

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 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. 2010AP784

Cir. Ct. No. 2009JV59

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF TYLER T., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

TYLER T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

¶1 REILLY, J.¹ Tyler T. appeals from an order of the circuit court waiving him into adult court. He argues that it was improper for the assistant district attorney to appear at a waiver recommendation meeting when neither Tyler nor his attorney were asked to attend. As Tyler believes the waiver investigation report was tainted by the assistant district attorney's presence, he asks that we vacate the circuit court's order and order a new waiver investigation report. We hold that there is nothing to preclude the prosecution from appearing at a waiver recommendation meeting. The order of the circuit court is affirmed.

FACTUAL BACKGROUND

¶2 On June 19, 2009, Tyler was allegedly involved in an armed robbery of a gas station. As Tyler was fifteen years old at the time, Walworth County filed a delinquency petition alleging that Tyler was a party to an armed robbery in violation of WIS. STAT. §§ 939.05 and 943.32(2). The State also requested that the juvenile court waive Tyler into adult court because armed robbery is a felony and it involves aggression and premeditation.

¶3 Pursuant to WIS. STAT. § 938.18(2m), the circuit court requested that the Walworth County Department of Health and Human Services (WDHHS) prepare a waiver investigation report. Members of the WDHHS held a staffing meeting to decide whether the WDHHS would recommend that Tyler be tried as an adult. The assistant district attorney was invited to this meeting but Tyler and his defense counsel were not. At the meeting, the assistant district attorney

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

recommended that Tyler be tried as an adult. The WDHHS eventually chose to make no recommendation in its report as to whether Tyler should be tried in adult court or juvenile court because the staffing members could not reach a consensus.

¶4 Roughly a week later, the circuit court held a waiver hearing to determine whether Tyler would be waived into adult court. At the hearing, Tyler's attorney objected to the fact that the assistant district attorney was present at the WDHHS meeting. Tyler's attorney argued that because she was not invited, the meeting constituted an ex parte communication and the WDHHS's waiver investigation report was invalid.

¶5 The circuit court waived Tyler into adult court. The court noted that while it did not think that it was a good idea to invite the assistant district attorney but not Tyler's attorney to the WDHHS staffing meeting, there was no evidence in the record that the WDHHS's report was "coerced" by the assistant district attorney's presence. Tyler appeals the circuit court's order.

STANDARD OF REVIEW

¶6 This appeal requires us to decide whether the prosecution can appear at a waiver investigation meeting under WIS. STAT. § 938.18(2m). The interpretation of a statute is a question of law subject to de novo review. *See City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

DISCUSSION

¶7 Tyler argues that the waiver investigation report was tainted by the assistant district attorney's presence, and that he is therefore entitled to a new report and a new waiver hearing. Tyler asserts that a waiver investigation report should be treated the same as a presentence investigation (PSI) report.

¶8 After a petition to waive a juvenile into adult court is filed, WIS. STAT. § 938.18(2m) permits the circuit court to designate an agency to submit a report analyzing whether a juvenile should be tried as an adult. Section 938.18(2m) is permissive and does not require the circuit court to order a waiver investigation report. If the circuit court does request a waiver investigation report, it is then entitled to use the report to determine whether to waive the juvenile into adult court. *Id.* A PSI, on the other hand, occurs after a defendant is convicted. WIS. STAT. § 972.15(1). It is for the circuit court to decide whether to order a PSI. *See id.* The purpose of a PSI report is to assist the circuit court in selecting the appropriate sentence for the defendant. *State v. Washington*, 2009 WI App 148, ¶9, 321 Wis. 2d 508, 775 N.W.2d 535.

¶9 Tyler argues that because an administrative agency gathers information for the court in both a waiver investigation report and a PSI report, the two reports should be treated the same. Specifically, Tyler points out that this court has held that a convicted defendant does not have a constitutional right to have his attorney present during a PSI interview because it would threaten the independence of the PSI. *See State v. Perez*, 170 Wis. 2d 130, 140-42, 487 N.W.2d 630 (Ct. App. 1992). Additionally, Tyler cites *State v. Suchocki*, 208 Wis. 2d 509, 520, 561 N.W.2d 332 (Ct. App. 1997), *abrogated on other grounds by State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, where we held that a PSI report is biased as a matter of law when the report's author is married to the prosecutor. Finally, Tyler refers to *State v. Howland*, 2003 WI App 104, ¶¶32, 37, 264 Wis. 2d 279, 663 N.W.2d 340, where we held that it was inappropriate for the district attorney to contact a parole agent to complain about a PSI report recommendation after the prosecution agreed in a plea bargain not to make a sentence recommendation. Tyler would like us to extend these PSI cases

and hold that a prosecutor may never be present at a waiver investigation recommendation meeting. We decline to do so.

¶10 A waiver investigation report is distinct from a PSI report. A petition to waive a juvenile into adult court can be filed by the prosecution, the juvenile, or the court. *See* WIS. STAT. § 938.18(2). A PSI is ordered exclusively by the court. *See* § 972.15(1). In this case, the assistant district attorney filed the waiver petition. While § 938.18 does not address whether a prosecutor may be present at a waiver recommendation report meeting, there is nothing in the Wisconsin statutes or case law that precludes a prosecutor from appearing. Indeed, it is entirely appropriate for the prosecution to appear at this meeting given that the assistant district attorney was the one who requested that Tyler be tried as an adult.

¶11 The cases that Tyler cites to are unpersuasive. In *Perez*, the agent preparing the PSI report refused to allow Perez’s attorney to attend the PSI interview. *Perez*, 170 Wis. 2d at 136. Perez argued that there was a due process right to have counsel present. *Id.* We rejected his argument and held that there is no due process right to have counsel present for a PSI interview because “[t]he presence of counsel could jeopardize the neutral objectivity of the PSI author and the cooperative surroundings of an independent investigation.” *Id.* at 141.

¶12 *Perez* held that a defendant does not have a constitutional right to have his attorney present during a PSI interview—that case did not hold that a defense attorney or a prosecutor may *never* be present during a PSI interview. While the *Perez* court noted that “[t]he active involvement of an advocate—defense counsel or, for that matter, the prosecution—in the information-gathering process could cause a serious degradation in the reliability and impartiality of the

sentencing court’s information base,” this statement does not imply that it is unlawful for the prosecution to be present during a PSI interview. *Perez*, 170 Wis. 2d at 141. Rather, the PSI report author still has discretion over whether he will allow the defense attorney or the prosecution to be present during a PSI interview.

¶13 The *Howland* and *Suchocki* decisions are also inapplicable. In *Howland*, the prosecution agreed not to make a sentencing recommendation in exchange for Howland pleading no contest. *Howland*, 264 Wis. 2d 279, ¶2. The prosecution then effectively ran an “end run” around the plea bargain by repeatedly contacting the Division of Community Corrections to complain about the PSI report recommendation. *Id.*, ¶¶29, 31. We held that this was an inappropriate ex parte communication on the part of the prosecution that violated the terms of the plea bargain. *Id.*, ¶¶32, 37. In *Suchocki*, we held that a PSI report prepared by an agent who was married to the prosecutor was impermissibly biased as a matter of law. *Suchocki*, 208 Wis. 2d at 520.

¶14 Neither of these cases support Tyler’s argument that it was unlawful for the assistant district attorney to be present during Tyler’s waiver recommendation meeting. In *Howland*, we found that it was inappropriate for the prosecution to contact Howland’s probation and parole agent to complain about the PSI report recommendation because Howland’s plea bargain stated that the prosecution would not make a recommendation. *Howland*, 264 Wis. 2d 279, ¶¶2, 29, 31-32. In Tyler’s case, there is no plea bargain that would have prevented the assistant district attorney from appearing at the waiver recommendation meeting. And the facts in *Suchocki*—where the prosecutor was married to the PSI report author—are far more egregious than the prosecution appearing at a waiver recommendation meeting. Additionally, *Perez*, *Howland*, and *Suchocki* all dealt

with PSIs, which as we noted earlier, are distinct from waiver investigation reports. None of these cases stand for the proposition that a prosecutor cannot attend a waiver recommendation meeting.

¶15 Finally, we note that waiver of juvenile jurisdiction under WIS. STAT. § 938.18 is within the sound discretion of the circuit court. *Elmer J.K. v. State*, 224 Wis. 2d 372, 383, 591 N.W.2d 176 (Ct. App. 1999), *superseded by statute on other grounds*, WIS. STAT. ch. 938. We review the circuit court’s decision for a misuse of discretion. *Id.* We will also look for any reason to sustain the circuit court’s discretionary decision, and will reverse a waiver determination only if the record does not reflect a reasonable basis for the circuit court’s decision or the basis of the circuit court’s rationale is not found in the record. *Id.* Here, the circuit court made an independent decision to waive Tyler into adult court. The waiver investigation report did not make a recommendation. Furthermore, the circuit court stated that “I have judged this on my own feelings and not based on the recommendations.”

CONCLUSION

¶16 As a waiver investigation report is distinct from a PSI, we decline to apply the case law governing PSI reports to waiver investigation reports. The record demonstrates that the circuit court’s decision was made independently. The order of the circuit court is affirmed.

By the court—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)(4).

