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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001202-MR

ROY KENNETH ROBERTS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 1996-CR-001168

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, and REMANDING FOR RESENTENCING

** ** ** ** **

BEFORE: EMBERTON, KNOPF, AND KNOX, JUDGES.

KNOPF, JUDGE: Roberts appeals from a May 6, 1997, judgment of the Fayette Circuit Court convicting him pursuant to his guilty plea of two (2) counts of third-degree rape (KRS 510.060) and sentencing him to two (2) consecutive five-year terms of imprisonment. Roberts raises as an issue on appeal what notice must a defendant receive of his or her presentence investigative report prior to the final sentencing hearing. Roy K. Roberts maintains that it should be more than none. In addition to his complaint about the lack of presentencing notice, Roberts claims that the trial court erred by denying his pretrial motions to suppress his confession and for a continuance, and by failing to

uphold his purported right to the assistance of counsel at a presentencing interview with a representative of the Commonwealth's Sex Offender Treatment Program (SOTP). Agreeing with Roberts that the lack of notice of the presentence investigation reports (PSI reports) deprived him of a meaningful opportunity to challenge the accuracy of those reports, we vacate his sentence and remand for additional proceedings. We are not persuaded, however, that Roberts is entitled to any additional relief.

In December 1996, the Fayette County Grand Jury indicted Roberts on twelve (12) counts of rape in the first degree. The grand jury charged that between July and October of 1996 Roberts had, on twelve (12) occasions, forcibly engaged a minor female in sexual intercourse. Subsequently, Roberts was indicted on thirteen (13) counts of sodomy in the first degree against the same person. These indictments were consolidated, and trial was set for February 10, 1997. The charges against Roberts stemmed from allegations by the purported victim, who filed an initial complaint with the Lexington Fayette Urban County Division of Police at the end of October 1996. She charged that during the preceding three (3) or four (4) months Roberts had repeatedly raped her in her home.

Upon the filing of the complaint, police officer Tracy Basehart was assigned to investigate. Officer Basehart arranged to meet with Roberts on the evening of October 29, 1996. During the course of this interview with officer Basehart, Roberts confessed that he had engaged in sex with the complaining witness

on about twelve (12) occasions. This confession is the principal focus of Roberts's appeal. He claims that he confessed without having understood his constitutional right to remain silent and thus that the confession should be deemed inadmissible as evidence against him.

At the suppression hearing on this issue, Officer Basehart testified that upon Roberts's arrival at the police station she had informed him of the young woman's allegations and had asked if he would consent to be questioned. Roberts had agreed, whereupon Officer Basehart took him to an interrogation room, read him his Miranda rights,[1] had him sign a form indicating waiver of those rights, and began to question him concerning the alleged encounters with the complainant. Initially, Officer Basehart said, Roberts denied having had any improper contact with the alleged victim, but after talking for about 45 minutes he admitted that once a week for nearly three (3) months he and the complainant had engaged in sexual intercourse. The officer thereupon obtained a tape recorder, and, she testified, Roberts repeated his confession on tape. The beginning of this recording was played during the suppression hearing. On the tape, Officer Basehart asks Roberts if she had earlier read to him his rights. He replies, "Yes, ma'am."[2]

Roberts testified, however, that the officer had not apprised him of his constitutional rights until after he had

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] This introductory portion of the tape is all that was introduced at the suppression hearing.

first confessed and had agreed to repeat his confession on tape. He also claimed that the officer's manner had been threatening and overbearing and that lack of sleep, together with a prescription cold medication, had left him incapable of understanding the events of that evening. When asked on cross-examination to account for his statement on the tape to the effect that Officer Basehart had explained his rights, Roberts claimed to have answered without thinking, overwhelmed by anxiety and confused by all that was happening around him. He was also asked during cross-examination whether he had understood during his interview with Officer Basehart that he had a right to counsel. He replied that he had felt that counsel was unnecessary because he was innocent, but that he knew he could have had an attorney if he had needed one.

The trial court found Officer Basehart's account of the interview the more credible. It noted that the questioning had not been unduly long, belying Roberts's claim of duress, and it emphasized the signed waiver card and Roberts's ready, unconstrained, and unconfused acknowledgment on the tape that he had been apprised of his rights, an acknowledgment Roberts had not convincingly disclaimed. Taken together, the court believed, these facts contradicted Roberts's assertion that he had misunderstood the nature of his interview with Officer Basehart. Accordingly, the trial court denied Roberts's motion to suppress his confession.

On appeal, Roberts disputes the trial court's findings, and contends, furthermore, that, even given those findings, the

evidence presented at the suppression hearing was insufficient to support the court's conclusion. In particular, he argues that because Officer Basehart did not inquire minutely into Roberts's competency to waive his rights or into his understanding of that waiver, neither the officer's testimony, the signed waiver card, Roberts's taped acknowledgment that his rights had been satisfactorily explained, nor any of these together, is sufficient to establish a voluntary waiver under Miranda v. Arizona. There being ample evidence in the record to support the trial court's factual findings, the only question before us is the legal one concerning the sufficiency of the evidence so found. This Court reviews such questions of law *de novo*. Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991).

To determine whether a criminal defendant has "voluntarily, knowingly, and intelligently" waived his rights to remain silent in the face of custodial police interrogation, the Court must look to the "totality of the circumstances surrounding the interrogation." First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice, rather than coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, ____, 89 L. Ed. 2d 410, 421 (1986). Furthermore, the focus must remain upon pressure to confess exerted by the police, and not upon pressure arising from any other source. Colorado v. Connelly, 479 U.S. 157, 107 S. Ct.

515, 93 L. Ed. 2d 473 (1986). The Court need not delve into a suspect's motivations that were not apparent to the police. Id. at 166-71, 107 S. Ct. at ____, 93 L. Ed. 2d at 484-87; *See also*, Commonwealth v. Cooper, Ky., 899 S.W.2d 75 (1995); Britt v. Commonwealth, Ky., 512 S.W.2d 496 (1974).

To summarize, under Miranda and its progeny, and under Commonwealth v. Cooper, a defendant's inculpatory statement made during a custodial interview may be used as evidence against him if and only if the statement and the circumstances in which it was made indicate: (1) that the statement was knowing and intelligent because the police properly advised him of his fifth-amendment right not to incriminate himself, including an express warning that the statement might be used against him; and (2) that the statement was voluntary because the police did not elicit it improperly, by means, for example, of intimidation, coercion, or deception. We agree with the trial court that Roberts's confession and the circumstances surrounding it satisfy these criteria of admissibility.

Like the respondent in Colorado v. Connelly, *supra*, Roberts bases his claim primarily on an alleged breach by Officer Basehart of her purported duty to inquire into his frame of mind and to ensure that he was ready and well able to make such an important decision. Relying upon Walker v. Commonwealth, Ky., 561 S.W.2d 656 (1978), and Jones v. Commonwealth, Ky., 560 S.W.2d 810 (1977), Roberts contends that Officer Basehart should have inquired into such factors as his age, intelligence, linguistic ability and sanity. However, Walker and Jones merely note

certain factors which can be pertinent to the question of whether a confession was obtained by police misconduct. The police are not obliged to investigate those factors where there is no apparent reason for the inquiry.

The trial court found that Officer Basehart advised Roberts of his rights to remain silent and to have an attorney, and she warned him that his statement could be used as evidence against him. Indeed, Officer Basehart twice advised Roberts of his rights, the second time in preparation for taping his statement when Roberts must have realized that the reason for the taping was to prepare potential evidence. Roberts does not seriously contend that there was any active police misconduct in this case. Roberts's impression that by asserting his right to counsel he would make himself appear guilty was unfortunate (if he truly believed that), but there is no suggestion that the police were the source of this impression. In short, nothing in the circumstances of this case suggests that Officer Basehart overreached Roberts. Therefore, as found by the trial court, his confession was constitutionally valid and admissible.

Roberts next complains that the trial court abused its discretion by denying his motion for a continuance. That motion was introduced the day following the denial of his suppression motion and three (3) days before the scheduled trial date. Counsel claimed that he and Roberts had been surprised by the introduction of Roberts's signed waiver card at the suppression hearing and so needed additional time to reappraise their defense. He also claimed that the adverse ruling on the motion

to suppress had left Roberts so depressed that he was able neither to participate in his defense nor to understand the ramifications of a guilty plea. This latter claim was not substantiated by any medical evidence, and it was contradicted by Roberts's ordinary demeanor in court and by counsel's assertion that the suppression hearing had enabled Roberts to understand "for the first time" just how serious were the charges and the evidence against him. The trial court denied the motion summarily.

As the Commonwealth notes, RCr 9.04 provides that the granting of a continuance is in the sound discretion of the trial court. In making its decision, the trial court is to consider such factors as

> length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579, 581 (1991)(citation omitted). Relief is available on appeal from a ruling on a motion for a continuance only if the trial court abused its discretion. Dishman v. Commonwealth, Ky., 906 S.W.2d 335 (1995). We are not persuaded that the trial court abused its discretion in this case.

Although Roberts would probably have been satisfied with a brief postponement, and although the case had not been unduly delayed prior to this motion, Roberts's case was not overly complicated. Even the allegedly new evidence against him,

while it did make the Commonwealth's case somewhat stronger, did not change the basic issues or make the case less straightforward. Indeed, Roberts failed to specify during the hearing on the motion any new avenues of investigation he needed to pursue as a result of the "new" evidence. On appeal he has suggested no reason to think that had a continuance been granted he would have chosen to go to trial on 25 counts of first-degree rape and sodomy, or that the result would otherwise have been different in any way. Furthermore, Roberts failed to produce any evidence to corroborate his claim of extreme emotional distress. There being no clear evidence of prejudice to Roberts in the denial of his request for a continuance, the trial court could give considerable weight to the obvious inconvenience to itself and the Commonwealth that even a brief delay would entail. Foley v. Commonwealth, Ky., 953 S.W.2d 924 (1997). We conclude, therefore, that Roberts's guilty plea is not invalidated by the trial court's denial of his ninth-hour request for a continuance.

Having concluded that Roberts's guilty plea and the conviction based on it were valid, we turn to the sentencing phase of the proceedings. Roberts maintains that he was denied fundamental fairness and the assistance of counsel during sentencing. He insists, in particular, that he was entitled to the presence of counsel during a court-ordered presentencing interview with a therapist in the SOTP. He maintains as well that he was denied a fair and reasonable opportunity to challenge the report's contents because he was not provided with a copy of

the therapist's report until the sentencing hearing convened. We shall address Roberts's contentions in the order presented.

Following Roberts's guilty plea, the trial court ordered that sentencing be postponed until the Office of Probation and Parole could prepare a presentence investigation report (PSI). Because Roberts had been found guilty of a qualifying sex offense, his PSI process was required to include an interview with a therapist from the SOTP. KRS 532.050(4). Defense counsel informed the SOTP therapist that Roberts wanted his attorney to be present at the interview, and apparently efforts were made to arrange a mutually convenient meeting. After some delay, however, and the parties' inability to agree on a time for the meeting, the therapist met with Roberts alone. Roberts answered some of the therapist's questions, but refused to answer others and repeatedly said that upon counsel's advice he would not answer in counsel's absence. In due course, the therapist filed his report with the trial court. Therein he mentions, but does not discuss, Roberts's assertion of his purported right to counsel and concludes that Roberts's "lack of willingness to discuss his behavior" was a significant indication that Roberts posed a high risk of offending again. Because of this asserted risk, the therapist recommended that Roberts not be probated and that he be sentenced to imprisonment for at least five (5) years.

Neither Roberts nor his attorney was notified of this SOTP report (or of the rest of the PSI) until Roberts's sentencing hearing was convened. A copy of the report was given

to counsel at that time, and counsel immediately moved to postpone the hearing in order that he and Roberts might have an opportunity to review it and raise objections. The trial court agreed to a two-hour delay. Thereafter counsel moved again for a continuance and complained that two (2) hours had been insufficient for a thorough review and had provided no opportunity to marshal countervailing evidence. Counsel also objected to the SOTP report as violative of Roberts's constitutional rights and moved to have it stricken. Not only had Roberts been denied his right to the assistance of counsel, he argued, but the therapist's report, by misinterpreting Roberts's refusal to answer questions, had, in effect, led to the recommendation that Roberts be punished for asserting that right. The trial court summarily denied both motions.

On appeal, Roberts maintains, first, that under the Sixth and Fourteenth Amendments to the United States Constitution he was entitled to the presence of counsel at the SOTP interview. He also maintains that he was denied a reasonable opportunity to examine and controvert the SOTP report, as was his right under KRS 532.045 and both the federal and state constitutions. Finally, he maintains that he was unfairly denied his constitutional right to confront the therapist who prepared the SOTP report. We are not persuaded by Roberts's unsupported claims of a right to counsel's assistance at the SOTP interview or of a right to confront the therapist at the sentencing hearing. As explained below, however, we agree with Roberts that

he was denied a reasonable opportunity to respond to the PSI report, including the summary of his SOTP interview.

The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This provision has been interpreted as a guarantee of access to counsel at all post-indictment "critical stages" of a felony prosecution, United States v. Ash, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973); Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), and as intended to promote the fairness and reliability of criminal proceedings by ensuring that the accused has assistance in coping with the procedural demands of the court system and in meeting the efforts of a professional prosecutor. The sixth-amendment right to counsel arises, therefore, if and only if: (1) the accused is confronted by the procedural system, by a governmental adversary, or by both, and (2) a subsequent trial or other proceeding is unlikely to cure "'a one-sided confrontation between prosecuting authorities and the uncounseled defendant.'" United States v. Byers, 740 F.2d 1104, 1118 n.14 (D.C. Cir. 1984) (quoting from United States v. Ash, *supra*). The right to counsel has been extended to critical stages of the sentencing phase of criminal proceedings. Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). However, whether a post-conviction, presentencing interview with a probation officer, psychologist, or other professional is such a "critical stage" has not been addressed either by the United States Supreme Court

or by the appellate courts of Kentucky. Thus far, the federal Courts of Appeals have either reserved the constitutional question or have decided that the right to counsel does not apply to such presentence interviews. United States v. Benlian, 63 F.3d 824 (7th Cir. 1995) (holding that a presentence interview with a probation officer is not a critical stage and collecting cases on the issue); *and cf.* United States v. Byers, *supra*, (holding that the constitutional right to counsel did not apply to a court-ordered, pre-trial psychiatric examination where the defendant had previously declared his intention to present an insanity defense). As noted by the Court in United States v. Jackson, 886 F.2d 838, 844 (7th Cir. 1982), "[w]hether a pre[sentence] interview . . . is a critical stage of criminal proceedings depends upon the nature of the [interviewer's] role in sentence determination."

Although the above authority is not binding, it persuades us nevertheless that Roberts did not enjoy a constitutional right to counsel's assistance at the presentence interview with the SOTP therapist. First, the interview did not oblige Roberts to make any decisions requiring legal expertise. Although the sex offender treatment program's requirement that participants admit having done "wrong," implicates, to some extent, a defendant's fifth-amendment privilege against self incrimination (*see* Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (holding that in limited circumstances the fifth-amendment privilege can apply to psychiatric interviews); *see also* Turner v. Commonwealth, Ky.,

914 S.W.2d 343 (1996) (discussing the question), Roberts makes no claim that his interview responses either were or could have been used to incriminate him. *See* Razor v. Commonwealth, Ky. App., 960 S.W.2d 472 (1997) (upholding this aspect of the sex offender treatment program and citing Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984), which held that states may, without running afoul of the Fifth Amendment, condition probation on a convict's completion of such a program). He therefore had no need of counsel's advice on that question,[3] nor does he advance any other reason to think that counsel's advice during the interview was crucial.

Second, the SOTP therapist can not accurately be characterized as Roberts's prosecutorial adversary. Even were we to adopt a jaundiced view of the Commonwealth's purported desire to provide Roberts with therapy and a skeptical view with regard to its ability to do so, we still would not regard the SOTP therapist as an agent of the prosecution. A defendant's guilt having been determined, it becomes the duty of the trial court under KRS 532.050 and KRS 533.010 to impose an appropriate, individualized sentence. The trial court must consider alternatives to imprisonment, if such alternatives are not foreclosed and are otherwise suggested by the defendant's circumstances, and must relate the severity of the punishment to the seriousness of the offense. To carry out this duty, the

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[3]Even if the fifth-amendment right against self-incrimination did apply to this interview, pre-interview access to counsel, which Roberts enjoyed, is apt to satisfy the related requirements of the Sixth Amendment. Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988).

court requires information about the defendant. To the extent that such information leads the court to impose a harsher rather than a more lenient sentence, the information-gathering process bears a resemblance to the prosecutorial phase of the proceedings, where the state assumes an accusatorial stance and attempts to prove the facts necessary either to establish guilt or to limit the court's sentencing discretion. Despite this potential resemblance to prosecution, the final sentencing of a defendant is not accusatorial and does not make the court the defendant's adversary. The court's presentence investigation of the defendant's history, character, and circumstances is not necessarily directed against the defendant, and its aim is not to establish grounds for punishment or to establish the boundaries of the court's sentencing discretion, but to ensure that that discretion may be exercised responsibly. Because a probation officer's presentence interview with a defendant is in the service of the court and is not prosecutorial, and because the officer's sentencing recommendations are in no way binding on the court, the federal Courts of Appeals that have addressed the issue have uniformly held that such a presentence probation-officer interview is not a "critical stage" in the prosecution and so does not implicate the sixth-amendment right to counsel. United States v. Benlian, *supra*.

A presentence therapist or psychologist interview, like the one to which Roberts objects, is similarly non-prosecutorial. Unlike the probation-officer interview, moreover, where counsel's participation can readily be accommodated, *see* United States v.

Herrera-Figueroa, 918 F.2d 1430 (9th Cir. 1990) (announcing a circuit rule that upon request probation officers must permit counsel to participate in presentence interviews), a defendant's interview with a therapist or psychologist is apt to be rendered far less meaningful than it might otherwise be if it is carried out in the atmosphere of opposition or defensiveness counsel's presence may create. *Cf.* Byers, *supra* (noting that the candor required for a meaningful pre-trial psychological exam is likely to be undermined by the presence of counsel). The state, of course, may not abuse this access to an uncounseled defendant, Estelle, *supra*, and United States v. Cortes, 922 F.2d 123 (2nd Cir. 1990), but where, as here, no abuse is alleged, the defendant's right to counsel is not violated.

As explained in Byers, *supra*, an important consideration in determining whether a particular encounter with the state constitutes a "critical stage" of a defendant's prosecution is a subsequent opportunity to compensate for counsel's absence. Roberts's assertion of a right to counsel at the SOTP interview would raise a more difficult question were he not entitled to counsel's assistance in reviewing the PSI report and in making objections to any errors or misrepresentations it contains. KRS 532.050(6)[4] provides for such assistance:

> Before imposing sentence, the court shall advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the

[4]Formerly KRS 532.050(5).

> defendant so requests, to controvert them. The court shall provide the defendant's counsel a copy of the presentence investigation report. It shall not be necessary to disclose the sources of confidential information.

Indeed, although the Constitution does not mandate particular procedures, to protect a defendant's fundamental right not to be sentenced on the basis of material misinformation, the principles of due process do require that the defendant be accorded a meaningful opportunity "to challenge the accuracy of presentence reports or other information developed for the edification of the sentencing judge." United States v. Silverman, 976 F.2d 1502, 1507 (6th Cir. 1992) (citing Roberts v. United States, 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980)). KRS 532.050(6) is intended to fulfill this constitutional guarantee of due process (*see also* KRS 532.045(8) and RCr 11.02), and as long as that guarantee *is* fulfilled, counsel's participation in presentence interviews is not constitutionally required. Byers, *supra*. Roberts maintains, however, that he was denied due process by not receiving adequate notice of the PSI report, especially of the therapist's portion thereof. He also maintains that he was denied his sixth-amendment right to confront accusers because he was not allowed to confront and cross-examine the therapist.

We are not persuaded that Roberts was entitled to cross-examine the therapist. Final sentencing need not be fully trial-like, and in particular the sixth-amendment's confrontation guarantee does not extend to sentencing hearings. As long as the

defendant is afforded a fair opportunity to present mitigating information and to challenge alleged inaccuracies in the PSI, the evidence considered and its manner of presentation is left largely to the trial court's discretion. Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); United States v. Silverman, *supra*; United States v. Petitto, 767 F.2d 607 (9th Cir. 1985); KRS 532.050; Edmonson v. Commonwealth, Ky., 725 S.W.2d 595 (1987).

We agree with Roberts, however, that he was not given adequate notice of the PSI and SOTP reports to ensure that he had a meaningful opportunity to review and controvert them.[5] In fact, Roberts was given no advance notice. As we have already observed, he was presented with the reports at the commencement of the sentencing hearing and, upon his request for a continuance to prepare a response, the trial court postponed sentencing for

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[5]The dissent distinguishes strictly between the PSI report and the SOTP report and suggests that the opportunity to review one is unrelated to the opportunity to review the other. To be sure, these reports generally are separate, prepared by different people, and are only two of several different reports that sometimes contribute to a defendant's presentence evaluation. That entire evaluation, however, the PSI in a broad sense, comprises all the reports written in any given case. Generally, as happened here, the entire evaluation is given to the defendant to review at one time. The fact that one component of that evaluation might, by itself, be reviewed in a short period does not imply that that component can be as easily reviewed in the context of the full PSI evaluation. We are persuaded, therefore, that the dissent's point, while it may have some bearing on how adequate review of the various PSI reports could be afforded, does not address the problem as defendants actually encounter it. Roberts's claim that he was afforded an inadequate period to review the SOTP portion of his PSI simply cannot be understood as anything but a claim that he was afforded an inadequate period to review the entire presentencing evaluation.

only about two (2) hours. We believe that this brief period was an inadequate amount of time for meaningful review.

In Kentucky's criminal justice system, as in the federal system, PSI and related reports are used

> not only in determining the initial sentence, but also by prison officials in classifying defendant's inmate status, and by parole officers in making parole decisions. . . . Thus inaccurate statements in the report may affect the defendant's sentence, the conditions of his confinement, and the date and terms of his parole.

United States v. Petitto, 767 F.2d at 610-11. Thoroughly challenged PSI reports, therefore, and well-documented sentencing proceedings, not only serve defendants' interest in just sentences, but also promote administrative efficiency by increasing the reliability of the final reports and by informing prison and parole officials of the scope of any inquiry already made into alleged inaccuracies. The current federal sentencing regime requires "that if a defendant alleges any factual inaccuracy in the presentence report, the court shall make factual findings regarding the disputed issue or determine that no factual finding is necessary because the contested information will not affect the sentence." United States v. Johnson, 935 F.2d 47, 50-51 (4th Cir. 1991) (citations omitted). Such written findings serve two purposes:

> [they] protect[] a defendant's due process rights by insuring his sentence is based on accurate information and [they] "provide[] a clear record of the disposition and resolution of controverted facts in the presentence report." United States v. Eschweiler, 782 F.2d 1385,1387 (7th Cir. 1986). This latter purpose is intended to assist "both appellate courts in their review

> of sentencing hearings and administrative agencies that use the report in their own decisionmaking procedures." Id. (footnote omitted).

United States v. Villasenor, 977 F.2d 331, 338-39 (7th Cir. 1992).

Kentucky's sentencing rules are not as detailed as the federal sentencing guidelines. Neither KRS 532.050 nor RCr 11.02, for example, specifically requires that trial courts enter written findings regarding disputes over the accuracy of the PSI, and they do not specify how far in advance of the sentencing hearing the defendant or his counsel must be informed of the PSI's contents. KRS 532.050(6) requires only that the defendant be given a "fair opportunity and a reasonable period of time" to controvert them. Federal law, on the other hand, currently requires at least 35 days' notice. Fed. R. Crim. P. 32(b)(6)(A). The federal rules, of course, are not binding on our state courts, but given the constitutional concerns we share with the federal courts and our similar desire to encourage systemic efficiency, we find the wide discrepancy between the federal requirements and the negligible notice provided in this case disturbing. We conclude that the "reasonable period of time" to controvert PSI's mandated by KRS 532.050, as well as by the Due Process Clause, requires at the very least that notice be given before the day of the sentencing hearing.

Here, apparently, neither Roberts nor his counsel had an opportunity to examine the PSI in advance of the sentencing hearing. They were, therefore, entitled, upon request, to have the hearing postponed. We do not address here how long the

minimum "reasonable" review period might be, that question not having been presented to the trial court. We hold only that the two (2) hours provided Roberts was insufficient.

In so holding, we are not unmindful that relief on appeal, even from a violation of one's right to due process, is generally not available absent some judicially recognizable prejudice, and that such prejudice is a function of the nature of the right violated and the likelihood of tangible harm to the defendant as a result of the violation. United States v. Coletta, 682 F.2d 828 (1982); RCr 9.24. In claiming that Roberts has not been prejudiced, the Commonwealth notes that he was able, despite the short time allotted for review and consultation with counsel, to raise several objections to the therapist's report. We are persuaded, however, that Roberts has been prejudiced and is entitled to relief.

First, the interests involved are substantial, both those of Roberts and those of the Commonwealth, and merit non-grudging protection. Next, the injury to Roberts, though procedural at this point rather than substantive, is sufficiently concrete for judicial acknowledgment. Roberts was unable even to read the entire PSI report during the two-hour recess, so inaccuracies could easily have gone undiscovered, and obviously he had no opportunity to gather affidavits or other countervailing evidence to bolster any objections he might have raised. *See* Johnson, *supra*. He was thus denied a reasonable opportunity to object to statements about and possibly against himself that are apt to bear on the length of his sentence. This

is an immediate harm. The potential for significant future harm, furthermore, is apparent. As it stands, the record does not make clear whether or to what extent Roberts's assertion of a right to counsel at his SOTP interview contributed to the therapist's conclusion that Roberts posed a serious risk of reoffending. It is just this sort of uncertainty that is apt to complicate the later decisions of prison and parole officials. Avoiding this uncertainty at the outset is well worthwhile.

In conclusion, we uphold the trial court's decisions denying Roberts's motions to suppress his confession and to continue his trial, and therefore affirm Roberts's plea of guilty to two counts of third-degree rape. We also hold that Roberts has not established a right to the assistance of counsel at his presentence SOTP interview. Such an interview is not, *per se*, a critical stage of the prosecutorial process and so does not give rise automatically to a right to counsel. On the contrary, presentence interviews are presumptively non-adversarial, being designed generally only to provide assistance to the trial court in the exercise of its sentencing discretion. Roberts has alleged no facts to overcome that presumption. We believe, however, that Roberts was denied a reasonable opportunity to review and controvert the contents of his PSI and SOTP reports, as was his right under KRS 532.050(6) and both the state and federal constitutions. Although we refrain from attempting to specify what, at a minimum, a reasonable period for review would be, we hold that the two-hour recess during the sentencing hearing in this case was insufficient. Accordingly, we vacate

that portion of the Fayette Circuit Court's May 6, 1997, judgment sentencing Roberts to ten (10) years in prison and remand for resentencing pursuant to procedures comporting with this opinion.

EMBERTON, JUDGE, CONCURS.

KNOX, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

KNOX, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully dissent only from so much of the majority opinion as holds the trial court abused its discretion in failing to afford Roberts a reasonable period of time within which to controvert the contents of the PSI and SOTP reports. Principally, Roberts does not appear to have even raised any issue respecting the period of time afforded to review and controvert the contents of the PSI report. Rather, he only argues that he was not given a reasonable period of time within which to controvert the contents of the SOTP report.

I agree with the majority that the "fair opportunity" and "reasonable period of time" language contained in KRS 532.050(6) must be applied in such a fashion as to assure due process. However, I do not believe the trial court, in this instance and under these circumstances, failed to give Roberts a reasonable period of time in which to controvert the contents of the SOTP report. The trial court did grant Roberts a period of two (2) hours within which to review the six-page SOTP report. While, under some circumstances, such a period of time might not be reasonable, I believe under the facts sub judice it was.

First, Roberts appears not to have fully cooperated with the SOTP therapist during his interview. Thus, the therapist's recommendations were based, in part, upon Roberts's refusal to provide complete information. Second, as conceded by the majority, Roberts has failed to articulate what portions of the SOTP report he would have controverted. As such, he has failed to demonstrate in what manner he was prejudiced by the trial court's unwillingness to extend any additional time than that which it did permit. Under this state of conditions, I do not believe Roberts has demonstrated that the trial judge committed an abuse of discretion, as I perceive an adequate time was extended for review of the six-page SOTP report.

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