COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-2414-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNIE PHIFFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DANIEL L. LA ROCQUE, Judge. *Affirmed.*

VERGERONT, J.[1] Johnnie Phiffer appeals from a judgment of conviction and sentence and from an order denying his postconviction motion for resentencing. He contends that because his probation agent provided the

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

prosecutor in this case with a copy of a presentence investigation (PSI) prepared for another case without a court order as required by § 972.15(4), STATS., the only equitable and effective remedy is a resentencing in which the prosecutor representing the State does not have access to that PSI or any collateral information received from it. We conclude that Phiffer is not entitled to resentencing and we therefore affirm.

BACKGROUND

The charges giving rise to this appeal were filed in Dane County Circuit Court. Phiffer pleaded no contest to one count of fourth-degree sexual assault contrary to § 940.225(3m), STATS., one count of criminal trespass to a dwelling contrary to § 943.14, STATS., and one count of resisting an officer contrary to § 946.41, STATS., each enhanced for habitual criminality under § 939.62, STATS. Two counts of misdemeanor bail jumping were dismissed. The court withheld sentence and ordered him to serve three years' probation. Phiffer's probation was subsequently revoked and he appeared before the court for sentencing with counsel. His attorney raised as a preliminary matter that at 4:30 p.m. on the preceding day the prosecutor had faxed to her office a copy of a PSI prepared by the probation agent in this case, John Mathews, for a different criminal case against Phiffer in Green County. She had not had a chance to look at this report until just before the hearing. She related that the prosecutor explained to her that Mathews had given him a copy of the PSI, and he had faxed it to her but had not provided it to the Dane County Circuit Court. Phiffer's counsel continued:

> My concern about that is it's my understanding, my reading of the law, specifically, of statute 972.15(4), that that material is confidential. And that (4) actually reads that:

> "The presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization by the court."
>
> Now, I guess we don't know -- Mr. Stephan [prosecutor] didn't know whether or not Green County court might have ordered the release of that report, but we're assuming that the court probably did not. I guess I don't have any concerns about this Court using that information, because, apparently, this Court has not been provided with that information. I'm just making a record.
>
> And I've told Mr. Stephan that I feel that he should be precluded--there be an order that he be precluded from arguing any information that he had obtained from that PSI report and strictly from that PSI report. He indicated to me that much of what he read in that report he was already aware of; he had already been told by collateral sources, specifically, most likely Mr. Matthews, [sic] since Mr. Matthews [sic] is the agent and he's been communicating with both Mr. Stephan and myself. But I'm concerned about the fact that this presentence report, which I believe is confidential, was turned over to Mr. Stephan and turned over to me subsequently and I don't think information derived specifically from it and solely from it should be used in the sentencing.

The court then asked the prosecutor whether he agreed that the report should not be considered, or whether the court needed to make a ruling on this issue. The prosecutor responded:

> Your Honor, if I can make a brief statement: I've had enough conversations with John Matthews [sic] about this case, both at prior sentencings that were set over, as well as yesterday when he phoned my office to talk about another case. We spoke for about 45 minutes on this case. And I specifically asked Mr. Matthews, [sic] you know, what, if any, information he had authored; if I could have a scope. He did provide me with a PSI, as well as a supplement from Green County and a police report. I felt it was my duty to turn those over to the defense, which I did immediately, by faxing original copy today.
>
> I will state to the Court that very little, if nothing, contained in those PSIs were [sic] of a surprise to me, based upon my extensive conversations with the PSI writer, Mr. Matthews, [sic] as well as conversations with the

> Green County District Attorney's office. I have removed any PSI--or the two PSIs from my notes in front of me. So I will not be relying on or quoting from them. I don't believe that there is anything that I would be arguing today that was not obtained by me from a collateral source. And I will stipulate to the fact that I will not use those in this sentencing today.

The following comments by the court and the attorneys concluded the discussion of this point:

> THE COURT: All right, well, the Court is satisfied from the record, so far at least, that there's nothing being withheld from the Court that I should be aware of. So I will not receive the PSI and I'll ask Mr. Stephan not to include it in his remarks, because it just complicates the problem.
>
> But I am assuming that, Mr. Stephan, you will limit your remarks to things that you obtained independently of the PSI.
>
> [PROSECUTOR]: I will, Your Honor.
>
> [DEFENSE COUNSEL]: Thank you.

The prosecutor then proceeded to argue for a sentence of two years on each charge, with the first two being consecutive and the third being concurrent, and Phiffer's counsel argued for a sentence of one year in the Dane County Jail, or longer, as long as it was jail and not prison so that Phiffer could be released for work. Both attorneys gave lengthy arguments supporting their recommendations, and Phiffer spoke at length. The court sentenced Phiffer to three years on the first and second counts, consecutive, and two years on the third count, concurrent. In explaining this sentence, the court referred to Phiffer's "bad" criminal record; his propensity to violence; his serious drug problem; the nature of the current charge of sexually assaulting a child; Phiffer's failure, as revealed by his own comments, to take responsibility for his conduct; and the great risk he presented to the community.

Phiffer filed a postconviction motion for resentencing on the ground that the district attorney's office had access to confidential information from the presentence investigation report prior to the sentencing hearing, and it was impossible to determine what information the district attorney derived from that report. At the hearing on the motion, the prosecutor objected to resentencing, arguing that Phiffer and his trial counsel had been satisfied at sentencing with the remedy that the prosecutor not refer to anything in the Green County PSI report, and Phiffer had not raised any objections at sentencing that the PSI was the source of any of the State's information. In his letter brief to the court and in his oral argument, the prosecutor referred to the transcript of his argument at sentencing and to the sources of his information, which included personal contacts, Dane County Circuit Court records and police reports, probation revocation summaries, and conversations with Green County attorneys, Mathews, and Phiffer's trial counsel. Phiffer's counsel responded that it was not possible to tell the source of all the information the prosecutor referred to at sentencing and therefore he had not been able to object. She also contended that the remedy of resentencing was necessary to prevent district attorneys and probation agents from intentionally violating the statute, although she was not asserting that happened in this case.

The court[2] denied the motion. It concluded that the integrity of the sentencing process had not been affected because, even if there was a "misuse" of the PSI, which it did not concede was the case, the purpose of a PSI is to provide information to the court about the events leading to the conviction and the defendant's background. Therefore, the court reasoned, information in the Green County PSI would be relevant and appropriate for the Dane County court to

[2] The judge hearing the postconviction motion was not the sentencing judge.

consider and ought to differ from one prepared specifically for a Dane County case against Phiffer only in the specifics of the recent conviction. Alternatively, the court noted that the Dane County sentencing court had not been provided with the Green County PSI; there was no evidence disputing the prosecutor's representation that there were collateral sources for all the information he used; and no evidence that the prosecutor's receipt of the PSI was detrimental to Phiffer at sentencing. The court also stated that there was no evidence of a widespread abuse of PSIs in this case, and, if that was demonstrated in another case, the question of a remedy for that should be addressed "under those facts and circumstances."

DISCUSSION

On appeal, Phiffer renews the arguments he made at the hearing on his postconviction motion. He contends that, as a matter of law, the only equitable remedy for any violation of § 972.15(4), STATS., is a resentencing in which the PSI is sealed and the prosecutor arguing at the resentencing has no access to the PSI. The State does not dispute Phiffer's contention that there was a violation of § 972.15(4) which provides:

> (4) After sentencing, unless otherwise authorized under sub. (5) [for functions of DOC] or ordered by the court, the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court.

However, the State contends that the remedy employed by the sentencing court—not allowing reference to information in the PSI that was not available to the prosecutor from other sources—was the appropriate one in this case. Alternatively, the State argues Phiffer has waived the right to object to this remedy

because he agreed to it before the sentencing court. Phiffer disagrees with the State's waiver argument, asserting that, after a violation of the statute occurred, the effort by trial counsel to create a "stop gap remedy at the trial level" to prevent further harm to her client does not constitute a waiver of the right to argue for another remedy in this court.

Generally, parties waive the right to raise an issue on appeal if they do not raise it before the trial court. ***State v. Dean***, 105 Wis.2d 390, 402, 314 N.W.2d 151, 157-58 (Ct. App. 1981). The purpose of the rule requiring parties to raise claims of error before the trial court is to allow the trial court to remedy any possible error and thus avoid creation of an issue for appeal. ***State v. Barthels***, 166 Wis.2d 876, 884, 480 N.W.2d 814, 817 (Ct. App. 1992), *aff'd* 174 Wis.2d 173, 495 N.W.2d 341 (1993). However, although a party may have waived the right to have a particular issue addressed on appeal, this does not prevent an appellate court, within its discretion, from deciding such an issue if it is a legal question involving no factual disputes and the record is adequately developed. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 444, 287 N.W.2d 140, 145 (1980).

Although Phiffer did argue at sentencing that Mathew's sending a copy of the PSI to the prosecutor violated § 972.15(4), STATS., the only remedy he requested for that violation was that the prosecutor not refer to any information gleaned only from the PSI, and the prosecutor agreed. Whether they had previously discussed and agreed to this resolution, or whether Phiffer first proposed it at the hearing is not important. What is important is that Phiffer expressed no objection to this manner of addressing the violation. The court made it clear it was prepared to rule on the question of whether the PSI could properly be considered by it, but neither attorney thought that necessary. Phiffer was not foreclosed from arguing to the court that the sentencing hearing should be

postponed and handled by another prosecutor with no access to the PSI. He could have done that while still preserving the remedy he agreed to as an alternative, in the event that the court denied the request for a postponement. Furthermore, Phiffer was not precluded from objecting at any time during the prosecutor's sentencing argument if he determined the prosecutor was referring to information that he might have discovered only through the PSI, or if Phiffer came to feel that the remedy he had agreed to was unworkable.

As a result of Phiffer's failure to request postponement of the sentencing, or to object to any specific information mentioned by the prosecutor in his sentencing argument, the sentencing court was deprived of the opportunity to consider whether the remedy Phiffer now requests was required because it is the only effective one. There is no record from which we can now tell how easy or difficult it was to separate the information the prosecutor obtained from the PSI from the information he obtained from other sources, or the way in which the PSI might have subtly shaped the prosecutor's sentencing argument, as Phiffer now argues may have happened.

On appeal, Phiffer frames the issue as one of law—whether a sentencing handled by a prosecutor who has never seen the erroneously provided PSI is the mandatory remedy for every violation of § 972.15(4), STATS. With the issue thus framed, it does not matter whether the PSI had any effect on the prosecutor's sentencing argument. We conclude that, although Phiffer has waived the right to raise this issue on appeal by not presenting it to the sentencing court, we do have the discretion to decide the issue because, thus framed, it is a legal question not dependent on disputed facts and not requiring further factual development. We choose to decide this issue, and we review the postconviction court's decision de novo. *See* ***Bahr v. State Inv. Bd.***, 186 Wis.2d 379, 386, 521

N.W.2d 152, 153 (Ct. App. 1994) (the application of a statute or a legal standard to an undisputed set of facts is a question of law, which we review de novo). We conclude that the postconviction court correctly decided Phiffer was not entitled to a resentencing handled by a prosecutor without access to the PSI.

We assume, based on the State's concession, that Mathews gave the prosecutor a copy of the PSI without a court order. There is no evidence that this was anything other than inadvertence by Mathews, or that the prosecutor was in any way involved in any improper conduct. As the trial court correctly noted, the purpose of a PSI is to provide the sentencing court with relevant information about the crime for which the defendant is being sentenced and the defendant's background—all information that is relevant to sentencing. *See* 3 A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 18-5.1 at 18:347-48 (1980); *see also* ***State v. Crowell***, 149 Wis.2d 859, 868, 440 N.W.2d 352, 356 (1989). The purpose of § 972.15(4), STATS., is to prevent disclosure to the public of the often sensitive information in a PSI, both to protect informants and the defendant, and to encourage the defendant and other sources to be candid in providing information. ***State v. Comstock***, 168 Wis.2d 915, 924-25, 485 N.W.2d 354, 356-57 (1992). We are not persuaded that this purpose can be effectuated only by imposing the remedy that Phiffer seeks for any violation of subsec. (4), regardless of the circumstances.

As the trial court noted, if there is evidence in another case that a probation agent or a prosecutor has acted improperly with respect to § 972.15(4), STATS., the remedy for such a violation should be addressed in the context of that case, not this one, where there is no such evidence. We cannot accept Phiffer's argument that we should assume prejudice because it is "impossible to prove," since we do not accept the premise that, as a matter of law, it is unfair to a

defendant who is being sentenced in one court for the prosecutor to have read a PSI, which defense counsel has also seen, that was prepared by the defendant's probation agent for sentencing in another case. Phiffer does not contend that this sentencing court was presented with any inaccurate information, or any information not relevant for sentencing purposes.

We do not intend to suggest that the remedy for the violation of § 972.15(4), STATS., that the prosecutor and Phiffer's counsel agreed to at his sentencing—no reference by the prosecutor to information obtained only from the Green County PSI—was required as a matter of law. We do not decide that question because it is not necessary to do so. We decide only this: Based on the record before us, Phiffer is not entitled, as a remedy for the violation of § 974.15(4), to resentencing with another prosecutor who did not have access to the PSI.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.