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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2011AP001770-CR &
2011AP001771-CR

v.

Circuit Court No. 2008CF1221 &
2009CF156

BRANDON M. MELTON

Defendant-Appellant.

APPEAL BRIEF OF DEFENDANT-APPELLANT BRANDON M. MELTON

APPEAL OF THE JUDGMENT OF CONVICTION IN CIRCUIT COURT, WAUKESHA COUNTY, THE HONORABLE ROBERT MAWDSLEY & MARK D. GUNDRUM PRESIDING

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TABLE OF AUTHORITIES

ISSUES PRESENTED

1. Does the Circuit Court have the authority to order the destruction of a defective Presentence Investigation Report when a new Presentence Investigation Report has been prepared to replace it?

   Trial Court: No (does not believe so)

POSITION ON ORAL ARGUMENT AND PUBLICATION

The issue presented by this appeal is not clearly controlled by existing law and, therefore, the appellant recommends both oral argument and publication. The opinion of the Court of Appeals will develop the law and will be of state-wide application.

STATEMENT OF THE CASE

On September 10, 2009, Brandon Melton ("Melton") entered guilty pleas on two charges to resolve the following three cases: 2008CF1221, 2009CF156, and 2009CF287. (43: 1-29; 33: 1-29).

Melton pled guilty as charged on circuit court case no. 2008CF001221, Second Degree Sexual Assault of a

Child Under 16 Years of Age, Wis. Stats. §948.02(2). (43: 2-10). He also pled guilty to an amended charge of Theft-Movable Property ≤ $2,500, Wis. Stats. §943.20(1)(a) on circuit court case no. 2009CF000156, charges of Battery and Felony Bail Jumping were dismissed and read-in as part of the plea agreement. (33: 2-10). Also dismissed and read-in was a charge of Second Degree Sexual Assault of a Child Under 16 Years of Age on circuit court case no. 2009CF000287. (43: 2-10; 33: 2-10).

On September 21, 2009, the court ordered a Presentence Investigation Report to be prepared ("PSI 1"). (44: 9-10).

The PSI 1 was filed with the court on November 19, 2009. (14:1; 15:1).

Melton filed a Notice of Motion and Motion to Strike Portions of the PSI 1 on February 22, 2010. (20: 1-3; App. C, 301-303).

On March 25, 2010, the court ruled that a new presentence investigation report would be prepared and that the PSI 1 would be destroyed following the expiration of any appellate time limits. (49: 1-19, App. A, 101-119). A

written order was signed and filed on March 31, 2010. (21:1, App. D, 401).

The updated presentence investigation report ("PSI 2") was filed on April 15, 2010. (22:1).

The sentencing hearing proceeded on July 22, 2010. (51: 1-7). As to the Second Degree Sexual Assault of a Child Under 16 Years of Age, Wis. Stats. §948.02(2), Melton was sentenced to 12 years, with 4 years of initial confinement followed by 8 years of extended supervision. (31: 1; App. G, 701). On the Theft-Movable Property ≤ $2,500, Wis. Stats. § 943.20(1)(a), Melton was sentenced to 6 months local jail, concurrent to his sentence on case no. 2008CF1221. (25: 1; App. H, 801).

After the sentencing hearing a review hearing proceeded on September 24, 2010. (53: 1-6; App. B, 201-206). At the hearing the circuit court modified the March 31, 2010 order, and ruled that the PSI 1 shall be sealed (as opposed to destroyed). (30: 1; App. E, 501).

Melton now files this appeal following the final order of the trial court.

STATEMENT OF FACTS

This appeal does not challenge the facts of the offenses Melton has been sentenced on, nor does it challenge the contents of any presentence investigation report prepared. The only issue being challenged is the circuit court's authority to order the PSI 1 to be destroyed. The facts are as stated below.

The circuit court ordered the PSI 1 to be prepared. (44: 9-10).

The PSI 1 was filed with the court on November 19, 2009. (14:1).

Melton's attorney filed a Notice of Motion and Motion to Strike Portions of the PSI 1 on February 22, 2010. (20: 1-3; App. C, 301-303). In the motion Melton's attorney requested the following relief:

> Nowhere in the documents governing presentence investigations is there authority for a presentence author to include uncharged allegations regarding a defendant. The defendant therefore moves the court for an Order that the information referred to beginning at page 2 and continuing through the top paragraph on page 4 be stricken, and further that the 2nd paragraph on page 7 under the heading of Offender's Version also be stricken from the report, and a new presentence report be prepared deleting that information and further that the original presentence report prepared on November 19, 2009 be destroyed and sealed.

(20:3, App. C, 303).

At the hearing the Court, by the Honorable Richard Congdon, indicated that the presentence writer admitted to including improper information in the PSI 1, such that:

> Mr. Centinario, the – Mr. Drankiewicz, the agent, says in his letter or seems to admit that – I'll recite from it. He writes, "The decision to include this information in this sentencing may be a deviation of the standard outline," and then it goes on to say, "It may be included otherwise or elsewhere."
>
> Do you agree this is somewhat of a deviation from the standard outline?

(49: 9; App. A, 109).

The State responded, "…you know, I can't disagree with him."

The Court then made the following ruling regarding the PSI 1:

> The Court has looked at this and the Court had reviewed the presentence actually several times. This matter was set for sentencing on several occasions, and for a variety of reasons, that never happened. The presentence investigation was prepared November 19, 2009, and each time I had reviewed it and reviewed this particular incident, it was – had little or no impact on the Court at all. I did not find it helpful as to what the Court was – would be doing, and as I was – in all likelihood, unless there is something brought to my attention at the –at a sentencing hearing, was likely to disregard it as not all that relevant.
>
> Mr. Keane is correct, that – so the Court believes that this information is of little use to the Court at a sentencing. Mr. Keane argues that – that I have the authority to order that part stricken, and I believe I do if – it's apparent – I think inherent within the authority

> given to me under 972.15, is that the Court request that this is done.
>
> I also look at the D.O.C. 328.27 of the Administrative Code. Sub 2 says, "Upon order of the Court the – agent shall prepare a presentence investigation report and shall contain the information provided for under this section unless the Court orders otherwise," and then it goes on to say what the contents should be as outlined in Mr. Keane's motion and information in support of that motion.
>
> The Court did not order anything otherwise that it wanted. It ordered the presentence investigation as was contemplated by the regular outline of that. So, the Court has already made a finding that such information about this other activity, and the Court would find that or believe that it could very well be prejudicial to Mr. Melton as he goes through whatever route is eventually – that the Court will set for him. It will be prejudicial to him. The Court will note that this information is uncharged and unverified except for what – the alleged statements.
>
> The Court will therefore grant the motion, will ask for a new presentence investigation, or at least an updated one.

(49: 11-13; App. A, 111-113).

Melton's attorney then requested that the PSI 1 be destroyed, "I would ask that the P.S.I.s be stricken and destroyed. If it's sealed in the file, it's going to become available at some point. I think the thing should be redone – that's the Court's position – without a reference to this event. (49: 14; App. A, 114).

The State then voluntarily agreed to return its copy of the PSI 1 to the court for destruction. (49: 15; App. A, 115).

A written order was entered by the Court indicating that, "The presentence investigation report dated November 19, 2009 shall be sealed and destroyed following the expiration of any appellate time limits, and defendant's copy shall be returned to the Court." (21:1; App. D, 401).

The PSI 2 was prepared and filed with the court. (22:1). Sentencing proceeded and the information in the PSI 2 was appropriately used at the sentencing hearing, and is not in dispute. (51:1-27).

Following the sentencing the Court, by the Honorable Mark Gundrum, requested a Review Hearing because he did not believe he had the authority to destroy the PSI 1.[1] (53:2; App. B, 202). The Court stated:

> Looking through the statutes, keeping it confidential is what is envisioned by the statute, and the Court didn't want to just go contrary to that order without having a hearing about it. Does somebody read the statutes differently than that, or see other authority for destroying a presentence investigation report?

(53:2; App. B, 202).

Not being advised of any authority, the Court stated the following:

> Okay. Well, it's the intention of this Court to modify the Order of May 14th to remove the portions which

[1] As indicated, a different judge presided over the review hearing.

> refer to destroying the presentence investigation report. It obviously can always be destroyed at some later date and the order can be revisited if some law is pointed out saying that that's something that's appropriate. But at this point I believe it would be inappropriate to destroy it. And rather than just ignore that Order, it seems to make more sense to the Court to amend the Order and just essentially keep it as is, except, and the sentence as follows: Number 2, the presentence investigation report dated November 19, 2009, shall be sealed, period.
>
> That's the intention of the Court.

(53:3-4; App. B, 203-204).

The Court went on to say, "Just so we have that kind of clean and covered. And if there's some later authority shown and a desire by somebody to do something different, that can be raised at that time." (53:4; App. B, 204).

A Modified Order was then prepared. (30:1; 26:1; App. E, 501).

Melton now files this appeal following the final order of the Court.

ARGUMENT

I. The Circuit Court Has the Inherent Authority to Order the Destruction of a Defective Presentence Investigation Report.

The issue of judicial authority is a question of law that this court reviews de novo. *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 747, 595 N.W.2d 635 (1999).

There are three areas where courts have exercised their inherent authority. First, courts have authority over the internal operations of the court. *Id.* at 749. Second, courts have authority to regulate members of the bench and bar. *Id*. Third, the court may exercise inherent authority to ensure that the court functions efficiently and effectively to provide the fair administration of justice. *Id*. at 749-50.

It has been said that "[t]he general control of the judicial business before it is essential to the court if it is to function. 'Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.'" *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314-15, 127 N.W.2d 225 (1964) (internal citations omitted).

The circuit court's original order to destroy the PSI 1in the present case would have been valid pursuant to its inherent power to regulate the powers of the court and to provide the fair administration of justice.

In contemplating its decision, the circuit court correctly recognized that there is no statutory language

granting the Court the authority to destroy a defective PSI; though, there is also no statutory language in Wis. Stats. § 972.15 prohibiting the destruction of a defective PSI by order of the Court. In fact, one of the purposes of Wis. Stats. § 972.15, is to prevent public disclosure of the information in a PSI, both to protect informants and the defendant, and to encourage the defendant and other sources to cooperate candidly in providing information. *State v. Comstock*, 168 Wis. 2d 915, 924-925, 485 N.W.2d 354, 356-57 (1992). With this in mind, the destruction of the PSI 1 would actually help fulfill the purpose of the statute by preventing the disclosure of sensitive information to the public.

Since no statute exists to guide the Court, the Court is left to deal with the PSI 1 under its inherent authority. The Court recognized this in its initial ruling stating, "Mr. Keane argues that – that I have the authority to order that part stricken, and I believe I do if – it's apparent – I think inherent within the authority given to me under 972.15, is that the Court request that this is done." (49:12; App. A, 112).

For the reasons stated on the record, and in the facts above, the Court granted the request to destroy the PSI 1. (49: 11-13; App. A, 111-113). The prosecutor also joined in and voluntarily offered to turn in their copy of the PSI 1 for destruction. (49: 15; App. A, 115).

The ability to destroy the defective PSI 1 is clearly within the Court's inherent authority. Among other things, the Court's ability to decide which documents will be accepted for filing is among the internal operations of the court, and the Court has essentially indicated that the PSI 1 will not be accepted by the Court. Also, the destruction of the PSI 1 will help insure that the Court functions efficiently and effectively by eliminating the confusion that having two sealed PSI's in a file will create.

If the PSI 1 is not destroyed Melton would be prejudiced as set forth in Wis. Stats. § 972.15(5), since the Department of Correction may use the presentence investigation report for correctional programming, parole consideration or care and treatment of any person sentenced to imprisonment. Further, Wis. Stats. § 972.15(6), authorizes the PSI report and any information contained in it

or upon which it is based to be used in any evaluation, examination, referral, hearing, trial, postcommitment relief proceeding, appeal, or other proceeding under Ch. 980, Wis. Stats. The list of individuals that may use the report under Wis. Stats. § 972.15(6) include, the Department of Corrections, the Department of Health Services, the individual or his attorney, the attorney representing the State, a licensed physician, psychologist, or other mental health professional who is examining the individual, and the Court or jury hearing the case.

The Court did not contemplate that the PSI 1 would be used for any of the aforementioned purposes, or any other purpose for that matter. That being said, simply sealing the PSI 1 does not go far enough. It is the general practice of the circuit court to seal PSI's in the court file. If you seal the PSI 1, it will be in the same file as the sealed PSI 2. Allowing the PSI 1 to remain in Melton's file is like failing to disarm a ticking time bomb. The mere fact that it is present in the file prejudices Melton; as to this the Court agreed. (49: 11-13; App. A, 111-113).

On the other hand, destroying the PSI 1 creates no prejudice to the State, the Department of Corrections, Melton, or anyone else. There is no prejudice in its destruction because the PSI 2 will remain in Melton's file for use by any agency requiring it.

Therefore, Melton is requesting that the decision of the circuit court be overturned, and that the original order be reinstated, or, in the alternative, that the case be remanded back to the circuit court with instructions that the circuit court has the authority to order the destruction of the PSI 1.

CONCLUSION

As indicated in the above discussion, Melton requests that the Court overturn the circuit court and reinstate the original Order dated March 31, 2010, or, in the alternative, remand the case back to the circuit court with instructions that the circuit court has the authority to destroy the PSI 1.

Dated: December 28, 2011

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FORM AND LENGTH CERTIFICATION

I hereby certify that this report conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,612 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this appeal brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic appeal brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____

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CERTIFICATION OF COMPLIANCE WITH REGARD TO THE APPENDIX

I, Kevin M. Gaertner, hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record

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APPENDIX

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