

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2002

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 Nos. 01-3239-CR
01-3240-CR
01-3241-CR
01-3242-CR
01-3243-CR
01-3244-CR
01-3245-CR
01-3246-CR**

**Cir. Ct. Nos. 96-CF-144, 96-CF-359,
98-CF-384, 96-CT-352,
97-CM-119, 96-CM-1174,
98-CM-1963, 98-CT-46**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY J. RYCHTIK,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Marathon County:
DOROTHY L. BAIN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Anthony Rychtik appeals an order denying his motion for sentence modification.¹ Rychtik argues that a diagnosis of his mental health condition constitutes a “new factor” requiring sentence modification, and that the presentence investigation report (PSI) on which the trial court relied was biased. We reject these arguments and affirm the circuit court order.²

Background

¶2 Pursuant to a plea agreement, Rychtik was convicted of multiple charges on November 10, 2000. These charges included fourth-degree sexual assault, disorderly conduct, bail jumping and criminal trespass.³ He was subsequently sentenced to five years’ imprisonment on a felony bail jumping charge and one consecutive year for operating while intoxicated. The court withheld sentence on the rest of the charges and placed Rychtik on probation.

¶3 Rychtik then filed a motion for postconviction relief seeking sentence modification based on a new factor—a mental health diagnosis made at the prison—and alleged bias of the PSI author, who was both Rychtik’s and his wife’s probation agent. The circuit court held hearings and denied the motion.

¹ Rychtik does not, however, seek to withdraw his plea or otherwise challenge his convictions.

² Rychtik also argued in his motion that he suffered ineffective assistance of counsel. However, that issue is not presented to us and is therefore deemed abandoned. *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306, n.1, 306 N.W.2d 292 (Ct. App. 1981).

³ This is not the complete list of charges, but only those relevant to this appeal.

Rychtik now appeals, arguing that the trial court erred when it declined to accept diagnosis as a new sentencing factor and when it failed to find bias on the part of the PSI writer.

“New Factors” and Sentence Modification

¶4 A trial court may, in its discretion, modify a sentence upon a showing of a new factor. *State v. Michels*, 150 Wis. 2d 94, 96, 441 N.W.2d 278 (Ct. App. 1989). Sentence modification involves a two-step process. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. *Id.* A new factor is a fact or set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of original sentencing either because it was not then in existence or it was unknowingly overlooked by all parties. *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983). If the defendant shows the existence of a new factor, then the circuit court must determine whether the new factor justifies sentence modification. *Franklin*, 148 Wis. 2d at 8.

¶5 Whether a fact constitutes a new factor is a question of law that we may decide without deference to the circuit court. *Id.* If a new factor is shown, the second step, the determination whether the new factor mandates modification, is committed to the trial court’s discretion and we will review it under an erroneous exercise of discretion standard. *Id.*

¶6 At the initial sentencing hearing, the court considered the gravity of Rychtik’s crimes, his apparent lack of remorse, his record of eighteen prior convictions, that his age did not mitigate the circumstances and his need for rehabilitation. The court also considered Rychtik’s family history of physical and mental abuse and his history of drug and alcohol problems.

¶7 At the postconviction hearing, Rychtik submitted a prison psychiatrist’s report, which diagnosed Rychtik’s bipolar and manic disorders. He argues that this new factor explains his behavior and directly impacts the court’s consideration of rehabilitation, because his disorders can be treated. We conclude, however, that Rychtik has not demonstrated a new factor.

¶8 To be a new factor, Rychtik’s mental health problem must have been unknown to the court at the time of sentencing. However, the circuit court knew he had “depression and anxiety” based on the PSI. The court also knew Rychtik had a history of noncompliance with treatment and expressed its hope that confinement would allow Rychtik to undergo successful treatment without distraction. The court was aware of and considered Rychtik’s mental health problems at sentencing. Placing a precise formal diagnosis on Rychtik’s mental health problems does not constitute a new factor.⁴

⁴ Because Rychtik has not shown a new factor, we need not consider whether it would have justified modifying the sentence. We note, however, that the trial court indicated if it had known the specific diagnosis at the initial sentencing hearing, it would have either given Rychtik the same sentence or it would have given him a *longer* sentence.

(continued)

*Allegations of Bias in Presentence Investigations*⁵

¶9 A defendant has a due process right to a fair sentencing hearing. *See State v. Suchocki*, 208 Wis. 2d 509, 516, 561 N.W.2d 332 (Ct. App. 1997). Our supreme court has acknowledged the importance of a presentence investigation at sentencing, and the integrity of the sentencing process requires that the PSI be accurate, reliable and objective. *Id.* at 518.

¶10 When claiming that bias taints a PSI, the defendant must demonstrate first that the writer actually was biased and, second, that the bias prejudiced the sentencing process. *Id.* at 516. Whether the PSI writer was biased is a mixed question of law and fact, and whether the sentencing process was prejudiced is a question of law. *Id.* at 514-15.

¶11 In this case, Thomas Marquardt, who prepared the PSI, was the probation supervisor for both Rychtik and his wife, Wendy. Rychtik argues that under *Suchocki*, the mere appearance of or potential for bias in this situation fulfills the first prong. This is incorrect.

We disagree with the State that *State v. Slagoski*, 2001 WI App 112, 244 Wis. 2d 49, 629 N.W.2d 50, controls this case. Unlike this case, *Slagoski* deals with significantly differing opinions of professionals.

⁵ Rychtik submitted, as part of the appendix to his brief, a page from the PSI. We remind counsel that PSIs are confidential documents once sentence is imposed. WIS. STAT. § 972.15(4). It is unnecessary to include part of the PSI in the appendix, which is a public record, because we are entitled to review all parts of the record. *See Chambers v. State*, 54 Wis. 2d 460, 465, 195 N.W.2d 477 (1972) (a PSI used in sentencing is part of the record and must be included for appellate review).

¶12 In *Suchocki*, the PSI writer was married to the prosecutor. PSI authors are probation and parole agents from the Department of Corrections. In the preparation of a PSI, the department and its officers are not agents of the State or defense, but rather exclusive agents of an independent judiciary. See *State v. Perez*, 170 Wis. 2d 130, 140-01, 487 N.W.2d 630 (Ct. App. 1992). The *Suchocki* court was concerned that the relationship between the PSI author and the prosecutor might subconsciously impact the report. *Id.* at 519.

¶13 The marital relationship in this case is wholly different from that in *Suchocki*. Here, the relationship did not involve the PSI author as one of the spouses. Rychtik claims that the agent is in a position to favor one spouse (his wife) over the other (him). Marquardt, however, testified that the Department of Corrections routinely assigns the probation agent of record to write the PSI for each case because the agent will be most familiar with the defendant and the family situation. Marquardt also testified that it is common practice for a PSI author to interview family in preparation of the report. Both situations would require Rychtik's wife as a reference regardless of any supervisory relationship Marquardt might have had with her. The trial court noted that, if anything, supervising both the husband and wife would lead to *better* information about the circumstances and behaviors of the parties.

¶14 Marquardt also testified that he did not believe there was any conflict of interest because he was trained to professionally handle each case. When directly asked if he harbored any bias, he answered "no." The trial court accepted Marquardt's conclusion based on "credible testimony" from a man who

“highly valued the importance of his professional responsibilities.” Assessing the credibility of witnesses is a trial court function to which we defer. WIS. STAT. § 805.17(2). Accordingly, we decline to conclude that there was any bias in this case. Because there was no actual bias, we need not decide whether the sentencing hearing was adversely affected.

Conclusion

¶15 Rychtik claims a new factor exists requiring modification of his sentence and bias in the PSI mandating resentencing. Because his mental health problems were considered in the original sentencing, we do not believe a formal diagnosis constitutes a new factor. Additionally, no actual bias existed on the part of the PSI agent. We therefore uphold the order of the trial court.

By the Court.—Order affirmed.

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

