

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

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

v.

Circuit Court No. 2008CF1221 &
2009CF156

BRANDON M. MELTON

Defendant-Appellant.

**REPLY BRIEF OF DEFENDANT-APPELLANT
BRANDON M. MELTON**

**APPEAL FROM JUDGMENTS OF CONVICTION
AND ORDERS ENTERED IN CIRCUIT COURT FOR
WAUKESHA COUNTY, THE HONORABLE
RICHARD CONGDON, THE HONORABLE ROBERT
MAWDSLEY AND THE HONORABLE
MARK D. GUNDRUM, PRESIDING**

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ISSUES PRESENTED

1. Melton respectfully disagrees with the issue as presented by the State and resubmits that the issue is whether the Circuit Court has the authority, prior to sentencing, to order a new Presentence Investigation Report to be prepared and order the destruction of the erroneous PSI after the appellate time limits have expired? Melton maintains that the answer is yes.

REPLY TO PLAINTIFF/RESPONDENT'S POSITION ON ORAL ARGUMENT AND PUBLICATION

Defendant/Appellant reasserts his statement on oral argument and publication.

SUPPLEMENTAL STATEMENT OF FACTS

Any reply to the any factual issues presented by plaintiff/respondent's brief will be set out in the argument section.

ARGUMENT

I. Under The Doctrine Of Judicial Estoppel, The State Should Not Be Allowed to Argue That The PSI Must Not Be Destroyed After Sentencing.

Because the prosecutor agreed with Melton's motion to destroy the PSI, and specifically requested that the PSI be retained in the file until the appellate time limits expired, the

State should be judicially estopped from now arguing that the circuit court lacks authority to destroy the PSI after sentencing. Judicial estoppel is aimed at preventing a party from manipulating the courts by asserting one position in judicial proceedings and then asserting an inconsistent position. *State v. Miller*, 2004 WI App 117, ¶ 31, 274 Wis. 2d 471, 683 N.W.2d 485. *See also State v. English-Lancaster*, 2002 WI App 74, ¶¶ 18-19, 252 Wis. 2d 388, 642 N.W.2d 627 (judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings). A party will be judicially estopped from asserting a position when: 1) that position is clearly inconsistent with a previous position; 2) the facts and issues are the same; and 3) the party convinced the court to adopt its previous position. *State v. White*, 2008 WI App 96, ¶ 15, 312 Wis. 2d 799, 754 N.W.2d 214. Whether these elements are met is a question of law. *Miller*, 274 Wis. 2d at 492.

All of the requirements for judicial estoppel are present here. First, the State's contention that the circuit court does not have the authority to destroy a PSI after

sentencing is clearly inconsistent with the position the State took at the motion hearing. When deciding to destroy the PSI following the passing of the appellate time limits, the following exchange occurred:

Mr. Keane [Counsel for Defendant]: 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 reference to this event.

The Court: Do I have authority to ask Mr. Centinario to return his existing one to me, or is that a moot point because that would not be going on and be available to the Department of Corrections?

Mr. Centinario [The State]: Your Honor, just to insure that the Defendant is not prejudiced in any way, I am voluntarily returning the P.S.I. to the Court.

The Court: That would be appreciated. Then Mr. Keane, would you do the same thing?

Mr. Keane: I'll do the same.

The Court: And then, Mr. Centinario –

Mr. Keane: Can I keep it just so I can make reference to the appropriate paragraphs in my order?

The Court: Yes, you may.

Mr. Keane: I will return the copy next time we're in court or however the Court wishes me to do that.

The Court: Mr. Centinario, do we need anything to protect your appellate rights on this issue because we could seal it and have it destroyed later?

Mr. Centinario: I would ask that you do that, Judge, until this matter's appeal time has run out.

The Court: I don't wish to jeopardize –

Mr. Centinario: I appreciate that.

The Court: All right. We'll turn those all in. They will be resealed, not to be open without permission of the Court, and then, Mr. Keane, I will leave it up to you to make the

appropriate motion at the appropriate time when the appeal order – the appeal rights have been or the State’s appeal rights have expired to make a motion to have these destroyed.

(49:14-16; App. A, 114-16).

Second, the facts and issues on appeal are the same as they were at the time of the motion hearing; neither the facts nor the law governing PSI’s has changed since the State requested that the circuit court delay the destruction of the PSI until after the appellate time limits had expired.

Third, the State convinced the court to adopt their position (49:15; App. A, 115). Originally, Melton requested that the PSI be “stricken and destroyed.” (49:14; App. A, 114). The court then inquired as to preserving any of the State’s appellate rights; the State then requested that the PSI be sealed and destroyed after “this matter’s appeal time has run out.” (49:15; App. A, 115). Clearly, the State’s request convinced the trial court to wait to destroy the PSI until the appeal time had run out. Because all three requirements of judicial estoppel are present, this court should find that the State is judicially estopped from now arguing that the court lacks the authority to destroy the PSI following sentencing. This kind of “fast and loose” game-playing is exactly what

judicial estoppel is designed to prevent. *English-Lancaster*, 252 Wis. 2d at 398.

II. The Court Has The Inherent Authority To Order A PSI Destroyed Prior To Sentencing, And To Delay The Physical Destruction Until The Appellate Time Limits Have Passed.

A. Standard of review.

Melton agrees with the State that the issue before this court is a question of a circuit court's judicial authority, as well as its interpretation of statutes and court rules, and that these are matters of law subject to independent review. *Hefty v. Strickhouser*, 2008 WI 96, ¶ 27, 312 Wis. 2d 530, 752 N.W.2d 820; *Ball v. District No. 4, Area Board*, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984).

B. A circuit court has the authority to destroy a PSI.

The State correctly observes that under Wisconsin case law interpreting Wis. Stat. § 972.15 that a court does have the authority to “destroy” a PSI. (Response Brief at p. 9); *See State v. Suchocki*, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997). The State goes on to indicate that the PSI may only be destroyed before sentencing for purposes of barring the PSI's use at sentencing. (Response Brief at p.

9). Melton disagrees; the circuit court has the inherent authority to order the destruction of an erroneous PSI even after sentencing. (See Brief at 8-13). Even if the State were correct, the erroneous PSI was ordered to be destroyed prior to sentencing, and the delay was merely an act to accommodate the State's request to preserve the record for appeal as indicated above.

As part of the State's argument, they indicate that implicit in Wis. Stats. § 972.15(4) is the power for the court to place the PSI under seal after sentencing. (Response Brief at 10). Further, the State concludes that the "destruction is not implicit in the statute because of the statute's intent to keep the PSI confidential and be kept intact after sentencing so that it may be accessed upon court order." (Response Brief at 11). In making this argument the State entirely overlooks the facts in the present case. Again, in Melton's case the court already ordered the erroneous PSI to be destroyed prior to sentencing, and a new PSI was prepared, so the statute's purported goal to keep the PSI intact is not compromised. Melton simply requests the destruction of the erroneous PSI as it was ordered prior to

his sentencing hearing. If not for the State's request to keep the PSI under seal until the time limits on appeal expired, then Melton would not be making this request now.

The State also disagrees that Melton is prejudiced by having two PSI's in the court file. (See Response Brief at 12). The State naively believes that having two PSI's in Melton's file would not cause confusion. *Id.* As has already been seen in this case, workers at the Department of Corrections often deviate from written instructions. (49:7-9; App. A, 107-09). As long as there are two PSI's in the file there is always the risk of a mix-up.

The State next argues that the destruction of the PSI is prevented by SCR 72.01; which, pertains to the retention of original paper records. (See Response Brief at 14-15). This contradicts the State's earlier argument that the PSI can be destroyed prior to sentencing. As already argued extensively, the circuit court has the authority to order the destruction of a PSI. Even so, the new PSI will be retained in the court file pursuant to SCR 72.01.

Finally, the State argues that under *State v. Bush*, 185 Wis. 2d 716, 519 N.W.2d 645 (Ct. App. 1994), Melton's

claim of error should be directed to the Department of Corrections. (Response Brief at 16). Also, the State quotes, “policy principles and considerations of judicial administration dictate that courts should not exercise their jurisdiction to correct PSIs for reasons solely related to Department of Corrections administration.” *Id.*

The State is incorrect in attempting to apply *Bush* to Melton’s situation. *Bush* involved a motion to correct information contained in a PSI after *Bush*’s probation had been revoked. *Bush*, 185 Wis. 2d at 720-21. Melton’s case is clearly distinguishable in that he is not seeking to correct information in the original, erroneous PSI, since the new PSI was already prepared and used at sentencing. The Department of Corrections has no authority to order the original PSI to be destroyed. The authority to order the original PSI destroyed lies solely with the circuit court; here the circuit court exercised this authority prior to sentencing. Further, in *Bush*, there was never a motion to correct the PSI prior to sentencing; on the other hand, Melton filed a written motion and the court granted the motion and ordered a new PSI to be prepared and the erroneous PSI to be destroyed.

Id. at 721. The issue here is not whether the court should make changes to the PSI; *that has already been done*. Melton's issue is whether the circuit court had the authority to carry out its original pre-sentencing order to destroy the erroneous PSI. This is the question that the circuit court could not definitively answer.

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 carry out the pre-sentencing order to destroy the erroneous PSI.

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 erroneous PSI.

Dated: February 29, 2012

Kevin M. Gaertner, State Bar No. 1054221

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 1,860 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 reply brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic reply 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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