

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2016AP001066-CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES J. HARTLEBEN,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Order
Denying Postconviction Relief, Entered in the Circuit Court
for Marathon County, the Honorable LaMont Jacobson,
Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

The relationship between Mr. Darling and Mr. Hartleben's past victims is a conflict of interest and demonstrates sufficient bias to warrant resentencing without a demonstration of actual bias.

The State proposes that claims of PSI writer bias should be analyzed under the same standards that apply to claims of judicial bias, because the PSI writer acts as an agent of the court in preparing the PSI. (State's Brief at 1-2). Mr. Hartleben disagrees that the same standards should apply. Judges have taken an oath to impartially discharge their duties pursuant to Wis. Stat. § 757.02, they are bound by the code of judicial conduct in SCR Chapter 60, and they are bound by Wis. Stat. § 757.19 which requires a judge to disqualify himself/herself from a case for various enumerated reasons. A strong presumption of impartiality makes sense in the judicial context. Furthermore, to undersigned counsel's knowledge, no published case involving PSI writer bias or conflict of interest uses the judicial bias standard. See *State v. Thexton*, 2007 WI App 11, 727 N.W.2d 560; see also *State v. Stafford*, 2003 WI App 138, 265 Wis. 2d 886, 667 N.W.2d 370; see also *State v. Howland*, 2003 WI App 104, 264 Wis. 2d 279, 663 N.W.2d 340; *State v. Suchocki*, 208 Wis. 2d 509, 561 N.W.2d 332.

Rather, in both pre and post 1999¹ case law involving bias or conflict of interest in the PSI writer, the court of appeals focuses on:

- Whether the PSI writer may be subconsciously influenced by the relationship in forming impressions regarding the defendant and in making recommendations to the court, and

¹ The State cites to *State v. Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999) as the case that changed bias law in 1999, but the language in *Faucher* indicates that this new terminology applies specifically to juror bias. (State's Brief at 2). *Faucher* announced: "...today we adopt the terms 'statutory,' 'subjective,' and 'objective' as the proper terms to use in referring to juror bias." 227 Wis. 2d 700, ¶ 25.

- Whether the relationship draws into question the objectivity of the PSI and raises serious questions as to the fairness of the sentencing process to the defendant.

State v. Howland, 2003 WI App 104, ¶ 35; *State v. Stafford*, 2003 WI App 138, ¶ 11; *State v. Suchocki*, 208 Wis. 2d 509, 519; see *State v. Thexton*, 2007 WI App 11, 727 N.W.2d 560.²

As argued in his brief-in-chief, Mr. Darling could very well have been subconsciously influenced by his relationships, observations, discussions, and warnings in forming impressions regarding Mr. Hartleben, in a way that draws the PSI's objectivity into question and raises serious questions as to the fairness of the sentencing process. (Defendant's Brief-in-chief at 14-15).

However, even under the standard the State has proposed, Mr. Hartleben should still prevail. There is certainly an appearance of bias that reveals a great risk of actual bias when:

- The PSI writer has known the defendant's victims since 2001 and 2009, respectively; (29:7-8)
- The PSI writer works with the victims and has formed "work bonds" with them; (29:6)
- The defendant's victims are people that the PSI writer cares about; (29:6)
- The PSI writer and the victims are supportive of each other; (29:6)
- The PSI writer is cover agents with one victim, he sees her daily at the office, and he calls her a friend; (29:7-8)

² The *Thexton* court reviewed *Suchocki*, stating the *Suchocki* court held "that the relationship in that case demonstrated bias in the both the author and the PSI as a matter of law." The court then concluded that "the same inherent bias" in *Suchocki* is not present in *Thexton's* case, thus apparently approving the cited *Suchocki* standard.

- The PSI writer's supervisor held a meeting with the PSI writer; at that meeting, the supervisor "outlined some very specific safety concerns" and made a plan for how they could keep the PSI writer safe from the defendant (29:23-24); and
- The PSI writer still had the incidents in his memory at the time he wrote the PSI report (29:17).

Simply because Mr. Darling's relationship with the victims was mostly confined to the "walls of the office," this does not negate the feelings he had toward them. (29:8; State's Response Brief at 4-5). Due to the time-consuming nature of jobs, a person can very well spend more time with co-workers than with their friends outside the office. Mr. Darling testified that he saw A.D. daily at work and they are cover agents for each other, so it follows that they likely spent a significant amount of time together over the course of his career. (29:7-8). Furthermore, as anyone who has a positive work environment knows, there can be a sense of camaraderie and group loyalty among co-workers sharing an office space. Mr. Darling's testimony suggests that this was indeed the kind of work environment at the Shawano office – supportive and bonding. (29:6).

In *State v. Thexton*, to which the State cites, the probation agent who prepared the defendant's PSI was married to another probation agent, and the two agents together were responsible for his supervision. 2007 WI App 11, 727 N.W.2d 560. Thexton claimed that this marriage created a conflict of interest compromising the PSI's neutrality. *Id.* ¶4. The court of appeals declined to extend *Suchocki* to cover Thexton's situation. *Id.* ¶¶4-5. The court held that the same inherent bias in *Suchocki* does not exist merely because two probation agents are married to each other, since there was no information suggesting that either could not be neutral. *Id.* ¶5. The court reasoned that, while it is vital for the PSI writer to be independent of the prosecution and the defense, simply because two probation agents are married to each other does not make them partial to one party. *See Id.* Thexton is inapposite because there was no logical reason in that case why the relationship would give the PSI

writer allegiance – whether conscious or subconscious – toward one side or the other. Here, there is.

As Mr. Hartleben's victims, E.T. and A.D. were in a clear adversary role to Mr. Hartleben. Their role as victims necessarily aligns them with the prosecution. That they were victims of a past crime rather than the current one would make no difference in terms of Mr. Darling's connection to them and subconscious feelings toward Mr. Hartleben. People Mr. Darling cared about had been personally aggrieved by Mr. Hartleben under the law and the behavior was serious enough to result in a criminal conviction.

The State minimizes the threats, characterizing the incident against A.D. as "not a true threat," and the incident against E.T. as "not that serious." (State's Response Brief at 6-7). However, the record suggests that the agents in the probation/parole office, the victims, the police – and indeed the State itself – took them very seriously.

The record indicates that E.T. was emotionally impacted by the incident. (29:11-13, 19:22-23). He was shaken up. (19:22). He reported that he had never been threatened like that in his career. (19:23). After the incident, which occurred around 10:00 a.m., he filled out a report and then needed to go home for the day. (19:23). Mr. Darling observed firsthand how upset E.T. was, noting that he was "struck" by E.T.'s unusual demeanor after the incident. (29:11-13).

Mr. Darling's probation supervisor, Julie Krause, thought it was serious too. This authority figure in the office held a meeting with Mr. Darling in which she "outlined some very specific safety concerns" and made a plan for how they could keep Mr. Darling safe from Mr. Hartleben. (29:23-24). Ms. Krause testified about the factors she considers in deciding whether to report an incident to law enforcement: "if there's something that we deem as a pretty serious and substantial threat, and that's based on...who's the offender, what's their history, what was the context of the threat, what [were] the details of the threat, and do we feel like there's a probability that that threat could be carried out." (29:28). Ms. Krause testified that she felt Mr. Hartleben's behaviors "did

rise to the level we needed to make law enforcement aware of it.” (29:27-28).

The sheriff’s department believed it was serious enough to refer Mr. Hartleben to the district attorney’s office for a criminal charge, and the State must have believed it was serious enough to warrant a criminal charge. (19:19-21). Thus, it appears from the record that no one at the time adopted the State’s now relaxed mentality about Mr. Hartleben’s behavior.

To be clear, Mr. Hartleben’s argument is not that bias caused Mr. Darling to simply place too much weight on the disorderly conduct conviction. (See State’s Brief at 8). It is implausible that personal bias existing in one’s subconscious would neatly confine itself to one small facet of consideration. More likely, bias permeates every aspect of a person’s thought process, and it could have subconsciously distorted the entire sentence recommendation from many angles. It is impossible to know or prove the extent to which Mr. Darling’s PSI was compromised by the writer’s relationship with Mr. Hartleben’s victims. Mr. Darling likely does not even know. But that is the very rationale behind *Suchocki* and *Stafford*.

The integrity of the sentencing process demands that the PSI report be accurate, reliable and, above all, objective. *Howland*, 2003 WI App 104, ¶ 36. As *Howland* states:

A defendant’s cooperation and openness depend upon the objectivity of this report; a cooperative and open relationship would be impossible if the defendant perceives the probation officer to be a mere puppet of the prosecution.

Id. Likewise, in the instant case, a cooperative and open relationship is impossible if the defendant perceives the probation officer to be partial to the prosecution or biased against him because of his relationship to the victims. Mr. Hartleben testified that having Mr. Darling as the author of his PSI made him feel “uncomfortable, anxious, and intimidated.” (29:35). This is a reasonable, understandable response. When the author of one’s PSI report works closely with and cares about the victims of one’s crime, it creates a

profound appearance of impartiality that creates a great risk of actual bias and it hinders the cooperative and open relationship that PSI reports depend on.

Mr. Hartlen asks this Court to find that the PSI author and report were biased as a matter of law or, in the alternative, that counsel was ineffective for failing to object to the report, as argued in his brief-in-chief.³

CONCLUSION

WHEREFORE, for all the reasons stated above and in his brief-in-chief, Charles Hartleben respectfully requests that this Court grant a new sentencing hearing before a different judge, utilizing a new PSI report prepared by an agent outside of Shawano County.

Dated this 7th day of October, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief in proportional serif font. The length of the brief is 1,807 words.

³ The postconviction court did not find waiver and instead ruled on the merits, ultimately denying on both grounds.

**CERTIFICATION OF COMPLIANCE
WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in context and format to the printed form of the brief filed on or after 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 5th day of October, 2016.

Signed:

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CERTIFICATION AS TO MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that this brief was deposited in the United States mail for delivery by first class or priority mail on October 8, 2016. Postage has been pre-paid. This brief is addressed to: Thomas J. Balistreri, Assistant Attorney General, P.O. Box 7857, Madison, WI 53707-7857 and Diane Fremgen, WI Court of Appeals, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 8th day of October, 2016.

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