williams in 2005 when the investigation was reopened. The complaint and the PSI reported objectively that ribbons and a sash, perhaps a robe belt, were found tied on Kora's crib when police first investigated, that Kora was found "wedged" between two pillows and that it was the police chief's "belief" that the bottle "may" have been propped and held in the sash. Similarly, the PSI repeated that police observed "pillows and a sash that appeared to have been used to prop a bottle in place for the infant." Crump's report noted that pictures[4] of Kora's crib showed "ribbons and a robe belt" tied to it; that, according to the autopsy, Kora

[4] The photographs are not included in the record.

died from aspirating formula; and that the cause of death "would be consistent with the propping/tying of the bottle to feed" Kora.

¶21 The police reported what they saw. The police chief's belief is not a fact, nor is the conjecture about the use to which the pillows and sash "appeared to have been" put. A statement that Kora's cause of death "is consistent with" having the bottle propped or tied into place is not an unequivocal statement that it *was* tied. In any event, the PSI writer and Crump also reported that Williams denied tying the bottle into place.

¶22 It is true that the court commented that "[u]sing pillows to … prop the bottle up, possibly using ribbons to secure the bottle in an upright position so that the child had a complete continuous flow of formula is neglect." The court also observed that fashioning Williams' sentence was difficult because "it's tough to determine just what a person is capable of doing who would tie a bottle up and allow a baby to die by drinking it." Williams admitted putting pillows around Kora so that she could not roll either way. She admitted, at various times, using blankets, pillows or stuffed animals to prop Kora's bottle. She further admitted that she gave Kora eight ounces of formula at a time, and knew that Kora sometimes vomited while taking her bottle. Based on the whole of the record, we are persuaded that once Kora was "wedged" between pillows so that she could not roll, whether the bottle was tied or propped is a distinction with little difference. Williams placed it in a fixed position so that, as the court said at sentencing, "the child had a complete continuous flow of formula" from which she could not escape.

¶23 We likewise disagree with Williams that her leaving Kora with Swadish and Zoey with a friend amounts to inaccurate information. Her real

dispute is the connotation of abandonment. This, too, strikes us as a semantic point. Consistent with a social worker's report produced at the postconviction motion hearing, Williams presents the twelve-day period during which Swadish cared for Kora as an agreed-upon preadoption "trial run." This "spin" does not quite square with the report Swadish gave early on to police, or with Williams' statement to Crump that she opposed Swadish's adoption offer.[5]

¶24 The social worker's report similarly downplayed Williams leaving Zoey with a friend. The report explained that while the friend thought Williams made inadequate arrangements, she knew where Williams was, with whom, and when she was expected to return. Williams, by contrast, told Crump that she thought it sufficient to leave her friend a note authorizing medical care for Zoey while she rode along to Florida with a truck driver friend because she likes to take pictures. We do not read the PSI's characterization of Williams' action as "seemingly" leaving Zoey in a basket on a doorstep as a literal fact, but to convey the author's opinion about Williams' hasty, perhaps irresponsible, decision.

¶25 Finally, Williams claims Crump asserted that she lied about propping the bottle and about having been instructed on the dangers of bottle propping. The record is clear that Williams received instruction about safe feeding methods and that she admitted that she propped Kora's bottle. Moreover, she was not sentenced for lying but for her neglect of a child resulting in death, a charge to which she pled guilty.

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[5] Williams told Detective Crump that when she became pregnant, Swadish, who was unable to have children, said, "Oh, you're having this baby for me," and later asked Williams to "give" Kora to her. Williams said she told Swadish no, because "[t]his ain't no surrogate mother type thing deal. This is my child … [n]ot yours, not anybody else's. My child." She said she and Swadish "got into a big fight about it and we haven't talked since."

¶26 Williams has not shown any material inaccuracies. Accordingly, we do not need to address whether trial court wrongly relied on inaccurate information, nor need we engage in a harmless error analysis. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶26.

By the Court.—Judgment and order affirmed.

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