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DISTRICT II

September 14, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2360-CR State of Wisconsin v. Nicholas C. May (L.C. #2013CF438)

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

Nicholas May pled guilty to one count each of misdemeanor theft, burglary, and theft of a firearm. He appeals from the judgment of conviction and the order denying his motion for postconviction relief. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the judgment and order.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

May went on a four-county theft and burglary spree in October 2011. He picked up eleven charges in this case after he and another man went to seven different properties in one night and entered vehicles, outbuildings, and a motor home, stealing personal belongings valued at several thousand dollars. They also stole a kitten.

May pled guilty to one count each of misdemeanor theft, burglary, and theft of a firearm, all as party to a crime. Five counts of misdemeanor theft, one count of burglary, and one count of catnapping, *see* WIS. STAT. § 951.03, were dismissed and read in at sentencing. May was sentenced to nine months in jail for the misdemeanor, three years' initial confinement and three years' extended supervision for the burglary, and two years' IC and two years' ES for the theft of a firearm, all to run concurrent to each other and to any other sentence. At the time of sentencing in this case, May was on probation in the three other-county theft and burglary cases.

Postconviction, May sought to have the PSI stricken and a new one prepared by a different agent and for vacation of his sentence and resentencing. May claimed the PSI writer, Jennifer Duffy-Juoni, was biased, compromising his due process right to a fair sentencing, as she also was his probation supervisor in the other cases and initiated revocation proceedings against him. Alternatively, he requested a *Machner*² hearing. He contended defense counsel's failure to object to her alleged conflict was either ineffective assistance or plain error. The trial court denied the motion without a hearing, concluding that May did not show actual bias.

A defendant has a due process right to a fair sentencing hearing. *See State v. Suchocki*, 208 Wis. 2d 509, 516, 561 N.W.2d 332 (Ct. App. 1997), overruled on other grounds by *State v.*

² *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Tiepelman, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. The integrity of the sentencing process requires that the PSI “be accurate, reliable and above all, objective.” *Suchocki*, 208 Wis. 2d at 518. A defendant claiming bias must demonstrate both bias in the PSI writer, *id.* at 516, and that the sentencing court actually relied on the biased, and thus inaccurate, report, *see Tiepelman*, 291 Wis. 2d 179, ¶31.

May contends it is “crystal clear” that Duffy-Juoni was biased because she concurrently prepared the PSI and “act[ed] in a prosecutorial function in her role as supervising agent,” and therefore “was unable to be neutral and independent.” Actual reliance is shown, he asserts, because the trial court adopted in full all of Duffy-Juoni’s recommended conditions of ES.

In *Suchocki*, the PSI writer was married to the prosecutor. It is vital for the PSI author to be independent of either the prosecution or the defense. *Suchocki*, 208 Wis. 2d at 518. The court’s concern there was that the marital relationship could subconsciously impact the report. *Id.* at 519. A PSI author, by contrast, “functions as an agent of the court which must deal impartially with both parties.” *State v. Thexton*, 2007 WI App 11, ¶5, 298 Wis. 2d 263, 727 N.W.2d 560. As the State correctly observes, “the supervising probation agent often conducts the PSI.” *Id.* We decline May’s invitation to extend *Suchocki* to facts such as these.

A court may consider the reasonableness and accuracy of the PSI in determining whether the writer was biased. *Suchocki*, 208 Wis. 2d at 517. Our review of the PSI shows a report that is reasonable in tone and that presents a balanced view of the circumstances surrounding May’s crimes. May points to nothing in the PSI that even suggests that Duffy-Juoni was biased.

May also fails to establish actual reliance. The court rejected any notion that it gave weight to Duffy-Juoni’s recommended conditions of ES or her summary of May’s revocation

proceedings. While it adopted her ES recommendations, the court found them “utterly routine and common.” Further, the court expressly stated that it was “sentencing him on these counts in Washington County ... not ... on the other counts in the other counties.” Finally, it ordered concurrent sentences; Duffy-Juoni recommended consecutive sentences. May’s bias claim fails.

Accordingly, defense counsel cannot have been ineffective at sentencing for not raising the meritless claim that Duffy-Juoni, and thus the PSI, was biased. *See State v. Wheat*, 2002 WI App 153, ¶¶14, 23, 256 Wis. 2d 270, 647 N.W.2d 441. Counsel’s failure to object likewise does not constitute plain error—an “error both obvious and substantial” that is “so fundamental that a new trial or other relief must be granted” despite the lack of objection. *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984) (citation omitted).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the trial court are summarily affirmed.
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals