

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2003

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. 03-0661-CR

Cir. Ct. No. 01CF001224

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OMARI A. BUTLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Omari Butler appeals a judgment convicting him of first-degree sexual assault by use of a dangerous weapon and false imprisonment, and an order denying his postconviction motion. He claims the trial court erred in refusing to perform an in camera inspection of the complaining

witness's probation records and erroneously exercised its discretion in refusing to grant a continuance. We disagree and affirm for the reasons discussed below.

BACKGROUND

¶2 The charges against Butler were based on allegations by Patricia L. that Butler had followed her out of a bar, forced his way into her home, repeatedly beat her, stabbed her, forced her to perform oral sex on him, and tried to force her to have intercourse with him before she was able to escape and obtain assistance from a neighbor. The defense theory was that Butler had escorted Patricia home from the bar, that she had blacked out or had memory lapses due to her level of intoxication, and that someone else had subsequently entered her home and assaulted her.

¶3 Some time prior to trial, Butler sought access to Patricia's Department of Corrections (DOC) probation file. The day before trial, the probation agent informed defense counsel that it would not allow the requested inspection on the grounds that much of the three to four hundred pages in the DOC's file related to Patricia's confidential treatment records. The next morning, immediately before trial, Butler moved the court for an in camera inspection of the file, asserting a due process right to see

any statements given to [Patricia's] probation agent relating to the crime in the above captioned matter, any evidence which would indicate that she experiences blackouts caused by drinking, any evidence relating to her contact with her former boyfriend, Andrew Smith, and any other evidence which would reflect on [Patricia's] credibility.

¶4 The trial court asked the prosecutor to confer with the probation agent in order to form an opinion as to whether there was any potentially exculpatory material in the file, including "evidence on the issues of character for

truth-telling or prior inconsistent statements about the events in question, or the other subject is state of intoxication for degree of dependency which results in black-outs affecting memory.” The prosecutor responded that it would be physically impossible for him to review the three to four hundred pages in the file that morning.

¶5 The trial court then questioned the probation agent about his knowledge of the file. The probation agent stated that there was nothing in the file relating to the current incident. He informed the court that he was aware of considerable alcohol use in Patricia’s past, but was not specifically aware of any blackout incidents. He also gave his opinion that Patricia’s character was “untruthful to a degree,” but was unaware of any reputation she had in that regard.

¶6 The trial court declined to make an in camera inspection of the DOC file, citing the lateness of the motion, the extent of the file, and the fact that the court was not persuaded to believe that the file would contain any exculpatory evidence. Butler then requested a continuance, which the court also denied, noting that Butler would still be free to call the probation agent and examine the issues of truthfulness and past memory loss.

DISCUSSION

¶7 Butler first contends that the trial court’s refusal to conduct an in camera inspection of Patricia’s probation file violated his due process rights. Due process requires that a defendant be given a meaningful opportunity to present a complete defense. *State v. Shiffra*, 175 Wis. 2d 600, 605, 499 N.W.2d 719 (Ct.

App. 1993).¹ A defendant's right to discover potentially exculpatory evidence must be balanced, however, against the State's interest in protecting otherwise confidential information about its citizens. *Id.* Therefore, a defendant who wishes to have the trial court perform an in camera review of confidential records to determine whether due process requires disclosure of those records must first make a preliminary showing of "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence." *State v. Green*, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298. The defendant must also undertake a reasonable investigation sufficient to show that the request is not based on mere speculation as to what is in the records, and must explain how the sought information would be relevant to the defense and why it would be independently probative (i.e., not cumulative). *Id.*, ¶¶33-35. This court will review any factual findings made by the trial court under the clearly erroneous standard of review, but will independently determine whether the evidentiary showing was sufficient to require an in camera review. *Id.*, ¶20.

¶8 Here, Butler did explain why he believed certain types of information that might be contained in the probation file of the complaining witness would be relevant and material to the defense theory. He failed, however,

¹ In its postconviction order, the trial court decided to analyze the defense motion for an in camera inspection under the line of cases stemming from *Brady v. Maryland*, 373 U.S. 83 (1963), rather than those stemming from *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993) because the records were in the exclusive possession of the State. However, *Shiffra* applies to requests for access to confidential records regardless whether the records sought are in the exclusive possession of the state. *State v. Green*, 2002 WI 68, ¶21 n.4, 253 Wis. 2d 356, 646 N.W.2d 298. Because the reason given by the probation agent for denying Butler access to the file was that it contained confidential treatment records, we agree with both parties that the *Shiffra* analysis properly applies here.

to make a particularized showing that the probation file was likely to contain such information. He offered no results from any independent investigation that would indicate that Patricia had previously suffered from blackouts or that she had discussed the current case with her probation agent. Indeed, the probation agent denied that the file contained any such information. Furthermore, with regard to information relating to Patricia's truthfulness, the trial court noted that Butler could question the probation agent regarding any incidents relating to untruthfulness. Butler made no showing that there was likely to be anything else in the file on the question of truthfulness that would not be cumulative to the testimony he could elicit. In sum, Butler's general allegations that the files might contain information about unspecified incidents that could undermine Patricia's credibility were insufficient to compel an in camera review. *See Green*, 253 Wis. 2d 356, ¶37.

¶9 Butler next argues that the trial court violated his rights to due process and effective assistance of counsel by denying his request for a continuance. The decision whether to grant an adjournment lies within the trial court's discretion, and will not be subjected to "probing appellate scrutiny." *State v. Leighton*, 2000 WI App 156, ¶27, 237 Wis. 2d 709, 616 N.W.2d 126. Rather, "this court's task on review is to balance the defendant's right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice." *Id.*

¶10 Here, as we have discussed above, Butler had failed to make a showing that the probation file was reasonably likely to contain relevant information necessary to a determination of guilt or innocence. Therefore, there was no basis for the trial court to conclude that a continuance was necessary to allow Butler to attempt to obtain a redacted version of the file to prepare for trial.

The trial court reasonably weighed the low probability that a continuance would result in the disclosure of any additional exculpatory materials against the waste of judicial resources that would result from canceling a trial after the jury and witnesses were already in court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

