

RENDERED: December 12, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-0476-MR

JAMES M. PERRY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 94-CR-116

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, GARDNER, and JOHNSON, Judges.

ABRAMSON, JUDGE: James M. Perry, pro se, appeals an order of the Kenton Circuit Court entered on February 5, 1997, denying his motion to obtain a copy of the Presentence Investigation Report (PSI) prepared in connection with his criminal conviction. We affirm.

In April 1994, Perry pleaded guilty to second-degree burglary (KRS 511.030) and being a second-degree persistent felony offender (PFO II) (KRS 532.080). Prior to sentencing, Perry was allowed to review and respond to the PSI; no objections were lodged. The circuit court later sentenced him to fifteen

years in the penitentiary. After initial placement in a minimum security facility, the Department of Corrections reassigned Perry to the medium security facility at Eastern Kentucky Correctional Complex. On January 14, 1997, Perry filed a motion in the circuit court requesting a court order requiring the circuit court clerk to provide a true and correct copy of the PSI prepared for the sentencing hearing in part because he alleged the prison transfer was based on information in his PSI. On February 5, 1997, the circuit court denied the motion.

Perry contends that he is entitled to obtain a copy of the PSI because it is utilized in determining a prisoner's classification, treatment, parole consideration and parole supervision. Perry states that he was informed by prison officials that he was placed in EKCC with a medium security classification because of an escape charge in the PSI. Perry argues the alleged escape charge is erroneous, and he needs a copy of the PSI to challenge his prison classification. In July 1996, Perry submitted an open records request under KRS Chapter 61 to the records custodian of the Department of Corrections. The request was denied pursuant to Corrections Policies and Procedures (CPP) 28-01-09 and KRS 61.878(1)(j) because Perry had not waived preparation of the PSI prior to sentencing.

This case is governed by the decision in Commonwealth v. Bush, Ky., 740 S.W.2d 943 (1987). In that case, Bush, a prison inmate, sought a copy of a PSI prepared by a probation and parole officer for the prison officials because he alleged it was

being used for purposes of classification and determination of eligibility for involvement in prison programs. Bush had initially waived preparation of a PSI prior to sentencing. The Kentucky Supreme Court held that defendants are not entitled to an actual copy of the PSI at either presentence or post-conviction stages. The Court noted the strong interest in protecting the sources of confidential information, and the matters of opinion and comments of a personal and factual nature typically contained in a PSI. The Court further noted that a PSI is explicitly exempt from disclosure under the Open Records Law by KRS 61.878(1)(j), which exempts any records made confidential by the General Assembly, as a PSI is by KRS 439.510. The Court also relied on KRS 532.050(4), which requires the court to "advise the defendant or his counsel of the factual contents and conclusions of any presentence investigation." The Court stated in Bush:

Thus, the statute specifies that the court shall advise of factual contents and conclusions; not that the court shall release a copy of the report. "Subsection (4) takes a middle position between complete disclosure of the entire report and no disclosure at all." Commentary to KRS 532.050. (Emphasis in original).

* * * * *

Nevertheless, to conform with the "fair opportunity" afforded a defendant by KRS 532.050(4), Bush is entitled to being advised by the prison official who has custody of the PSI of the factual contents and conclusions therein, and to a reasonable time to controvert factual information contained therein.

In order to protect the sources of confidential information, matters of opinion and comments of a personal and nonfactual nature shall not be revealed. Bush is not entitled to a copy of the report.

Id. at 944.

Bush clearly supports the Department of Corrections' refusal to provide Perry a copy of the PSI. Perry's attempt to distinguish Bush is unpersuasive. Similarly, Perry's citation of case authority from other jurisdictions is unavailing because we are bound by the decisions of our Supreme Court. See S.C.R. 1.030(8)(a); Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Finally, we note that KRS 532.050 has been amended since Bush was rendered to require that the trial court provide the defendant's counsel with a copy of the PSI prior to sentencing. See KRS 532.050(5). Provision of a copy of the PSI to the defendant's counsel actually occurred in this case as reflected in the April 25, 1994, Judgment and Sentence on Plea of Guilty. This statutory requirement that Perry's counsel receive a copy of the PSI prior to sentencing has no bearing on the issue presented by this appeal. Bush continues to control in the post-conviction stage.

For the foregoing reasons, we affirm the order of the Kenton County Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE:

James M. Perry
West Liberty, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Courtney A. Jones
Assistant Attorney General
Frankfort, Kentucky