

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 06, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2005AP1823-CR

Cir. Ct. No. 2003CF5722

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY JASON MACHICOTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony Jason Machicote appeals from a judgment of conviction for four armed robberies, and from a postconviction order denying his motion for resentencing. The issues are whether the trial court's actual reliance on certain diagnoses, conclusions and opinions in a State psychologist's

report referenced in the presentence investigation report (“presentence psychological report”) that differed from those in a defense psychologist’s report filed with Machicote’s postconviction motion for resentencing constituted a denial of his due process right to be sentenced on accurate information, and if so, whether trial counsel was ineffective for failing to object to, correct or comment on these arguable inaccuracies, or for failing to seek to adjourn the sentencing hearing to counter that information. We conclude that the trial court’s reliance on certain information from the State’s psychologist did not deny Machicote’s due process right to be sentenced on accurate information, and that trial counsel was not ineffective for failing to attempt to counter that information, as demonstrated by the trial court’s explanation after considering the defense psychologist’s report (“defense postconviction psychological report”) filed with Machicote’s postconviction motion for resentencing. Therefore, we affirm.

¶2 The State charged Machicote with kidnapping and five counts of armed robbery, each as a party to the crime. Incident to a plea bargain, Machicote pled guilty to four of the armed robberies, two of them as a party to the crime, in violation of WIS. STAT. §§ 943.32(2) (amended Feb. 1, 2003) and 939.05 (2003-04).¹ The prosecutor recommended substantial prison time without specifying the duration of the proposed confinement term; trial counsel recognized that “[t]his [wa]s a prison case.” The trial court imposed a forty-year aggregate sentence

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

comprised of twenty-eight- and twelve-year respective periods of confinement and extended supervision.²

¶3 Machicote moved for postconviction relief seeking resentencing. He alleged that the trial court relied on inaccurate information from the presentence psychological report that tainted its assessment of his (lack of) rehabilitative potential, and he proffered a defense postconviction psychological report to correct those inaccuracies and deficiencies. In its postconviction order denying the motion, the trial court quoted from and referenced both psychological reports, explaining that: (1) the information on which it relied was not “*factually* inaccurate,” but “only *opinions* with respect to the defendant’s character”; and (2) the opinions of the psychologists were “no[t] real[ly] substantial[ly] differen[t]” from one another.³

¶4 “A defendant has a constitutionally protected due process right to be sentenced upon accurate information. Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (citations omitted).

“A defendant who requests resentencing due to the [trial] court’s use of inaccurate information at the sentencing

² For the first armed robbery, the trial court imposed a fifteen-year sentence comprised of ten- and five-year respective periods of confinement and extended supervision. For the second armed robbery, the trial court imposed a five-year sentence comprised of three- and two-year respective periods of confinement and extended supervision. For the third, an eight-year sentence comprised of six- and two-year respective periods of confinement and extended supervision; for the fourth, the trial court imposed a twelve-year sentence comprised of nine- and three-year respective periods of confinement and extended supervision. All sentences were imposed consecutively to each other and to any other sentence.

³ The italicized words were emphasized by the trial court in its postconviction order.

hearing ‘must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing.’” Once actual reliance on inaccurate information is shown, the burden then shifts to the [S]tate to prove the error was harmless.

Id., ¶26 (citations omitted).

¶5 At sentencing, the trial court was referring to the presentence investigator’s references to the psychological report, although that report was not in the record.⁴ The information’s accuracy that Machicote challenges was referenced by the trial court as follows:

[Machicote] is very self centered and self immersed. Quite immature and without empathy. He has difficulty seeing things from others['] perspectives. He believes that rules are for others to follow and that he can disregard rules for his own convenience.

Diagnostically, he appears to meet the criteria of a personality disorder with both narcissistic and antisocial features.

That’s a pretty grim situation in terms of his rehabilitative potential.

Machicote contends that this cursory (and thus unreliable) psychological assessment inaccurately portrayed him, and that the trial court relied on this inaccurate and unreliable portrayal when it evaluated his rehabilitative potential as “grim” (when determining the length of the confinement portions of his sentences).

⁴ One of Machicote’s criticisms is that the complete presentence psychological report was not presented to the trial court; it was only referenced (but not incorporated by reference) in the presentence investigation report.

¶6 Machicote told the presentence investigator “that he feels something is wrong with him emotionally” and that he had threatened suicide, so the presentence investigator requested a psychological examination. This presentence psychological examination was fifty-seven minutes long and consisted of the psychologist interviewing Machicote; no psychological tests were administered. As a result of that interview, the psychologist characterized Machicote as “very self-centered and self-immersed.” He viewed Machicote as “[q]uite immature and without empathy.” He also viewed Machicote as “disregard[ing] rules for his own convenience,” and believing that he was not required to follow the rules that were required of others. The presentence psychologist opined that Machicote had “a Personality Disorder with both narcissistic and anti-social features.” From that opinion, the trial court characterized Machicote’s (lack of) rehabilitative potential as “grim.”

¶7 The trial court characterized armed robbery as the third “worst crime known under the criminal code[, after murder and sexual assault].” It discussed the increasingly aggravated nature of these armed robberies (and those that were read-in for sentencing purposes) over the two-month period during which Machicote committed these offenses. It considered his criminal history, “history of undesirable behavior patterns” and his “abysmal” employment record. The trial court stated at sentencing that “[i]t appears to [the trial court] that the rehabilitative needs of the defendant are best served in confinement. It is shown by his track record in confinement thus far. The needs of the community to be protected from

him are profound.” It also considered and relied upon the presentence psychologist’s unfavorable opinions and his tentative diagnosis of Machicote.⁵

¶8 These opinions, based on a psychologist’s observations of and interaction with Machicote are not factual or “inaccurate information”; they are a psychologist’s opinions and diagnosis of a subject following a fifty-seven-minute interview. *See State v. Slagoski*, 2001 WI App 112, ¶9, 244 Wis. 2d 49, 629 N.W.2d 50. The trial court considered the psychologist’s impressions and assessment of Machicote to determine that Machicote’s rehabilitative potential was “grim”; this type of information is not properly characterized as inaccurate. *See id.* Consequently, Machicote was not deprived of his due process right to be sentenced on accurate information.

¶9 Machicote then hired his own psychologist to examine him. He next filed a defense postconviction psychological report with his postconviction motion for resentencing. The defense psychologist conducted a two-hour interview and administered five psychological tests. The trial court characterized the defense psychologist as being “much more thorough” when considering his report in its postconviction order; it quoted from and referenced excerpts from that report.

They both found the defendant to be self-absorbed and self-centered. [The presentence psychologist] thought that the defendant *appeared* to meet the criteria for narcissistic and anti-social tendencies; [the defense postconviction

⁵ The State relies on *State v. Slagoski*, 2001 WI App 112, ¶¶8-9, 244 Wis. 2d 49, 629 N.W.2d 50, for the proposition that a psychiatrist’s prediction of a defendant’s future dangerousness does not necessarily consist of facts amenable to characterizations of (in)accuracy, but are expert opinions, which “the trial court was entitled to accept or disregard ... as it deemed appropriate.” *Id.*, ¶9. The facts in *Slagoski* are slightly different from those in this case and involve references to prognoses of future dangerousness from pretrial competency and mental responsibility examinations, rather than diagnoses, conclusions and opinions from a presentence psychological report. Consequently, we interpret *Slagoski* as persuasive, not controlling.

psychologist] merely thought that narcissistic and anti-social tendencies were not *strong*. [The presentence psychologist] thought the defendant had little empathy; [the defense postconviction psychologist] believed that the defendant's self-absor[p]tion caused him to fail to take the feelings of others into consideration. All in all, the reports are very similar, albeit [the defense postconviction psychologist's] report is much more thorough; however, they are, with all due respect, only *opinions* with respect to the defendant's character.

.... The *opinion* of [the defense postconviction psychologist] may or may not be factually accurate. In the world of psychology, nothing is certain. Because there is no way of saying for certain what is factually accurate in a psychological opinion, the court is hard[-]pressed to declare that a psychological opinion that may differ with another psychological opinion demonstrates that a court relied on *factually* inaccurate information. Nevertheless, because the court does not perceive a significant difference between the two psychologists' reports with respect to the s[u]m[] of the characteristics of the defendant's personality, it cannot find that it relied on inaccurate factual information when it sentenced the defendant.⁶

(Footnote added.) Consequently, it denied Machicote's postconviction motion for resentencing.

¶10 The trial court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). Although we have analyzed this issue independently of the trial court's analyses both at sentencing and in its postconviction order, the trial court's explanation in its postconviction order is sound: (1) the presentence psychologist's conclusions are opinions, not factual information that can be characterized as (in)accurate; and (2) insofar as the psychologists' diagnoses, conclusions and opinions differed, the differences were

⁶ The italicized words were emphasized by the trial court in its postconviction order.

not sufficiently significant for purposes of determining Machicote's rehabilitative potential and the need to protect the public from him.

¶11 Incident to our independent review of this issue, we also note some other impressions and comments that support the trial court's conclusion that Machicote's rehabilitative potential was "grim." The presentence investigator remarked that "Machicote gave his agent a hard time when he thought [the presentence investigator] was only there to handle the probation case[,] but when he found out that [the investigator] was doing his presentence report he became instantly courteous and complied." Consistent with this impression of Machicote, the defense postconviction psychologist opined that Machicote "attempt[ed]" to portray himself in an unrealistically favorable light." Machicote's closing comment to the trial court after it imposed sentence (subsequent to his multiple apologies during his lengthy, comprehensive and eloquent allocution) was "[f-]ck you. F-ck her," presumably referring to the (female) prosecutor and to the (female) trial court (judge); these comments also support the trial court's assessment of Machicote's rehabilitative potential as "grim."

¶12 Machicote recognizes that trial counsel's failure to object to, comment on, or correct the alleged inaccuracies in the presentence psychologist's opinions and diagnosis, or to seek an adjournment to attempt to counter those alleged inaccuracies, constituted waiver pursuant to *State v. Mosley*, 201 Wis. 2d 36, 46, 547 N.W.2d 806 (Ct. App. 1996). Machicote also challenges the effectiveness of trial counsel on this same issue. In doing so, he relies on *State v. Anderson*, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998), in which we reversed and remanded for resentencing because defense counsel neglected to seek an adjournment (or accept the trial court's offer of a continuance) to investigate the inaccuracies in the presentence investigation report (to which counsel

objected) and to refute that allegedly inaccurate information. *See id.* at 405-06, 410-12.

¶13 To maintain an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Our conclusion, that the presentence psychologist's diagnoses, conclusions and opinions did not constitute inaccurate information, coupled with the trial court's denial of Machicote's resentencing motion, after it considered the defense postconviction psychologist's report claiming "the opposite conclusion," demonstrate Machicote's inability to show either deficient performance or prejudice, both of which are necessary to maintain an ineffective assistance claim. *See id.* The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). Consequently, Machicote's failure to establish that the presentence psychological report contained inaccurate information obviates his due process and ineffective assistance claims.

By the Court.—Judgment and order affirmed.

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

