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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2016AP1066-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES J. HARTLEBEN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER ENTERED
IN THE CIRCUIT COURT FOR MARATHON COUNTY,
THE HONORABLE LAMONT K. JACOBSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

ARGUMENT

Hartleben failed to prove that the author of the PSI was biased against him.

Hartleben claims that his attorney was ineffective for failing to object that the author of the presentence report was biased against him.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

Hartleben failed to prove either deficient performance or prejudice because he failed to prove that the author of the PSI was biased against him.

The person who prepares a presentence investigation report functions as an agent of the court in gathering information about the defendant's personality, social circumstances and patterns of behavior to allow the court to make a more informed decision about the appropriate sentence for that individual. *State v. Howland*, 2003 WI App 104, ¶¶ 32-33, 264 Wis. 2d 279, 663 N.W.2d 340; *State v. Suchocki*, 208 Wis. 2d 509, 518, 561 N.W.2d 332 (Ct. App.

1997), *modified in part on other grounds, State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. Therefore, a claim that the author of the PSI is biased should be reviewed under the same standards that apply to claims of bias against a judge.

It is presumed that a judge, or in this case an agent of the judge, acts fairly, impartially and without bias. *State v. Goodson*, 2009 WI App 107, ¶ 8, 320 Wis. 2d 166, 771 N.W.2d 385; *State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114.

This presumption may be rebutted by a showing of either subjective or objective bias. *Goodson*, 320 Wis. 2d 166, ¶ 8; *Gudgeon*, 295 Wis. 2d 189, ¶ 20. The burden is on the party asserting bias to rebut the presumption of impartiality. *State v. Pirtle*, 2011 WI App 89, ¶ 34, 334 Wis. 2d 211, 799 N.W.2d 492; *State v. Neuaone*, 2005 WI App 124, ¶ 16, 284 Wis. 2d 473, 700 N.W.2d 298. Whether the presumption has been rebutted is a question of law considered independently by a reviewing court. *Pirtle*, 334 Wis. 2d 211, ¶ 34; *Goodson*, 320 Wis. 2d 166, ¶ 7.

Relying primarily on *Suchocki*, the defendant-appellant, Charles J. Hartleben, argues that the author of the PSI in this case, DOC corrections agent James Darling, was impliedly biased.

However, after *Suchocki* was decided, the courts changed the terminology relating to claims of bias, as well as the way the newly defined kinds of bias may be shown.

What used to be called implied or inferred bias has now been incorporated in the concept of objective bias. *State v. Faucher*, 227 Wis. 2d 700, 716 & n.3, 596 N.W.2d 770 (1999).

Objective bias may be shown when there are objective facts demonstrating either that a person was actually biased or that there was a great risk of actual bias although only the appearance of bias could be shown. *State v. Dylan S.*, 2012 WI App 25, ¶ 30, 339 Wis. 2d 442, 813 N.W.2d 229;

Goodson, 320 Wis. 2d 166, ¶¶ 9, 14. See *Gudgeon*, 295 Wis. 2d 189, ¶ 23. “Thus, actual bias – either its presence, or the great risk of it – is the underlying concern of objective bias analysis.” *Goodson*, 320 Wis. 2d 166, ¶ 14.

Hartleben contends that Darling was biased, objectively under the current terminology, because he had a work relationship with two of Hartleben’s past victims. Hartleben had previously been convicted of disorderly conduct for threatening other corrections agents who worked in the same office as Darling. (29:12.)

The mere fact that Darling had a work relationship with other corrections agents is not enough to demonstrate objective bias. Unlike the marital relationship between a corrections agent and a prosecutor, which was found to create a conflict of interest in *Suchocki*, a relationship between corrections agents who work together does not create an inherent conflict of interest sufficient to show a great risk of actual bias. *State v. Thexton*, 2007 WI App 11, ¶ 1, 298 Wis. 2d 263, 727 N.W.2d 560.

Rather, all the relevant facts and circumstances regarding Darling’s relationship with the victims of Hartleben’s crime must be considered in assessing whether Darling was objectively biased.

State v. Stafford, 2003 WI App 138, 265 Wis. 2d 886, 667 N.W.2d 370, *modified in part on other grounds*, *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, is instructive.

In *Stafford*, this Court held that a mental health worker who wrote an assessment of the defendant that was included in the PSI had a conflict of interest because she treated the victim for emotional issues caused by the sexual abuse for which the defendant was convicted. *Stafford*, 265 Wis. 2d 886, ¶¶ 5, 8, 11.

It was not merely the fact that there was contact between the assessor and the victim that was of concern. *Stafford*, 265 Wis. 2d 886, ¶ 11. Rather, what was

troublesome was that the assessment of the defendant could have been consciously or subconsciously influenced by the extensive treatment relationship between the assessor and the defendant's victim. *Stafford*, 265 Wis. 2d 886, ¶ 11.

Thus, the court found bias because a contributor to the defendant's PSI had a close relationship with the victim, and what the defendant did to the victim could have influenced the writer's perception of the defendant. A contributor to the PSI could have been biased against the defendant because of her sympathy for the person the defendant harmed, and could have written a less than neutral assessment of the defendant because she made the assessment from the perspective of the victim.

Three relevant considerations can be gleaned from *Stafford*: (1) the nature of Darling's relationship with the other corrections agents beyond the mere fact that he worked with them, (2) the nature and effect of Hartleben's crimes against the victims with whom Darling had a relationship, and (3) the possibility that any bias Darling might have had because of the first two considerations could have influenced the PSI.

A. Darling did not have a close emotional relationship with Hartleben's past victims.

Darling had a work relationship with both corrections agents who were previously threatened by Hartleben, but not a close emotional relationship with either of them.

Darling knew Agent AD for 15 years. (29:7.) They saw each other every day, worked closely together, and were friends on the job. (29:7-8.)

Although Darling had known Agent ET since 2009, they did not interact frequently. (29:8-9.) They were just associates. (29:9.) ET may have left the office by the time Darling wrote the PSI in this case. (12; 13; 29:9.)

However, Darling's relationship with the other agents was confined to the walls of the office. Darling did not

socialize with either of the other agents outside of work. (29:6.)

So Darling's relationship with AD and ET was nothing comparable to the marital relationship that concerned the court in *Suchocki* or the treatment relationship that concerned the court in *Stafford*.

Darling's relationship with his fellow agents was at a low level of intensity that might have caused him to be concerned, but not necessarily upset, about their being victims of a crime. Therefore, the nature of Darling's relationship with the victims in and of itself would not have created a great risk of actual bias against the person who committed the crimes against them.

Moreover, under the circumstances of this case, Darling's relationship with the victims must be weighed with his relationship with the defendant.

Darling worked not only with AD and ET, but also with Hartleben, albeit in a different capacity. Darling supervised Hartleben on his release from prison. (29:14, 46.)

Darling always got along with Hartleben during the entire time he supervised Hartleben, including the day Hartleben made threats against the other agents. (29:12, 14, 16.)

Objectively, there would be even less risk of bias against a person with whom Darling had a continuing positive relationship.

B. The nature and effect of Hartleben's crimes against the other officers were unlikely to cause bias because Hartleben made only verbal threats that were never carried out.

Darling's associates were not the victims of the crimes for which the PSI in this case was written. They were the victims of entirely unrelated conduct that was committed three years before Darling wrote this PSI. (12; 13; 19:19; 29:11-12.)

As Hartleben was being taken into custody by the police, he commented that he was going to get AD even if it sent him back to prison. (19:22, A-App. 148.) AD was not present at the time. (19:22, A-App. 148.)

It is not unusual for corrections agents to be threatened by persons they supervise (29:18, 26), and Hartleben's generalized threat to "get" AD was just the sort of meaningless remark that could easily be uttered by someone who was angry about being arrested.

Hartleben's remark was not a true threat, i.e., a serious expression of a purpose to inflict harm, because it lacked several of the attributes of a true threat. *See State v. Douglas D.*, 2001 WI 47, ¶ 34, 243 Wis. 2d 204, 626 N.W.2d 725. The threat was not communicated directly to the victim. There is no record of similar threats by the speaker to the victim. And the victim had no reason to believe that the speaker had a propensity to engage in violence since none of his previous offenses involved aggression against other persons. (13:6-7.)

A remark made in anger because of some action by the victim is not necessarily a serious threat to do harm. *See Douglas D.*, 243 Wis. 2d 204, ¶ 40.

Hartleben's ephemeral threat against AD was not the reason the agent in charge of the office reported Hartleben to the police. (29:28.) The agent in charge contacted the police because of the aggressiveness of Hartleben's behavior toward ET while he was in custody later the same day. (29:18.)

Hartleben swore at ET, and advanced toward him with his arms raised above his waist, although his hands were not balled into fists. (19:22, A-App. 148.) When ET yelled at Hartleben to sit down, he backed off, but continued to verbally taunt ET until jail officials arrived. (19:22, A-App. 148.)

In neither of these instances were Hartleben's threats actually carried out. Hartleben never physically touched or harmed either agent.

Furthermore, it does not appear that Hartleben ever made any similar threats against AD, ET or any other agent again. Indeed, Darling thought that lashing out the way he did was out of character for Hartleben. (29:16.)

The isolated outburst against AD was not the sort of behavior that would create a great risk of bias on the part of someone who was work friends with a corrections agent whose job involved a potential for such threats.

More likely, Darling just shrugged off Hartleben's threat against AD as part of AD's job and never held it against Hartleben, especially since Darling always got along with Hartleben and never had any problems with him either that day or any other time while he supervised Hartleben on release. (29:12, 14, 16, 18, 38, 46.) Indeed, Darling stated in the PSI that he got a positive impression of Hartleben because he was respectful during his last term of supervision up to and including the time Darling was writing the PSI. (13:24.)

Although Hartleben's behavior toward ET was more aggravated than his behavior toward AD, it was still not that serious since it never went beyond verbal and body language uttered in a single incident. ET was able to diffuse the threat just with threatening words of his own.

Darling's relationship with ET was too attenuated for this incident, which occurred in 2012, to create a great risk of bias when he wrote the PSI in this case three years later, after ET may no longer have been one of his colleagues. (29:9, 11-12.)

Considering the nature of Hartleben's threats and the nature of Darling's relationship with the persons who were threatened, there was very little risk that Darling was biased against Hartleben because of those threats.

C. There was not much risk that any bias Darling might have harbored could have manifested itself in any significant way in the PSI.

Presentence reports are designed to gather information concerning a defendant's personality, social circumstances and patterns of behavior to assist the court in making a sentencing decision. *Howland*, 264 Wis. 2d 279, ¶ 33.

Since a court may properly consider a defendant's record of past criminal offenses in imposing a sentence, *State v. Klubertanz*, 2006 WI App 71, ¶ 18, 291 Wis. 2d 751, 713 N.W.2d 116; *State v. Gallion*, 2004 WI 42, ¶ 43 n.11, 270 Wis. 2d 535, 678 N.W.2d 197, those criminal offenses may also be considered in the PSI. *See State v. Buchanan*, 2013 WI 31, ¶ 43, 346 Wis. 2d 735, 828 N.W.2d 847.

Thus, it was perfectly proper for Darling to consider in the PSI Hartleben's conviction of disorderly conduct for threatening Darling's fellow corrections agents. *See United States v. Smith*, 210 F.3d 760, 764 (7th Cir. 2000) (stating obvious and indisputable facts does not exhibit bias).

Even assuming that there might have been a great risk that Darling was biased, Hartleben's only complaint might be that Darling gave the disorderly conduct conviction too much weight in computing his sentence recommendation because of his relationship with the victims of that offense.

But that is highly unlikely in light of Hartleben's considerable record which includes 13 adult convictions for such crimes as burglary, arson and possession of THC, as well as numerous read-in offenses, and several juvenile adjudications including one for first-degree sexual assault of a child. (13:6-7.) It is also highly unlikely in light of the COMPAS evaluation which placed Hartleben in the high risk category for both general and violent recidivism. (13:22.)

There was so much weight to be given other offenses that there was little risk that too much weight would be

given to one disorderly conduct conviction, even if Darling might have had strong feelings about that offense. That one misdemeanor conviction would be buried under the weight of all Hartleben's other offenses.

For any and all these reasons, Hartleben failed to overcome the presumption that the author of the PSI was impartial by showing that there was a great risk that Darling was biased against him.

CONCLUSION

It is therefore respectfully submitted that the judgment and order of the circuit court should be affirmed.

Dated September 23, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 2,498 words.

Dated this 23rd day of September, 2016.

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

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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 23rd day of September, 2016.

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