

RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000170-MR

BILLY L. BARNETT, JR.

APPELLANT

V. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
INDICTMENT NO. 99-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND TAYLOR, JUDGES; MILLER, SENIOR JUDGE.¹

MINTON, JUDGE: At sentencing, a criminal defendant must be advised of the factual contents of the written presentence investigation report (PSI) and given a fair opportunity to controvert its factual content and conclusions if he so desires.²

Billy Barnett reviewed his PSI before being sentenced to

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Revised Statute (KRS) 532.050(6).

23 years in prison after a jury convicted him of murder. Four years post-judgment, Barnett brought a motion in the trial court to amend his PSI. The court denied the motion and Barnett appealed. We believe Barnett's motion was untimely; therefore, the circuit court properly denied it. We affirm.

Barnett was tried and convicted in 1999 for the gruesome murder of Roger Dale Jones in Calloway County, Kentucky, in 1993. He was sentenced to 23 years in prison. In an unpublished opinion, rendered December 20, 2001, the Kentucky Supreme Court affirmed the direct appeal of the judgment of conviction and sentence.³

On September 16, 2003, Barnett filed a motion in the trial court to correct the PSI that had been prepared and used in connection with the sentencing in 1999. He claimed the report contained several factual errors and requested a hearing so he could correct his PSI "and assure his right to have his sentence and his parole suitability based on credible information." On November 19, 2003, the court entered an order denying Barnett's motion. This appeal follows.

Barnett's argument on appeal is simply his insistence that the trial court erred by denying the motion to correct the PSI. But we agree with the trial court's decision to deny relief.

³ Billy Barnett, Jr. v. Commonwealth, 1999-SC-1077-MR.

From the outset, we note that Barnett's motion failed to designate any procedural rule or authority of any kind to provide an avenue to reopen the content of the PSI four years after the entry of the final judgment. But realizing that a *pro se* litigant is not held to the same standards imposed on legal counsel,⁴ we afford Barnett some leeway.

In his motion, Barnett argued that he should be allowed to correct his PSI so that his sentence and parole eligibility could be amended accordingly. We construe this request to be akin to a motion for relief from a final judgment, as permitted under CR⁵ 60.02. Therefore, we will address Barnett's claim as if it were brought pursuant to CR 60.02.

CR 60.02(a) affords relief from a final judgment upon proof of "mistake, inadvertence, surprise or excusable neglect." A motion for relief under CR 60.02(a) cannot be made more than one year after a judgment is entered. Post-judgment relief is also available under CR 60.02(f) if the movant can prove there are "extraordinary circumstances" justifying such relief. In those cases, the one-year limitation expands to a more flexible, "reasonable time."

Barnett's motion claimed that factual errors were made in his PSI that affected the outcome of his sentence and parole

⁴ Commonwealth v. Miller, Ky.App., 416 S.W.2d 358, 360 (1967).

⁵ Kentucky Rules of Civil Procedure.

eligibility. We believe this argument more falls under CR 60.02(a) since Barnett is claiming there was a mistake in his PSI justifying relief, and no facts constituting "extraordinary circumstances" under CR 60.02(f) were shown. Therefore, because he filed his motion four years after judgment was entered, his claim was barred. On that basis alone, we should affirm the trial court's decision to deny this motion.

But even if we disregard CR 60.02's limitations, we must nonetheless affirm the denial of Barnett's motion. In his motion, Barnett makes two main arguments. First, although he concedes he was allowed to review his PSI prior to sentencing, he argues he was not given ample time to review the record. The Kentucky Supreme Court has held that a defendant should be given a "meaningful opportunity to controvert the evidence against him at his sentencing hearing."⁶ A determination of "[w]hat constitutes a 'meaningful opportunity to controvert' . . . will vary with the circumstances, and the provision of such an opportunity is entrusted to the trial court's discretion."⁷

We do not have the record from Barnett's trial or his direct appeal before us. The only record provided to us begins with the filing of the motion to correct the PSI on September 16, 2003. While we recognize that this would

⁶ Commonwealth v. Jeffries, Ky., 95 S.W.3d 60, 62 (2002).

⁷ Fields v. Commonwealth, Ky.App., 123 S.W.3d 914, 917 (2003).

typically be sufficient, Barnett makes allegations of factual errors based on information from his trial. Therefore, Barnett should have designated the transcript of his trial, or at least those portions of the trial applicable to his current appeal, in order for the record to be complete. When the entire record is not before us, we "must assume that the omitted record supports the decision of the trial court."⁸

It is significant that Barnett does not allege that he was precluded from objecting to the content of his PSI; rather, he claims he was not given sufficient time to do so. Without any clear evidence from the record indicating the amount of time Barnett was afforded, we must assume the trial court's actions were in compliance with the statutory requirements. This assumption is bolstered by Barnett's apparent failure to raise this issue on direct appeal. Had the trial court committed an error affecting Barnett's sentence, we presume an objection would have been raised and addressed before the filing of this motion.

Second, Barnett argues KRS 532.050 requires the court to grant him a hearing on his motion. That statute states a defendant must be given a fair opportunity to controvert the factual content of his PSI, **within a reasonable period of time**. Barnett's delay of four years between his judgment and the

⁸ Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985).

filing of his motion cannot be considered "reasonable."
Moreover, the statute clearly states that a defendant must be given the opportunity to object to the factual content of a PSI **before imposing the sentence**. The statute does not provide for post-conviction relief, nor does it require a court to hold a post-conviction hearing if claimed factual errors within the PSI are later discovered. Since Barnett does not claim he was precluded from objecting to the content of his PSI prior to sentencing, we must affirm the denial of his request to do so now.

For these reasons, the trial court's order denying Barnett's motion to correct his PSI is affirmed.

ALL CONCUR.

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