

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000135-MR

HAROLD EGBERT

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NOS. 03-CR-00035 AND 04-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AND ORDER DISMISSING

** ** * ** ** *

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Harold Egbert appeals from an Order overruling his Motion to Correct, Amend, or Modify his pre-sentence investigative report (hereinafter "PSI").

After careful review, we dismiss the appeal.

On July 18, 2003, Egbert was indicted on one count of trafficking in a controlled substance in the first degree, one count of possession of drug paraphernalia,

¹ Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

one count of possession of marijuana, one count of operating a motor vehicle on a suspended license, one count of operating a motor vehicle without insurance, one count of failing to possess a registration receipt, one count of failure to wear seat belt, and one count of failure to register the transfer of a motor vehicle. His sentence was probated for five years.

On February 6, 2004, Egbert was again indicted on one count of criminal possession of a forged instrument in the second degree, one count of possession of drug paraphernalia (second offense), one count of driving under the influence (second offense), one count of operating a motor vehicle without a license, one count of operating a motor vehicle without insurance, one count of failure to wear a seat belt, one count of unlawful possession of a police radio, and one count of obstructed windshield. Egbert pleaded guilty to amended charges and was sentenced to serve a total of eighteen months. As a condition of his probation in that case, he was ordered to complete a residential treatment program at the Hope Center for Men in Lexington. On July 28, 2005, probation was revoked in both cases because Egbert failed to complete the residential treatment program and was convicted of other crimes in Greenup County.

On October 12, 2006, Egbert filed a Motion to Correct, Amend, Modify Movant's Pre-Sentence Investigation (PSI) Report. In the Motion, he alleged that his PSI report contained inaccurate information. Specifically, he maintained that the report erroneously reflected that he had cheated on a urinalysis test at the Hope Center and that he possessed drugs on Hope Center property. Egbert claimed he was unaware of these

alleged inaccuracies until he was eligible for parole and that he was not given his rightful opportunity to challenge these allegations. In an order entered November 17, 2006, the trial court overruled the Motion. This appeal followed.

Egbert's sole argument is that because he was not permitted to address the alleged inaccuracies in his PSI report, he did not and could not receive a fair and impartial parole hearing. This issue, however, is improperly before our Court.

First, it should be noted that most of the alleged inaccuracies were contained in the PSI at the time of Egbert's probation revocation hearing; therefore he clearly had an opportunity to refute them. Any additional inaccuracies allegedly added after the revocation of his probation are not subject to KRS 532.050 as Egbert asserts. That statute only requires that a defendant be given the opportunity to controvert the report *before the trial court imposes a sentence*. See KRS 532.050(6). Instead, Egbert's claim is governed by KRS Chapter 439, which deals with probation and parole.

KRS 439.340(1) requires that the Department of Corrections compile certain information (i.e. criminal history, employment, attitude in prison) about each inmate and submit that information to the parole board. Presumably, it is the contents of this report to which Egbert now objects. However, there is no rule comparable to KRS 532.050(6) in KRS Chapter 439, meaning that neither the parole board nor the trial court are required to give Egbert the opportunity to object to the information contained in the report.

Furthermore, KRS 439.330(3) states that “orders of the board shall not be reviewable except as to compliance with the terms of KRS 439.250 to KRS 439.560.” *See also Willard v. Ferguson*, 358 S.W.2d 516, 517 (Ky. 1962). Here, Egbert has not alleged that the board's order did not comply with the terms of the aforementioned statutes. Instead, he has tried to circumvent the rules by turning this into a trial court issue via his Motion.

Accordingly, we dismiss this appeal based on failure to follow proper procedure.

ROSENBLUM, SENIOR JUDGE, CONCURS.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I would affirm the trial court's order overruling Egbert's motion to amend the pre-sentence investigation report.

JUDGE, COURT OF APPEALS

ENTERED: _____

BRIEF FOR APPELLANT:

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