

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 22, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP3045-CR**

**Cir. Ct. No. 2003CF5310**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MITCHELL MILLER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Reserve Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Mitchell Miller appeals from a judgment of conviction entered after he pled guilty to armed robbery, contrary to WIS. STAT.

§ 943.32(2) (2003-04).<sup>1</sup> He also appeals from an order denying his postconviction motion. Miller alleges that the trial court should have granted his motion for postconviction relief because the presentence report was biased, and therefore the trial court did not have objective and reliable information upon which to base its sentence in violation of the defendant's due process rights. Because the trial court did not err in denying the motion, we affirm.

### BACKGROUND

¶2 On September 17, 2003, Miller was charged with armed robbery with threat of force (count one), first-degree recklessly endangering safety (count two), and felon in possession of a firearm (count three). The complaint alleged that on September 12, 2003, Miller robbed a pregnant McDonald's restaurant manager after stalking her for several weeks. He knew that she was the manager, and he also knew that she took the morning money deposit to the bank. The morning of the robbery, Miller loitered outside the restaurant so he could watch the manager. He had a gun with him. When the manager got into her vehicle, Miller approached her and demanded that she give him the bag of money. She gave him the bag, and he ran off. As Miller was being chased by two workers from McDonald's, he discharged his weapon. Miller was caught by police officers in the area shortly thereafter.

¶3 On April 5, 2004, Miller appeared before the trial court and advised that he had entered into a plea agreement with the State. He pled guilty to armed robbery (count one) in exchange for the State's motion to dismiss counts two and

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

three. The State recommended that the sentence be nine years of initial confinement and four years of extended supervision. The trial court accepted the plea and was advised that Miller would prepare a private presentence investigation report (PSI).

¶4 On May 20, 2004, Miller appeared before the trial court for sentencing. He was sentenced to thirteen years, consisting of nine years of initial confinement followed by four years of extended supervision. Miller filed a postconviction motion, alleging that he was sentenced on inaccurate information. Specifically, he points to comments the court made about the defendant's private PSI. The court said:

The Presentence report, I thought it was an excellent Presentence report, very thorough and very complete, but also very one-sided. The Presentence writer -- and I realize this is a private Presentence report -- didn't have an opportunity to talk to the victim, to get the victim's side of what happened and to get the victim's view of what should happen. And she has declined to appear here .... in any event, it doesn't make any difference.

¶5 The trial court denied Miller's motion, reasoning that the defendant failed to point to any information in the PSI that was inaccurate, the requirement of neutrality does not apply in cases where the defense orders a private PSI, and a trial court was not even obligated to order or use a PSI at all. Miller now appeals.

## DISCUSSION

¶6 Miller contends that the trial court should have granted his motion for postconviction relief because the PSI was biased, and therefore the trial court did not have objective and reliable information upon which to base its sentence in violation of the defendant's due process rights. The State responds that Miller is not entitled to resentencing because his challenge is frivolous. The trial court

agreed with the State. We conclude that the trial court did not err in denying defendant's motion for postconviction relief.

¶7 In reviewing a trial court's decision on a postconviction motion, we determine whether the trial court acted within the ambit of its discretion. *State v. Johnson*, 158 Wis. 2d 458, 463, 463 N.W.2d 352 (Ct. App. 1990). “[S]uch questions will be treated in light of a strong policy against interference with the discretion of the trial court in passing sentence.” *Elias v. State*, 93 Wis. 2d 278, 281, 286 N.W.2d 559 (1980) (citations omitted). The trial court is presumed to have “acted reasonably ... [unless] the defendant [can] show some unreasonable or unjustified basis ... for the sentence ....” *State v. Harris*, 119 Wis. 2d 612, 622-23, 350 N.W.2d 633 (1984).

¶8 Miller's due process rights were not violated. A defendant's due process rights at a sentencing hearing are to be (1) present at the hearing and to be afforded the right of allocution, (2) represented by counsel, and (3) sentenced on the basis of true and correct information. *Bruneau v. State*, 77 Wis. 2d 166, 174-75, 252 N.W.2d 347 (1977). The factor of due process that requires a judge to sentence only on the basis of true and correct information is similar to the sentencing requirements mandated in *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). *McCleary* requires that a trial court articulate the basis for the sentence imposed on the facts of the record: “[T]here should be evidence in the record that discretion was in fact exercised and the basis of that exercise of discretion should be set forth.” *Id.* at 277 (citation omitted).

¶9 As a matter of due process, Miller was afforded each of these rights. He was present with counsel at two hearings: one on September 17, 2003 before the court commissioner, and the other on April 5, 2004 before the trial court; he

was given the opportunity of allocution at both hearings. The sentencing court told Miller that it would listen to Miller, his attorney and the district attorney, and that it would read any PSI that was prepared. It emphasized to Miller that in the final analysis, the court would make the appropriate disposition regardless of anyone's recommendation. The court reviewed Miller's extensive criminal record and his private PSI. The court noted that it was very well written, but "also very one-sided"; he believed the report unequivocally favored Miller. However, as discussed below, the private PSI was not required to be neutral or unbiased. *See State v. Perez*, 170 Wis. 2d 130, 140, 487 N.W.2d 630 (Ct. App. 1992).

¶10 Miller has failed to demonstrate that the court relied on inaccurate information. When a defendant alleges that a court's sentencing decision is based on inaccurate information, the defendant must establish that the information is, in fact, inaccurate and that the trial court relied on the inaccurate information in sentencing. *State v. Harris*, 174 Wis. 2d 367, 378, 497 N.W.2d 742 (Ct. App. 1993).

¶11 Here, Miller was unable to point to anything inaccurate in the PSI. Both he and his attorney assured the court at the outset of the sentencing hearing, that the information contained in the private PSI was, in fact, accurate.

¶12 Miller contends that the PSI was one-sided, presumably because it did not include the victim's version of the events. However, the absence of other information in the report (the victim's viewpoints) does not render the report *inaccurate* as the term is used in case law nor does it warrant resentencing.

¶13 Miller argues that he is entitled to be resentenced because the PSI was too favorable to him and, therefore, not neutral. He claims that the report should have been not only accurate, but that the person preparing the report "must

be neutral and independent of either the prosecution or the defense.” *Perez*, 170 Wis. 2d at 140. Further, Miller believes that if the court had had a more neutral and independent report, he would have received a lighter sentence.

¶14 Miller, however, makes several concessions regarding his appeal. First, he admits that he cannot point to any inaccurate information in the PSI, although he also asserts this (the finding of inaccurate information) is not required in a postconviction motion. Second, he is aware that the PSI was prepared at his request and on his behalf. Third, he recognizes the apparent absurdity in receiving a favorable report and now complaining about it on appeal. Fourth, he admits that the trial court is not even obligated to order or use a PSI at all.

¶15 If Miller wanted a neutral report, he should have requested a court-ordered PSI prepared by a probation or parole agent. Only PSI’s prepared by the Department of Corrections’ agents, at the request of the sentencing court, are required by law to be neutral. *See id.* By contrast, there is no prohibition against a private PSI which presents the defendant in a favorable light. The defendant may, if he so chooses, “file his own presentence memorandum with the court which can present what the defendant believes to be true and correct information the court should rely upon in sentencing.” *Id.* at 142; *see State v. Greve*, 2004 WI 69, ¶¶9-12, 272 Wis. 2d 444, 681 N.W.2d 479 (explaining that a defendant’s sentencing memoranda are similar in content to court-ordered PSI’s; however, these memoranda have no prescribed format or requisite inclusions, and are prepared by a person advocating on behalf of the defendant). As a defense advocacy document, the private PSI is expected to paint a favorable picture of the defendant for sentencing purposes.

¶16 Here, the focus of the PSI was solely on Miller, his acts, his family, his employment history, and his character. This is fairly typical of defense PSI's, as it is "one 'means through which the sentencing court receives information' about a defendant, and it is 'intended to assist the sentencing court in determining the kind and extent of punishment to be imposed in the particular case.'" *Greve*, 272 Wis. 2d 444, ¶9 (quoting *State v. Heffran*, 129 Wis. 2d 156, 163-64, 384 N.W.2d 351 (1986)). Thus, the report benefits the defendant because the court will obtain a larger picture of him for sentencing purposes.

¶17 A court is not obligated to order and use a PSI at all. *Bruneau*, 77 Wis. 2d at 174. A court "may" order a PSI; that is, it is not required by law to do so.<sup>2</sup> Such reports are not constitutionally required, and the legislature has not mandated the use of such reports. *Id.*

¶18 Here, the PSI was prepared at the defendant's request and on his behalf. As it happened, the information in the report was used in sentencing. The State referred to it in its sentencing recommendation, the defense relied upon it in his remarks, and the trial court relied on it when exercising sentencing discretion.

¶19 Based on the foregoing, we conclude that Miller has not shown that the court relied on inaccurate information when it sentenced him or that reliance on a PSI prepared by the defense, absent the victim's version of events or her

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<sup>2</sup> See WIS. STAT. § 972.15(1). After a conviction, the court may order a PSI, except that the court may order an employee of the department to conduct a PSI only after a conviction for a felony.

feelings toward Miller, warrants resentencing. Accordingly, the trial court did not err in denying Miller's motion for postconviction relief.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.



