

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002873-MR

KENNETH J. SIMPSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
INDICTMENT NO. 90-CR-00609

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * **

BEFORE: HUDDLESTON, KNOFF and MILLER, Judges.

HUDDLESTON, Judge: Kenneth Simpson appeals from an order of the Fayette Circuit Court that denied his pro se motion for resentencing brought pursuant to Kentucky Revised Statute (KRS) 532.050 and his subsequent motion to alter or amend.

In the summer of 1989, Simpson entered into a sexual relationship with C.J., the twelve-year old son of his male companion, Harold Johnson. At that time Johnson and Simpson were living in Laurel County. In the late summer of 1990, Simpson moved to Lexington, Kentucky, in Fayette County following the breakup of his relationship with Johnson. Simpson, however, continued a

sexual relationship with C.J. After Simpson's activities with C.J. were reported to the Department for Social Services, he was arrested on various charges related to illegal sexual contact with C.J.

On September 18, 1990, the Fayette County grand jury indicted Simpson on one felony count of sodomy in the second degree¹ and one misdemeanor count of sexual abuse in the second degree.² At that time, Simpson was facing charges on numerous counts of sodomy in Laurel County also involving C.J.³ On October 8, 1990, Simpson entered a guilty plea to second-degree sodomy pursuant to an agreement with the Commonwealth, which recommended a sentence of five years on the sodomy count and moved to dismiss the second-degree sexual abuse count. The circuit court temporarily accepted the guilty plea pending a subsequent final sentencing hearing and review of a Presentence Investigation Report (PSI). The circuit court ordered that a copy of the PSI be provided to Simpson and his attorney prior to final sentencing. On November 2, 1990, Simpson appeared in court with his attorney, who moved for a continuance to allow him additional time to investigate statements in a victim impact statement that Simpson indicated he wanted to challenge.

On November 9, 1990, Simpson again appeared with his attorney for sentencing. When queried by the court, Simpson's

¹ Ky. Rev. Stat. (KRS) 510.080.

² KRS 510.120.

³ Simpson was indicted on August 22, 1990, in Laurel County on three felony counts of first-degree sodomy, thirteen counts of second-degree sodomy and two counts of sexual abuse.

attorney stated that he and his client had received a copy of the PSI and they did not wish to make any additions or corrections to the report. While arguing for leniency for his client, Simpson's attorney stated that "other than some alcohol related offenses in the past, Kenneth's prior criminal record doesn't suggest anything of this nature." The attorney also addressed Simpson's challenges to portions of the victim impact statement and the pending charges in Laurel County. The circuit court expressed reservations about the plea agreement and continued sentencing for three weeks in expectation of a resolution of the charges in Laurel County. At the sentencing hearing on November 30, 1990, defense counsel informed the circuit court that the Laurel County case had not been resolved. The court continued sentencing for another month.

On January 4, 1991, defense counsel told the court that the parties were unable to reach agreement in Laurel County. The circuit court indicated it would proceed with sentencing again asking defense counsel if he had any additions or corrections to the original PSI. The circuit court decided to reject the recommendation of the Commonwealth and allowed Simpson to withdraw his guilty plea.

On February 1, 1991, Simpson appeared with his attorney and indicated that he wanted to enter a guilty plea without a plea agreement or recommendation by the Commonwealth. Counsel stated that he and Simpson had been provided a copy of the PSI prior to the earlier sentencing hearings. The court again reviewed with Simpson the waiver of his various constitutional rights. Counsel noted that a PSI had already been filed in the record, so the court

postponed final sentencing for updating of the PSI custody time credit. On February 22, 1991, defense counsel again indicated to the court that he and his client had reviewed the PSI, agreed with the updated custody time credit calculation, and declined the opportunity to make any corrections or additions. The circuit court sentenced Simpson to ten years for second-degree sodomy and twelve months for second-degree sexual abuse to run concurrently.

On January 6, 1997, Simpson filed a pro se Motion to Amend Pre-Sentence Investigation report pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(a) alleging that the PSI prepared in the Fayette County prosecution contained erroneous convictions for driving under the influence (DUI) and possession of narcotic substances from Laurel County. He stated that after he moved for amendment of the PSI prepared in the Laurel County prosecution in September 1993 on similar grounds, the Laurel Circuit Court ordered the removal of the DUI and drug possession convictions based on a review of the court records. On January 9, 1997, the Fayette Circuit Court summarily denied the motion.

On July 12, 1999, Simpson filed a Motion to Correct Errors seeking expungement of the DUI and drug possession convictions in the Fayette County PSI pursuant to Kentucky Rule of Criminal Procedure (RCr) 10.10 on the same grounds as stated in the prior CR 60.02 motion. He alleged that the presence of these convictions in the prior criminal history section of the PSI prepared for the Fayette County prosecution effectively prevented him from being granted parole. He asked the circuit court to order an updated review of court records for verification of his

allegation. Based on the motion, the circuit court requested a response from the Division of Probation and Parole on Simpson's allegation. On July 22, 1999, the probation and parole officer who prepared the Fayette County PSI responded that he could not verify the existence of the misdemeanor DUI and drug possession convictions because the Laurel District Court had not retained records of convictions from the time period involved, 1983-1987, and they predated the period of computerized records. The officer stated that he normally would object to altering a PSI nine years after it was prepared. Given the fact that the misdemeanor convictions involved originated in Laurel County, however, the probation and parole officer recommended that the Fayette Circuit Court defer to the decision of the Laurel Circuit Court, which had ordered removal of the references to the misdemeanor convictions in the PSI prepared for the Laurel County prosecution. On July 29, 1999, the Fayette Circuit Court denied Simpson's RCr 10.10 motion based on the response provided by the probation and parole office.

On October 8, 1999, Simpson filed a Motion for Resentencing pursuant to KRS 532.050 again seeking amendment of the PSI in the Fayette County case. He alleged that two DUI convictions, four traffic violations and a possession of marijuana conviction between 1983-1987 were erroneously included in the PSI. He said that a check of the National Crime Information Center (NCIC) records ordered by the Laurel Circuit Court in September 1993 indicated that he was not the person involved in those offenses. Simpson stated that there was no available administrative remedy through the Department of Corrections and

that he was suffering adverse consequences because of the presence of the erroneous information on his PSI. Simpson included an affidavit from his brother stating that he was physically unable to drive between 1983-1987. On October 20, 1999, the circuit court denied the motion in part because Simpson and his counsel were given an opportunity to review the PSI prior to sentencing and made no corrections at the sentencing hearing. Simpson filed a motion to alter or amend the order, which the court summarily denied. This appeal followed.

Simpson argues on appeal that the circuit court had authority to order amendment or correction of the PSI under RCr 10.10, which deals with clerical errors. He asserts that the circuit court should have corrected the PSI because the probation and parole officer who prepared the report did not dispute Simpson's claim that the misdemeanor entries were erroneous. We believe that Simpson is not entitled to relief for several reasons.

First, we note that on appeal, Simpson, through counsel, relies on RCr 10.10, whereas the circuit court order underlying this appeal involved a motion filed pursuant to KRS 532.050. The later was the third in a series of motions seeking correction of the PSI based on the exact same grounds. Simpson did not appeal the circuit court's orders denying his CR 60.02 motion and RCr 10.10 motion, and therefore, they became binding final judgments subject to the principles of res judicata and collateral estoppel.⁴ Consequently, Simpson was barred from relitigating the issue of the

⁴ See generally, Yeoman v. Commonwealth, Ky., 983 S.W.2d 459 (1998); Moore v. Commonwealth, Cabinet for Human Resources, Ky., 954 S.W.2d. 317 (1997)

allegedly erroneous PSI and the motion for resentencing involved in the current appeal could have been summarily denied on procedural grounds.

Second, the Commonwealth argues that the issue is moot because Simpson has completed service of the ten-year sentence imposed by the Fayette Circuit Court.⁵ Simpson alleges that the Fayette County PSI adversely affects his parole opportunities but fails to provide any facts supporting that allegation. While Simpson presumably is still serving the sentence he received in the Laurel County prosecution,⁶ it is unclear how or why the Fayette County PSI would be utilized or relied upon by the Parole Board, rather than the PSI prepared for the sentencing in the Laurel County case, which the Laurel Circuit Court ordered amended to delete the 1983-1987 misdemeanor convictions at issue in this appeal. Furthermore, even if the Fayette County PSI was utilized by the Parole Board, Simpson could explain the discrepancy and the alleged errors in it at the parole hearing. Accordingly, Simpson has failed to demonstrate any actual prejudice because of errors in the PSI.

Finally, our review of the videotape record reveals that the circuit court meticulously complied with KRS 532.050. Under the statute, the court must provide defense counsel a copy of the PSI, advise the defendant or his counsel of its factual contents

⁵ The Commonwealth calculates Simpson's maximum expiration serve out date as August 17, 2000, based on a ten-year sentence imposed on February 22, 1991, with a 185 day jail time credit.

⁶ The record does not contain any documents or information on the sentence imposed by the Laurel Circuit Court.

and afford the defendant a fair opportunity and a reasonable period of time to controvert its contents.⁷ In this case, final sentencing was continued several times upon request of the appellant. On each occasion, defense counsel indicated in response to inquiries from the court that he and his client had received a copy of PSI and did not wish to make any corrections or additions. If his attorney did not review the PSI with him as he now claims, Simpson certainly had ample opportunity and an obligation to bring that to the court's attention.

In addition, Simpson waited over six years from the date he was sentenced before filing his first motion to correct the PSI. More importantly, he did not raise the issue of the erroneous criminal history in the Fayette County PSI until approximately 3½ years after the Laurel County PSI was amended. Even if he did not review the Fayette County PSI prior to sentencing, he certainly was on notice of possible discrepancies in it based on the alleged errors he had corrected in the Laurel County PSI.

As a result of Simpson's delay in challenging the Fayette County PSI, the probation and parole office was unable to verify his allegation of errors because the district court records had been disposed of. The Fayette Circuit Court was not obligated to rely on the actions of the Laurel Circuit Court. We agree with the circuit court that Simpson waived any claim that the Fayette County PSI contained factual errors. Thus, we cannot say that the circuit

⁷ KRS 532.050 (5) (now (6)). See also Commonwealth v. Bush, Ky., 740 S.W.2d 943 (1987).

court erred in denying Simpson's motion to correct errors in the PSI.

The Fayette Circuit Court order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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