STATE OF WISCONSIN

IN SUPREME COURT

Nos. 2011AP1770-CR & 2011AP1771-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

BRANDON M. MELTON,

Defendant-Appellant.

APPEAL FROM A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MARK D. GUNDRUM, PRESIDING

REPLY BRIEF OF STATE OF WISCONSIN AS PETITIONER

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TABLE OF CONTENTS

Cases

Page

Statutes

Other Authorities

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ARGUMENT

The State reaffirms the arguments it presented in its brief-in-chief in this court. As argued therein, an inherent power to destroy the PSI after entry of judgment would conflict with SCR 72.01, and such a power is not inherent because it is not essential to the circuit court's functioning and existence.

Before addressing Melton's arguments point-by-point, the State addresses Melton's repeated assertion that there is a "wrong" PSI and a "right" PSI in this case.

As developed in the State's brief-in-chief at pages 32-35, there is no "wrong" PSI. There are two PSIs that are identical, except that one contains Melton's admission to conduct constituting an uncharged sex offense, and the other does not. The PSI containing the admission is not the "wrong" report for the court's purposes because the court could consider that admission at a resentencing. Melton suggests that the report is in some way "wrong" under DOC regulations, but does not explain how it is "wrong." Even if the report were somehow "wrong" for DOC's purposes, the circuit court would almost certainly lack the inherent power to destroy the report to prevent its use in corrections administration. *See State v. Bush*, 185 Wis.2d 716, 519 N.W.2d 645 (Ct. App. 1994).

I. THE STATE SHOULD NOT BE JUDICIALLY ESTOPPED FROM ARGUING THAT THE COURT LACKS THE INHERENT AUTHORITY TO DESTROY THE PSI REPORT WHERE THE CIRCUIT COURT TOOK UP THE ISSUE OF ITS POWER TO DESTROY THE REPORT *SUA SPONTE*.

Melton contends that the State has played "fast and loose" with the courts and therefore should be judicially estopped from arguing on appeal that the circuit court lacks the power to destroy the PSI after entry of judgment (Melton's br. at 3-6). Melton argues that the State's position on appeal is inconsistent with its prior position in the circuit court, wherein the prosecutor agreed to language in the first order delaying destruction of the report until after expiration of appellate time limits.[1] (49:14-16; Pet-Ap. 125-27) (Melton's br. at 4-5).

[1] Melton incorrectly states that the prosecutor "requested" the language providing for destruction after expiration of appellate time limits (Melton's br. at 6, 16-17). The transcript shows that the language was suggested by the court, and the prosecutor agreed to it (49:14-16; Pet-Ap. 125-27).

Melton's judicial estoppel argument should be summarily rejected by this court for two reasons.

First, Melton ignores that the circuit court raised and decided *on its own motion* the issue of its power to destroy the PSI report (53:1; Pet-Ap. 131). While the doctrine of judicial estoppel seeks to prevent a party from asserting inconsistent positions in litigation, it may be applied only when such inconsistencies are the product of that party's "cold manipulation" of the judicial process *See State v. Petty*, 201 Wis.2d 337, 346-47, 548 N.W.2d 817 (1996). "[J]udicial estoppel is not directed to the relationship between the parties, but is intended to protect the judiciary as an institution from the perversion of judicial machinery." *Id.* at 346.

As detailed in pages 3-7 of the State's brief-in-chief, two circuit court orders pertaining to the PSI were issued in this case. The first was entered by Judge Congdon, ordering the report initially sealed and then destroyed after expiration of appellate time limits. The second was entered by his successor, Judge Gundrum, who modified the original order to direct that the report be sealed but not destroyed.

Critically, Judge Gundrum took up the issue of the court's power to destroy the PSI *sua sponte* after conducting an independent review of the file. The State never asked the court to revisit the prior order, and, at the hearing scheduled on the court's own motion, the State did not offer any argument on the issue of the court's power to destroy the report (53:1-5). Thus, the record shows that the State did not manipulate the courts in an effort to revive the issue of the destruction of the report.

Second, the State is not required to sit on its hands whenever a defendant appeals a circuit court's *sua sponte* order decided on grounds that are arguably inconsistent with a prior position taken by the State. Melton appears to believe that the State should be estopped from making any argument to uphold the circuit court's decision in this

case. It is well-established that the State, as respondent, may advance reasons for upholding a circuit court's decision that were not advanced in, or considered by, the circuit court. *See State v. Holt*, 128 Wis.2d 110, 123-26, 382 N.W.2d 679 (Ct. App. 1985). Suffice to say, a rule that would preclude the State from making arguments in support of a circuit court's decision in circumstances like the present case would be bad policy and contrary to principles of judicial efficiency. *See id.*

II. MELTON HAS NOT SHOWN THAT THE CIRCUIT COURT HAD THE INHERENT AUTHORITY TO DESTROY THE PSI REPORT.

As the party asserting that the circuit court had the inherent power to destroy the PSI report, Melton must establish that this asserted power is necessary to the court's existence and functioning. *See City of Sun Prairie v. Davis*, 226 Wis.2d 738, 751, 595 N.W.2d 635 (1999) (party asserting existence of inherent authority carries burden to show necessity of the power). He has plainly failed to show that the power to destroy the report is necessary to the court's existence and functioning.

A. Melton Does Not Attempt to Reconcile His Claim of Inherent Power with This Court's Mandate in SCR 72.01 that "All Papers" in Felony Case Files Be Retained for at Least 50 Years After Judgment.

Melton makes several complaints about portions of the State's argument that an inherent power to destroy the PSI after entry of judgment would conflict with SCR 72.01, which will be addressed momentarily (Melton's br. at 7-10). However, the main point here is that none of these complaints amount to an argument that SCR 72.01, by its plain language, would not apply in this case.

Melton complains that the State's SCR 72.01 argument contradicts its concession made in the court of appeals that circuit courts may destroy a PSI prior to sentencing for purposes related to sentencing (Melton's br. at 7-8). Melton neglects to mention that the State has requested leave to withdraw this concession, see State's brief-in-chief at page 18.[2] Regardless, the power to destroy a PSI *prior to sentencing* would not implicate SCR 72.01, which applies *after entry of judgment*. Thus, for what it is worth, the State's SCR 72.01 argument does not contradict its prior (withdrawn) concession.

Melton next asserts that the "destruction of erroneous portions of a PSI implicates a defendant's due process right to be sentenced on 'true and correct' information" (Melton's br. at 8). Of course, a defendant has a due process right to be sentenced on accurate information (State's br. at 16). However, this has never been an "inaccurate information" case. Melton does not dispute that the information at issue is an *admission*. And, while Melton's trial counsel indicated he had been unable to review the police reports containing this admission (49:10-11; Pet-Ap. 121-22), any doubt now regarding the validity of the admission would certainly not mandate destruction of the PSI. Even assuming (without conceding) that the court had the power at sentencing to destroy the report for sentencing-related purposes, sentencing is over. The appropriate time for Melton to challenge the accuracy of his admission is at resentencing, should that occur.

Melton next appears to argue that, because Judge Congdon's order was entered before sentencing, the destruction order does not implicate SCR 72.01. No matter when the order was entered, it calls for the

[2] This concession was based on case law establishing that circuit courts have the power to "strike" a PSI prior to sentencing (State's brief-in-chief at 18). The State now believes that "strike" as used in this context is ambiguous, and may reasonably be read to mean either "destroy" or "disregard" or "ignore" (State's brief-in-chief at 18).

destruction of the PSI at a time *after entry of judgment* contrary to SCR 72.01.

Melton also misconstrues the State's argument regarding the expunction provision in SCR 72.06 (Melton's br. at 9). The State did not argue that the expunction provision directly applies, only that it shows this court's disfavor for premature destruction of court records. As argued, the court adopted an expunction rule that requires expunged records to be sealed but not destroyed (State's brief-in-chief at 24).

Finally, Melton labels the first PSI an "erroneous document[ ]" and a "defective report" because he claims it violates DOC regulations in some unspecified way, and argues he should not be "punished by the PSI writer's mistake" (Melton's br. at 9-10, 12). But Melton does not explain how the report was erroneous, or why the PSI author's alleged error would justify an inherent power to destroy the report after entry of judgment contrary to SCR 72.01.[3]

Most importantly, these various complaints do not collectively add up to an argument that an inherent power to destroy the PSI would not conflict with SCR 72.01, and that this conflict should be resolved in favor of recognizing an inherent power to destroy the report. Melton has thus failed to offer a meaningful response to the State's SCR 72.01 argument.

[3] In the circuit court, there was argument about whether the PSI report conformed to DOC rules (49:4-11; Pet-Ap. 115-22). However, in his bench ruling, Judge Congdon did not address whether the first PSI violated DOC rules. He merely concluded that the admission in the report would be "of little use to the Court at a sentencing" and would be "prejudicial" to Melton in the corrections system (49:12-13; Pet-Ap. 123-24).

B. Melton Has Not Shown that the Power to Destroy the PSI is Necessary to the Court's Existence and Functioning.

1. The Fact that the PSI Statute Does Not Explicitly Deny the Circuit Court the Power to Destroy the PSI Is Irrelevant to Whether the Court Has the *Inherent* Power to Do So.

As argued in pages 27-28 of the State's brief-in-chief, the power to destroy a PSI report, particularly after sentencing, is not essential to a court's existence where the statute already authorizes sealing the report. Moreover, an inherent power to destroy the PSI would be contrary to an important purpose of Wis. Stat. § 972.15(4), (5) and (6): preservation of the report so that it may be accessed by authorized parties (State's brief-in-chief at 28).

Melton's main response to these arguments—that the statute does not specifically prohibit the court from destroying the PSI report—is a nonresponse (Melton's br. at 11-14). The parties agree that the statute does not explicitly address whether the court may destroy the report. The issue is whether, in the absence of express statutory authorization, the court has the inherent power to destroy the report.

Further, Melton asserts that there is no "logical reason" to keep the PSI report in the file when the second PSI exists in the file (Melton's br. at 13-14). If Melton's point is that it is not likely to be used in any later proceeding, this fact does not give circuit courts the inherent power to destroy the report, in contravention of SCR 72.01. Most papers in felony case files are never used in post-judgment proceedings. Moreover, the burden

is on Melton to establish that the claimed power is necessary to the court's existence and functioning—not on the State to show that the power's existence would be undesirable or harmful. *See Davis*, 226 Wis.2d at 751.

2. Melton Has Not Shown that the Power to Destroy the Report to Ensure that It Is Not Used Against Him in a "Prejudicial Manner" is a Power that is Essential to the Court's Functioning.

Melton argues that the State has "misrepresent[ed]" his reasons for seeking destruction of the PSI report by asserting that he wants to prevent DOC and other parties from accessing and using the report (Melton's br. at 15-16). He now says that he wants "to ensure that the 'wrong' PSI report is not used in any prejudicial manner," without identifying his specific concerns (Melton's br. at 15). But Melton made his concerns clear in the court of appeals:

> 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[s] 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 … proceeding under Ch. 980, Wis. Stats.

(Melton's court of appeals' brief-in-chief at 11-12).[4] The State has not "misrepresent[ed]" Melton's reasons for seeking the PSI report's destruction.

[4] Despite his suggestion to the court of appeals that DOC has the right to access the first report pursuant to Wis. Stat. § 972.15(5) and (6), Melton now asserts that Judge Gundrum's order sealing the PSI report "would seemingly prevent access to the 'wrong' PSI

Melton has not affirmatively shown that the power to destroy the PSI report to prevent its use by the DOC is necessary to the court's existence and functioning. He merely argues that the State has "overstate[d]" the relevance of the *Bush* case, noting that Bush sought to correct the PSI report long after judgment strictly for purposes related to corrections administration (Melton's br. at 17). However, Melton's apparent reason for appealing Judge Gundrum's order—entered *after sentencing*—was to prevent DOC and other parties from accessing and using the first PSI report. The State submits that *Bush* is well-reasoned and essentially on point. *See Bush*, 185 Wis.2d at 724 ("[P]olicy principles and considerations of judicial administration dictate that courts should not exercise their jurisdiction to correct PSIs for reasons solely related to the Department of Corrections administration."). In fact, if *Bush* is distinguishable, it is in ways that are not helpful to Melton's cause. Bush at least asserted that there were inaccuracies in the PSI report, while Melton makes no such claim. Moreover, there is no indication in Melton's case that DOC has actually accessed and used the PSI report.

For the reasons developed in pages 28-32 of its brief-in-chief, the State resubmits that the power to destroy a PSI report to prevent its use by the DOC and other authorized parties is not a power that is essential to the circuit court's existence and functioning.

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report" (Melton's br. at 15-16). The issues of whether the court order prohibits DOC from exercising its right under § 972.15(5) and (6) to access and use the PSI report, and whether the circuit court even has the power to prohibit DOC from accessing and using the report, *see Bush*, 185 Wis.2d at 722-24, are not presented here. There has been no suggestion that the DOC has attempted to access and use the first report. Moreover, DOC is not a party to this case.

C. Melton Has Not Shown that the Power to Destroy the PSI Report to Prevent "Confusion" and "Misuse" at a Resentencing Is Essential to the Court's Existence and Functioning.

Melton relies heavily on the faulty assumption that the first PSI is the "wrong" PSI in asserting that the power to destroy the first PSI is necessary to prevent "confusion" and "misuse" of the first PSI report at a resentencing (Melton's br. at 21-23). The misuse-at-resentencing rationale was the sole basis for the court of appeals' decision. *State v. Melton*, 2012 WI App 95, ¶ 23, 343 Wis.2d 784, 820 N.W.2d 487.

To repeat, the first PSI is not the "wrong" report for purposes of a hypothetical resentencing. The only way in which it differs from the second PSI report is that it contains Melton's admission to conduct constituting an uncharged offense. And a court could consider this admission at a resentencing (State's brief-in-chief at 34-35). *State v. Church*, 2002 WI App 212, ¶ 15, 257 Wis.2d 442, 650 N.W.2d 873; *Elias v. State*, 93 Wis.2d 278, 284, 286 N.W.2d 559 (1980).

Melton objects that he "has never conceded that information in the first PSI is accurate" (Melton's br. at 22). Perhaps Melton has some as-yet-unargued grounds for claiming that his admission is inaccurate. If Melton were resentenced, he may challenge the accuracy of his admission at the resentencing hearing. The fact that Melton has "never conceded" the accuracy of his admission does not make the first PSI the "wrong" PSI for resentencing purposes, or necessitate the unique power to destroy it after entry of judgment.

Melton says that the State "maintains that the second PSI report should not be needed" (Melton's br. at 22-23). The State's position is only that a resentencing

court could within its discretion review the first PSI and consider the admission in passing sentence (State's brief-in-chief at 34-35). Melton also argues that the State has "conceded that the first PSI report was invalid" by not appealing Judge Congdon's order (Melton's br. at 22-23). Respectfully, this is nonsense, and Melton has strayed far from the issue in this case. The State need not have appealed Judge Congdon's order to argue that use of the first PSI report at a resentencing would not be "misuse" of the report, and that, accordingly, the power to destroy the report to prevent its use at resentencing is not necessary to the court's existence or functioning.

CONCLUSION

The court of appeals' published decision in *Melton* will reasonably be read by judges and litigants to stand for the following proposition: Notwithstanding SCR 72.01, circuit courts have the inherent power to destroy court documents after entry of judgment in some circumstances. This is a dangerous precedent, an invitation to any party interested in having a document removed from a case file to make such a request. For this reason, and those set forth in this brief and the State's brief-in-chief, the court of appeals' decision must be reversed and the circuit court's order reinstated.

Date: January 17, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,993 words.

Dated this 17th day of January, 2013.

_____
Jacob J. Wittwer
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

This electronic 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.

Dated this 17th day of January, 2013.

_____
Jacob J. Wittwer
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