

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-002729-MR
and
No. 1997-CA-000722-MR

JOSEPH VERNON HOBBS

APPELLANT

v. APPEALS FROM McCracken Circuit Court
HONORABLE RON DANIELS, JUDGE
ACTION NO. 92-CR-0022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, GARDNER, and GUIDUGLI, Judges.

ABRAMSON, JUDGE: This is the consolidation of two appeals by Joseph Hobbs from rulings of McCracken Circuit Court. Hobbs, an inmate at the Eastern Kentucky Correctional Complex in West Liberty, Kentucky, appeals pro se from a September 19, 1996, order denying his request to have his pre-sentence investigation report (PSI) amended. Hobbs also appeals, with counsel's aid, from a December 16, 1996, order denying his CR 60.02 motion for relief from his criminal conviction. Hobbs was convicted in 1992

of numerous counts of theft and was sentenced to twenty years in prison. He maintains that his conviction should be vacated because the grand jury that indicted him was unlawfully constituted. He also seeks relief from what he claims are errors in his PSI, errors that have resulted in his being assigned to unfavorable prison housing and in his being denied parole. In both cases, the trial court ruled that as a matter of law Hobbs had failed to state a ground for relief. We review the trial court's conclusions of law de novo. Commonwealth v. Collins, Ky., 821 S.W.2d 488 (1991). Agreeing with the trial court that Hobbs has failed to state a claim, we affirm.

We begin with Hobbs's motion pursuant to CR 60.02. In Allen v. Commonwealth, Ky. App., 901 S.W.2d 881 (1995), this Court vacated a McCracken County judgment convicting Allen of a felony. Undisputed evidence in that case showed that during the term of Allen's indictment (he was indicted in June 1992), the trial court had unlawfully delegated aspects of grand jury selection to a court administrator. Allen did not discover the error until after trial, but prior to sentencing he moved on that ground to have his conviction vacated and his indictment dismissed. The trial court denied relief, but this Court, relying on Commonwealth v. Nelson, Ky., 841 S.W.2d 628 (1992), and Bartley v. Loyall, Ky. App., 648 S.W.2d 873 (1982), ruled that, because Allen had raised the issue before the judgment had become final and as soon as he reasonably could have, he had preserved the error for review and so was entitled to rely on the

presumption that a substantial deviation from the grand jury selection process specified by law is prejudicial.

Hobbs was indicted by the McCracken Grand Jury in February 1992, just four months before Allen. He claims that for the reasons discussed in Allen he should be accorded the same relief. Aside from the facts recited in Allen, which are clearly not dispositive of Hobbs's claim, Hobbs has offered no evidence that he was in fact indicted by an improperly selected grand jury. Even if we assume that he was, however, his reliance on Allen is misplaced. Allen was given the benefit of the presumption of prejudice because his post-trial but pre-judgment motion was deemed to have adequately preserved the grand jury error despite his having failed to raise the issue prior to trial. On the other hand, Hobbs, whose judgment had been final for more than two years before he raised the grand jury issue, makes and could make no claim to having preserved the error. To be sure, unpreserved errors may sometimes be reviewed pursuant to RCr 11.42 and CR 60.02. However, except where there have been certain egregious constitutional violations, a movant seeking relief under these rules must show that he or she has been prejudiced in fact. CR 60.02 (a court may grant relief "on such terms as are just"); Gross v. Commonwealth, Ky., 648 S.W.2d 853 (1983). In Pierce v. Commonwealth, Ky. App., 902 S.W.2d 837 (1995), this Court ruled that a similarly tainted indictment was not prejudicial because even were the indictment quashed there was no reason to believe that a properly constituted grand jury

would not have reindicted the appellant. Hobbs too has suggested no reason to doubt that he would have been reindicted had his indictment been dismissed. This leads us to conclude, as in Pierce, that Hobbs suffered no prejudice from the grand jury error and so is entitled to no relief.

Hobbs also contends that his PSI contains factual errors which have led the Department of Corrections to treat him more harshly than it otherwise would have done. In seeking relief from this problem, Hobbs claims to have been placed in a bind. When he has asked Department of Corrections officials to amend the report, they have characterized the PSI as a court record over which they have no authority and have referred Hobbs to the court. Now the trial court has told him that it, too, is barred from altering his PSI because its authority to amend the judgment has long since lapsed.

As Hobbs notes, his PSI bears on several important decisions concerning the conditions and the duration of his confinement. He thus has a significant interest in the factual accuracy of that report. This interest is recognized in KRS 532.050, which requires sentencing courts to apprise the defendant or his counsel of the PSI's factual contents and to afford the defendant a meaningful opportunity to contest them. Commonwealth v. Bush, Ky., 740 S.W.2d 743 (1987); Doolan v. Commonwealth, Ky., 566 S.W.2d 413 (1978). Hobbs acknowledges that prior to sentencing he was allowed to examine his PSI and would have been allowed to raise objections. However, because

his counsel concluded that none of the errors Hobbs found would affect the sentence, Hobbs waived his opportunity to contest them. Hobbs does not challenge counsel's advice nor does he contend that the alleged PSI inaccuracies led to an unlawful sentence. Because the alleged errors have no bearing on the validity of Hobbs's judgment, the trial court did not err by denying Hobbs's request to reopen the sentencing procedure.

Hobbs's real complaint is against the Department of Corrections. He maintains that the PSI inaccuracies are relevant to such agency determinations as his security classification and his suitability for parole and thus that the agency should afford him an opportunity to prove the errors and to have his PSI amended accordingly. However, because neither the Department of Corrections nor any of its officials is a party to this action, the question of Hobbs's right to administrative review of his PSI is not properly before us.¹ We may observe, though, that federal law has recognized a right to such administrative review in some instances. The United States Solicitor General has conceded that federal PSI's are agency records, not court records, Crooker v. United States Parole Commission, 760 F.2d 1 (1st Cir. 1985), and where alleged PSI inaccuracies have been deemed irrelevant to sentencing, federal courts have declined to review the PSI's

¹To obtain judicial review of adverse Department of Corrections' decisions, Hobbs is obliged first to exhaust the administrative grievance procedure. If he remains dissatisfied, he may then petition for a declaratory judgment against the agency and the official allegedly violating his rights. Smith v. O'Dea, Ky. App., 939 S.W.2d 353 (1997).

under the assumption that the agency could and would do so.

United States v. Betancourt, 838 F.2d 168 (6th Cir. 1988); United States v. LeBlanc, 762 F.2d 502 (6th Cir. 1985).

Having concluded that the McCracken Circuit Court decided correctly the matter before it, we affirm its orders of September 19 and December 16, 1996.

ALL CONCUR.

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