

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000173-MR

JEFFREY A. SCHERRETZ

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE KAREN LYNN WILSON, JUDGE
ACTION NO. 06-CR-00195

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND KELLER, JUDGES; KNOPF,¹ SENIOR JUDGE.

KELLER, JUDGE: Jeffrey Scherretz (Scherretz) appeals from the trial court's denial of his Kentucky Rules of Civil Procedure (CR) 60.01 motion to amend his pre-sentence investigation (PSI) report. On appeal, Scherretz argues that the trial court failed to comply with the mandate in Kentucky Revised Statute (KRS)

¹ Judge William L. Knopf concurred in this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

532.050(6) to provide him with an opportunity to controvert alleged errors in his PSI report. He asks this Court to remand this matter to the trial court with instructions that it hold a hearing regarding those alleged errors. The Commonwealth argues that the trial court complied with the statutory requirements of KRS 532.050 and that Scherretz cannot obtain the relief he seeks via CR 60.01. For the following reasons, we affirm.

FACTS

At the outset, we note that the record does not contain a copy of Scherretz's CR 60.01 motion or the PSI report. However, as noted by the Commonwealth, the record does contain a motion by Scherretz asking the court to rule on his CR 60.01 motion and an order by the court denying that motion. Because the court ruled on Scherretz's motion and the Commonwealth has not contested the existence of that motion, we accept as true that the motion was properly filed. However, because we cannot review the motion or the PSI report, we rely on the trial court's order regarding their contents. With those caveats in mind, we summarize below the facts necessary to resolve the issues raised by Scherretz on appeal.

Following trial, a Henderson County jury found Scherretz guilty of manslaughter in the second degree and burglary in the first degree. At the sentencing hearing Scherretz questioned several statements contained in the PSI

report. In pertinent part, Scherretz argued that the offenses of assault in the fourth degree, unlawful imprisonment in the second degree, terroristic threatening in the third degree, and harassing communications were designated in the report as “status unknown” when the charges had been dismissed. The court asked the person who prepared the report to review those charges and, if Scherretz’s suggested changes were accurate, to make them. Following that hearing, Scherretz filed a “Notice of Filing” setting forth the alleged errors in the PSI report. It does not appear that any changes were made to the “status unknown” charges of the PSI report.

Following the court’s entry of final judgment, Scherretz filed an appeal to this Court arguing that the trial court made a number of errors. This Court was not persuaded by Scherretz’s arguments and affirmed. Scherretz sought discretionary review of this Court’s opinion by the Supreme Court of Kentucky, which the Supreme Court denied. Thus this Court’s opinion affirming his conviction became final on August 25, 2009. *Scherretz v. Commonwealth*, 2008 WL 4531355 (Ky. App. 2008)(2007-CA-001605-MR).

While his appeal was pending, Scherretz filed a CR 60.01 motion asking the trial court to remove certain information contained in his PSI report. It appears from what is in the record, that Scherretz asked the court to remove from the report those charges listed as “status unknown.” Without holding a hearing, the court denied Scherretz’s motion, noting that the charges had not been expunged but that the court records related to the charges had been destroyed. Furthermore, the

court stated that CR 60.01 “allows a court to correct clerical mistakes in judgments, orders or other parts of the record” and that no correction of the PSI report was necessary. Therefore, the court denied Scherretz’s motion. This appeal followed. We set forth additional facts as necessary below.

STANDARD OF REVIEW

We review the trial court’s denial of Scherretz’s motion for an abuse of discretion. *See Aurora Loan Servs. v. Ramey*, 144 S.W.3d 295, 299 (Ky. App. 2004).

ANALYSIS

Scherretz argues that the trial court did not follow the mandates of KRS 532.050(6) when it failed to conduct a hearing on his CR 60.01 motion. We disagree for two reasons. First, Scherretz’s arguments to the contrary notwithstanding, the trial court did comply with the mandates of KRS 532.050(6). Pursuant to KRS 532.050(6), a trial court is required to: advise a criminal defendant and his counsel of the factual contents and conclusions of the PSI report; “afford a fair opportunity and a reasonable period of time . . . to controvert” the contents and conclusions in the report; and provide counsel with a copy of the report.

At the sentencing hearing, counsel for Scherretz pointed out a number of alleged errors in the PSI report. In doing so, counsel referred directly to pages in the report. The court asked the person who prepared the report to review the alleged errors regarding those charges listed as “status unknown” and to make

changes to the report if appropriate. Furthermore, the court asked counsel for Scherretz to file a supplement to the report regarding other alleged discrepancies. The court then asked Scherretz and his counsel if, after reviewing the report, they had any other concerns with regard to the report's contents, and they responded that they did not. Based on the preceding, it is apparent that the court provided a copy of the report to Scherretz's counsel prior to the hearing and thereby advised Scherretz and his counsel of the factual contents and conclusions in the report. It is also apparent that the court provided Scherretz the opportunity to controvert the report's contents and conclusions, which he did. That is all that KRS 532.050(6) requires. KRS 532.050(6) does not, as Scherretz appears to contend, require the court to hold a second hearing pursuant to CR 60.01 to address issues it previously addressed.

Second, as implied by the trial court, CR 60.01 is not the proper avenue for Scherretz to take to obtain the relief he seeks. CR 60.01 provides for the correction of clerical mistakes in judgments, orders, or other parts of the record. It does not provide for the correction of substantive errors. *See Brozowski v. Johnson*, 179 S.W.3d 261, 263 (Ky. App. 2005); *Potter v. Eli Lilly and Co.*, 926 S.W.2d 449, 452 (Ky. 1996), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1, 6 (Ky. 2004); and *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky. App. 1987). Therefore, in order to benefit from the provisions of CR 60.01, Scherretz must show that there was a clerical mistake. This he has failed to do. As found by the trial court, the court records related to the cases cited in the

criminal history of the PSI report were destroyed. Because there are no records, the status of the cases is not known. Therefore, the statement that the status of those cases is “unknown” is not a clerical mistake. Furthermore, to the extent Scherretz is correct that the charges were dismissed, the statement in the PSI is a substantive not clerical error and not subject to relief under CR 60.01.

CONCLUSION

Scherretz has failed to establish that the trial court did not afford him a fair opportunity to controvert statements in his PSI report and has failed to establish that alleged incorrect statements in that report were the result of clerical error. Therefore, we affirm.

ALL CONCUR.

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