

RENDERED: January 9, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 96-CA-2376-MR

MARK L. DYER

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE CHARLES SINNETTE, SPECIAL JUDGE  
ACTION NO. 94-CR-00071

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ABRAMSON, BUCKINGHAM, and EMBERTON, Judges.

ABRAMSON, JUDGE: Mark L. Dyer, acting pro se, appeals an order of the Boyd Circuit Court entered August 13, 1996, denying his motion to compel production of a copy of a Presentence Investigation Report (PSI). We affirm.

On November 18, 1994, Dyer entered a guilty plea under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to one felony count of Criminal Possession of a Forged Instrument in the Second Degree (KRS 516.060), pursuant to a plea agreement in which the Commonwealth recommended a sentence of one year. After conducting the guilty plea hearing, which included informing Dyer that he was waiving several

constitutional rights, the trial court found that the guilty plea was entered freely, voluntarily and intelligently. At that time, the court postponed sentencing for preparation of a PSI.

On December 16, 1994, Dyer appeared in court with his attorney for final sentencing. The trial court provided defense counsel with a copy of the PSI prepared by the Division of Probation and Parole. During the sentencing hearing, Dyer challenged the accuracy of several entries. First, he denied the existence of a 1981 charge for possession of narcotics, which the PSI indicated was dismissed. He also denied having committed a charge for shoplifting and a charge for bail jumping, which he asserted had been dismissed. Dyer voluntarily agreed to allow the sentencing to proceed, but he asked the trial judge to order Probation and Parole to investigate the alleged errors and correct the PSI accordingly. The judge told Dyer that he could file a motion later if there were any questions about the inaccuracies. Dyer also asked the court to strike from the PSI a reference to a statement by a former employer implicating him in some possible thefts from the employer. The court granted this request and then sentenced Dyer to serve one year in prison.

In February 1995, Dyer wrote a letter to the trial judge stating that he had been unable to obtain a copy of his PSI and asking the judge to order a copy be made available. On February 24, 1995, the circuit court issued an order denying the request stating the court did not have a copy of the PSI and Dyer needed to make a request directly with the Division of Probation

and Parole. On May 21, 1996, however, the circuit court entered an Agreed Order ordering the Probation and Parole Office to investigate the criminal history portion of the PSI and report to the court within ten days any changes.

On July 8, 1996, Dyer filed a motion to compel the Division of Probation and Parole to comply with the May 21, 1996 order of the court. Dyer also requested a copy of the PSI to check for any inaccuracies. On August 13, 1996, the circuit court denied the motion to compel stating Dyer had not shown any prejudice and the PSI was available only at the time of sentencing. This appeal followed.

Dyer argues the circuit court abused its discretion by refusing to grant his motion to compel and refusing to allow him to review a copy of his PSI to see that it had been corrected. He contends that following the circuit court's February 24, 1995 order, his request for a copy of the PSI was denied by the Division of Probation and Parole, the prison records custodian and the Attorney General's Office, although we note there is no evidence in the record to support this claim. Dyer asks this Court to remand the case to the Boyd Circuit Court to allow him to continue the process of refuting his PSI or remand for a new sentencing hearing.

The Commonwealth argues that this case is controlled by the decision in Commonwealth v. Bush, Ky., 740 S.W.2d 943 (1987). Bush, a prison inmate, sought a copy of a PSI (more appropriately referred to as a post-sentencing investigation report) prepared

by a probation and parole officer after sentencing 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 reversed a Court of Appeals decision that would have permitted receipt of an edited version of a PSI with the names and sources of confidential information deleted. The Supreme Court held that defendants were not entitled to an actual copy of the PSI at either presentence or post-conviction stages. The Supreme Court stated that in order to protect the sources of confidential information, and matters of opinion and comments of a personal and factual nature, an actual copy of the PSI need not be revealed. The Court noted that a PSI is explicitly exempt from disclosure under the Kentucky Open Records Law by KRS 61.878(1)(j), which exempts any records made confidential by the General Assembly. The PSI is made confidential by KRS 439.510.<sup>1</sup> The Court also relied on KRS 532.050(4), which provided for the court to "advise the defendant or his counsel of the factual

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<sup>1</sup> KRS 439.510 states in pertinent part:

All information obtained in the discharge of official duty by any probation or parole officer shall be privileged and shall not be received as evidence in any court. Such information shall not be disclosed directly or indirectly to any person other than the court, board, cabinet, or others entitled under KRS 439.250 to 439.560 to receive such information, unless otherwise ordered by such court, board or cabinet....

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).

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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. The type of censoring suggested by the Court of Appeals would be difficult if not impossible to make.

Id. at 944.

The decision in Bush was based primarily on the following factors: 1) a PSI is exempt from the Open Records law under KRS 61.870 and KRS 439.510; 2) KRS 532.050(4) only required that the court advise the defendant of the factual nature of the PSI, rather than provide a copy; 3) KRS 532.050 expressed a need to protect sources of confidential information; and, 4) editing the PSI to delete all references to confidential sources would be too burdensome. Subsequent to the Bush decision, however, the General Assembly amended KRS 532.050 to require the trial court

to provide a defendant's counsel with a copy of the PSI, subject to deletions to protect the sources of confidential information. The pertinent provision, now appearing in subsection (5), states as follows:

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 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.<sup>2</sup>

The amendment to KRS 532.050 appears to conflict with part of the rationale supporting the decision in Bush, especially the reliance on the requirement that the defendant merely be advised of the factual contents of the PSI and the burden created by censoring the report. Moreover, the concern for protection of confidential sources and confidential information is alleviated somewhat if the defendant has already received access to the PSI, albeit a censored version. Nevertheless, the other factors addressed by the court in Bush remain, such as the exclusion from the Open Records law and a need to protect confidential sources. Indeed, the amended statute retains the provision stating that confidential information need not be disclosed. Consequently, while the viability of some aspects of the Bush decision is unclear, even the current statutory law indicates that reports

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<sup>2</sup> The sentence stating the court shall provide defendant's counsel with a copy of the presentence investigation report was added in 1990. In 1996, a new Subsection (4) dealing with sexual offenders was added, and the contents of former Subsection (4) became a part of new Subsection (5).

prepared by the Division of Probation and Parole are not automatically subject to disclosure, and the trial court retains discretion under KRS 439.510 whether to provide a defendant a copy of a PSI/Post-Sentencing report after sentencing as long as he is provided the factual information in the report and a "fair opportunity" to challenge it.

In the case sub judice, Dyer has not established that he was entitled to obtain a copy of the PSI subsequent to sentencing, and we cannot say the trial court abused its discretion. Dyer has demonstrated no actual prejudice at sentencing because he took advantage of the opportunity to fully challenge the contents of the PSI at the sentencing hearing, and the trial court duly considered the alleged inaccuracies prior to sentencing. Dyer voluntarily waived further postponement of sentencing despite the problems with the PSI. Finally, the trial court sentenced Dyer consistent with the Commonwealth's recommendation in the plea agreement. Therefore, Dyer is not entitled to a remand for a new sentencing proceeding.

Dyer also contends that the parole board denied him parole because of the alleged erroneous information in the PSI. First, we note that Dyer has provided no evidentiary support for this allegation. The parole board is entitled to consider the PSI. See Aaron v. Commonwealth, Ky. App., 810 S.W.2d 60, 62 (1991); KRS 439.510. "A parole board has broad discretion in hearing evidence, including dismissed counts of an indictment, hearsay evidence, and allegations of criminal activity for which

the prisoner has not even been charged." Aaron, 810 S.W.2d at 62. Given the wide scope of information that may be included in a PSI, Dyer's four disputed entries include only one - the 1981 charge for possession of narcotics - which is even arguably subject to expungment from the PSI. Dyer has not established that he was not given an opportunity to challenge the PSI before the parole board. Thus, Dyer has demonstrated neither any prejudice related to not being granted parole, nor a compelling need to obtain a copy of the PSI.

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

ALL CONCUR.

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