COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2528-CR **Cir. Ct. No. 2007CF1250**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TARVEL CORTES DON FRANKLIN,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Tarvel Franklin appeals a judgment of conviction for first-degree sexual assault of a child and an order denying his motion for postconviction relief. Franklin argues he is entitled to resentencing because the

presentence investigation writer was biased.[1] We reject Franklin's argument because Franklin fails to demonstrate the circuit court actually relied on the inappropriate content in the writer's report.

BACKGROUND

¶2 Franklin was convicted of first-degree sexual assault of a child following a one-day trial, and the circuit court ordered a presentence investigation (PSI). The PSI noted Franklin faced a maximum sentence of sixty years, forty of which could be initial confinement. The PSI recommended thirteen years' initial confinement and six years' extended supervision. At sentencing, Franklin's trial counsel made several clarifications and corrections to the PSI, including a statement regarding plea negotiations that the court agreed to strike.

¶3 The agent assessment and impressions portion of the PSI stated, in part:

> No one can argue that living in Chicago is like residing in a war zone. The media describes it this way and the gang homicide rate can not be disputed. Minority families are fractured and disenfranchised with fathers often absent and uncaring. [Franklin] is proof. However, this can not tug at the court's compassion and empathy. Mr. Franklin can offer his apologies and remorse. It is what we expect. And, he may, indeed, be sincere. However, it is after the fact and much too late for one who has stated that sexual violence affecting a girl is "disgusting." He can persuasively claim that a period of alcohol induced amnesia may be responsible. But, he does not think it was the alcohol. He, then, offers that it must be the marihuana. Yes, both substances are mood altering and inhibition reducing agents. And, finally, he can assert that he may

[1] Franklin also made a sentencing guideline argument, which, as his reply acknowledges, is disposed of by the recently decided ***State v. Barfell***, 2010 WI App 61, 324 Wis. 2d 374, 782 N.W.2d 437.

> have been drugged. These claims are not factual but mere rationalizations.
>
> ….
>
> [Franklin] provides denial, distortion, minimization, and rationalization for this outrageous violation of a sleeping and vulnerable child. He denies that he remembers what happened .... He alleges that alcohol or some analgesic may be responsible. It is not; he is the party who must be held accountable .... But, most evident, is the entitlement he exudes. ... It is this simple: Mr. Franklin did it because he wanted to sexually gratify himself and discovered an opportunity to do so. He is entitled to do as he so chooses.
>
> ….
>
> The sexual assault of a child is not just a crime but an egregious human rights violation. It is an abomination which should be granted little forgiveness. Social engineers and researchers, treatment gurus, and those who unknowingly become complicit can all provide some psycho-social explanations amid the myriad of contentions for Tarvel Franklin's moral lapse, indulging only the naïve and vain that he is a low-risk to society. They will declare he can be redeemed. They will assert there was "no bodily harm." However, the brain is the body's driving life force. And, within this matter is where [the victim] will experience this pain for the remainder of her life. A sentence provides nothing for the life this child has lost. It will only briefly protect the community. Society witnesses the toll sexual assault takes on the victim and the communities in which they live. These children become promiscuous, sexually compromised, alcohol and drug abusers, criminally involved, and condemned to be perpetually victimized. Justice[,] and Mr. Franklin's redemption[,] will come in another dimension. There is absolutely no defense for what Tarvel Franklin created. He did this because he believes he is entitled "to kick-it."[2]

[2] Earlier, in the personal history section, the PSI states: "Since arriving in Green Bay, Tarvel has encountered several relationships[,] which he describes as having 'fun and kicking it.'"

¶4 The circuit court imposed sixteen years' confinement and eight years' extended supervision. Explaining its reasons for the sentence, the court commented:

> This would be an amazing world to live in, a far better place[,] if treatment could cure everything. We just need some treatment. He needs some treatment. The family needs some treatment, give them some treatment and all is better. Well, I wish it was so, but wishing doesn't make it so.
>
> ….
>
> The reality of it is, those of us who have been in this business long enough know that [the victim is] going to have all sorts of problems growing up, that she's going to be victimized all her life.
>
> ….
>
> She's going to suffer longer than you are. You'll get out of prison some day. She'll always be imprisoned in her mind. You took away the innocence of youth, took away the innocence of a young female child, and why? For your own pleasure, some sexual gratification.
>
> ….
>
> I'm not sure if treatment does work at all. There is a lot of literature that indicates that people with such deviant sexual desires like that never get treated and maintain that way all through their lives. Some material indicate[s] treatment works. I'm not sure which to believe.

¶5 Postconviction counsel moved for resentencing, arguing the PSI writer abandoned his neutrality.[3] The circuit court denied Franklin's motion, and Franklin appeals.

[3] Franklin argued in the alternative that trial counsel was ineffective. The circuit court addressed the merits of the PSI issue directly, and Franklin does not renew his ineffective assistance argument on appeal.

DISCUSSION

¶6 "The integrity of the sentencing process demands that the PSI be accurate, reliable, and, above all, objective." ***State v. Howland***, 2003 WI App 104, ¶36, 264 Wis. 2d 279, 663 N.W.2d 340. In preparing the PSI, the agent functions neither as an agent of the State nor the defense. ***State v. Perez***, 170 Wis. 2d 130, 140-41, 487 N.W.2d 630 (Ct. App. 1992). Rather, the PSI author acts on behalf of the judiciary, and it is therefore essential that the agent be neutral and independent. ***Id.*** at 140.

¶7 A defendant has a due process right to be sentenced on the basis of true and accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "[T]he offender [has] a right to a fair sentencing *process*—one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information." ***Id.***, ¶26 (quoting ***Welch v. Lane***, 738 F.2d 863 (7th Cir. 1984)). To establish a due process violation, a defendant must demonstrate that there was some inaccurate information presented at sentencing and that the court relied on that information. ***Id.***, ¶¶1, 26, 31. The ***Tiepelman*** analysis also applies to instances of bias by the presentence investigator. *See* ***State v. Suchocki***, 208 Wis. 2d 509, 516, 521, 561 N.W.2d 332 (Ct. App. 1997), *abrogated in part by* ***Tiepelman***, 291 Wis. 2d 179, ¶2 (withdrawing "any language" in several cases suggesting a defendant must demonstrate prejudicial reliance, rather than actual reliance, by the sentencing

court).[4] "The process is not fair if the sentencing court relied upon a PSI from a biased writer." ***Id.*** at 521.

¶8 Franklin argues the content of the PSI demonstrates bias in the probation agent who prepared it. He contends the agent's inflammatory generalizations reflect the writer's personal emotions, beliefs, and biases rather than an individualized assessment of Franklin's character, offense, and treatment needs.

¶9 The State does not explicitly dispute that the PSI contained inappropriate content or that it exhibits bias. Rather, it argues there is no remedy because this case is unlike ***Tiepelman*** or ***Suchocki***. The State further argues that, regardless, Franklin has not demonstrated the circuit court actually relied on the inappropriate content.

¶10 We reject the State's first contention. While, unlike ***Tiepelman***, this case does not involve inaccurate historical information, we recognized in ***Suchocki*** that a sentencing court's reliance on a biased PSI could similarly violate

[4] Our supreme court recently held that a court of appeals decision that has been overruled, even in part, no longer retains any precedential value. ***Blum v. 1st Auto & Casualty Ins. Co.***, 2010 WI 78, ¶56. We do not believe that holding bars our reliance on ***State v. Suchocki***, 208 Wis. 2d 509, 516, 521, 561 N.W.2d 332 (Ct. App. 1997), because, rather than overruling ***Suchocki***, ***State v. Tiepelman***, 2006 WI 66, ¶¶2, 31, 291 Wis. 2d 179, 717 N.W.2d 1, merely withdrew any unspecified language contrary to its holding. If we are incorrect, however, then we find ***Suchocki*** persuasive and adopt its reasoning—except to the extent of any conflict with ***Tiepelman***.

a defendant's due process rights. That there are different factual bases for the bias here and in ***Suchocki*** is irrelevant.[5]

¶11 Franklin asserts the reliance component of ***Tiepelman*** is satisfied because "the court echoed the tenor and sentiments of the PSI writer when imposing sentence." He also observes, and the State acknowledges, we are not bound by the circuit court's disclaimer of reliance on inappropriate information at sentencing. *See* ***State v. Anderson***, 222 Wis. 2d 403, 407-10, 588 N.W.2d 75 (Ct. App. 1998).

¶12 We do not agree that the circuit court so closely echoed the contested portions of the PSI as to demonstrate it relied on them. At sentencing, the court did not reference the PSI author's conclusions beyond the undisputed status of Franklin's prior criminal history. That some views were held in common is a function of the facts and the crime, as opposed to a slavish adherence to the PSI author's views. Further, the court's remarks properly focused on the seriousness of the offense, character of the offender, and need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). These considerations provide a rational, innocent explanation for the sentence imposed.

¶13 Denying Franklin's postconviction motion, the court explained:

> Well, I'll concede that I recall that presentence report, and I thought that was a very—I'll call it writing style that differs

[5] The defendant in ***Suchocki***, 208 Wis. 2d at 513, alleged the PSI writer was biased against homosexuals and was biased because she was the prosecutor's spouse. We concluded the record supported the circuit court's finding that there was no bias against the defendant as a homosexual. ***Id.*** at 516-17. The circuit court had observed that there was no challenge to the objective information presented in the report and that the subjective portions of the report were reasonable. ***Id.*** However, we concluded the spousal relationship established per se bias in the PSI writer. ***Id.*** at 520.

> from many of my presentence reports that I read. And you can tell that there was clearly emotion behind that writing style of that presentence writer, *but I recognized that*.
>
> The reality of it is I've been here now for eighteen years on this bench, and there are some presentence writers who are just very short sentence, matter of fact, simplest objective statements. ... And there are different style of writers that you can tell maybe minored in English—heck, maybe majored in English, rather than criminal justice, but I didn't sentence him based upon any false information or any inaccuracies contained in that report.
>
> *I fully understand that there are agent's impressions and recommendations, and they are their opinions.* ... But I recognize that is simply just one of the tools, and I recognize the difference in the style of writings, the difference in the personal concern or involvement in that type of crime by some writers.
>
> ….
>
> And there are individual differences in writing styles. And I'll agree that this was, in a sense, was more akin to a person that has a writing background versus a strict criminal justice, black-and-white background. *But having said that, I took it for that when I read it. I took it for no more*.
>
> And I think even in my sentencing comments I talked about the different sides of the effectiveness of treatment for sexual offender defendants. And I've been to seminars over the years, and I've had speakers there ranging from individuals that are on the law enforcement side and those who are on the side of the providing treatment clinic for the individuals. So, I've had those that say 87 percent are a hundred percent treatable down to obviously a lower percentage on the other end, and I've seen the spectrum of cases, and I think I even mentioned that. So, I'm satisfied that there was no prejudicial harm to this defendant from the writing style of the presentence writer in this case, and I deny the motion based on that grounds. (Emphasis added.)

¶14 The agent's assessment and impressions portion of the PSI stands in stark contrast to the remainder of the PSI, which appears to be both objective and thorough. Indeed, Franklin has not identified any historical information that is

either incorrect or missing. Considering the court's sentencing remarks as a whole, and given the lack of subtlety in the objectionable portions of the PSI, we confidently accept the experienced judge's disclaimer of reliance upon that content.

¶15 We recognize the difficulty in demonstrating actual reliance absent an explicit statement by the circuit court that it is relying on particular information. However, had Franklin objected to the PSI at the sentencing hearing, the court, in its discretion, might have entertained a request for either a new Department of Corrections PSI or an independent PSI. *See* ***Suchocki***, 208 Wis. 2d at 515 ("The court has discretion to order a PSI and to determine the extent to which it will rely upon the information in the PSI.").

By the Court.—Judgment and order affirmed.

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