

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000736-MR

MARK PRICE

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE JULIE REINHARDT WARD, JUDGE  
ACTION NOS. 01-CR-00095 and 01-CR-00367

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON AND KRAMER, JUDGES.

DIXON, JUDGE: Appellant, Mark Price, appeals *pro se* from an order of the Campbell Circuit Court denying his motion to correct his Presentence Investigation report (PSI). Finding no error, we affirm.

In 2001, Appellant was indicted on numerous offenses and, after a jury trial in the Campbell Circuit Court, was convicted of receiving stolen property

over \$300, first-degree fleeing and evading police, and second-degree wanton endangerment. He thereafter pled guilty to being a first-degree persistent felony offender in exchange for dismissal of the misdemeanor wanton endangerment charge and a negotiated fifteen-year sentence of imprisonment. Appellant retained his right to appeal the two underlying convictions. On appeal, this Court affirmed his convictions and sentence. *Price v. Commonwealth*, 2002-CA-000406 (May 30, 2003), and the Kentucky Supreme Court subsequently denied discretionary review. Appellant thereafter filed several unsuccessful post-conviction motions for relief.

On March 11, 2014, Appellant filed the motion at issue herein, styled “Motion to Correct PSI.” Therein, Appellant claimed that the PSI report used during the 2002 sentencing hearing contained erroneous information. As such, Appellant requested an order requiring the Department of Probation and Parole to correct the report or, in the alternative, an evidentiary hearing to resolve all issues. By ordered dated March 26, 2014, the trial court denied the motion. This appeal ensued.

In this Court, Appellant argues that the trial court violated his due process rights when it failed to follow the mandatory procedure set forth in KRS 532.050 before imposing his sentence and, as such, he is entitled to have his sentence reconsidered in light of a new, updated PSI report. We disagree.

KRS 532.050 provides, in relevant part:

- (1) No court shall impose sentence for conviction of a felony, other than a capital offense, without first ordering a presentence investigation (after conviction)

and giving due consideration to a written report of such investigation.

...

(4) 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 sources of confidential information need not, however, be disclosed.

As noted in *Brewer v. Commonwealth*, 550 S.W.2d 474, 476 (Ky. 1977), “[t]he ordering of a presentencing investigation and consideration of the written report of such investigation is made mandatory by the statute. The court is also mandatorily required to advise defendant or his counsel of the factual contents and conclusions of the investigation and to afford him an opportunity to controvert them should they be adverse to the interest of the defendant.”

The video of Appellant’s sentencing hearing is not contained in the record herein.<sup>1</sup> However, the Commonwealth summarized the hearing as follows: During the January 16, 2002, hearing, the trial court asked Appellant if he had read the PSI report and if he had any issues therewith. Defense counsel pointed out that some of the facts listed in the report were from a previous case. The trial court acknowledged the error and stated that the erroneous facts related to an assault charge that had, in fact, been dismissed. Appellant contended that the erroneous facts contained in the report would place him in a different classification with the

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<sup>1</sup> The Commonwealth filed a notice informing this Court that the sentencing hearing video was contained in the record filed in Appellant’s other appeal, 2013-CA-1032, which was pending in this Court at the time the briefs were filed herein.

Department of Corrections. Accordingly, the trial court stated that it would order the Department to correct any misinformation and issue an updated report.

Thereafter, defense counsel requested that Appellant be sentenced in accordance with the negotiated plea agreement. The trial court's subsequent judgment and sentence entered on January 23, 2002, accurately reflects the Commonwealth's summation of the hearing and provides, in relevant part:

On the 16<sup>th</sup> day of January, 2002, the defendant appeared in open court with his attorney, Dennis Aldering, and the Court inquired if the defendant and his counsel whether they had a legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment. Defendant and his counsel read the written presentence investigation report prepared by the Department of Probation and Parole and the defendant disagreed with the factual contents of said report. The Court thereupon ORDERS that the Division of Probation of Parole file a corrected presentence investigation report.

Having given due consideration to the written report of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for the protection of the public because there is a substantial risk the defendant will commit another crime during any period of probation or conditional discharge and that probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

In accordance with the plea agreement, Appellant was sentenced to a total of fifteen years' imprisonment, ordered to be served consecutively to any sentence

imposed in Indictment 01-CR-095 that was then-pending in the Campbell Circuit Court.

We are of the opinion that the trial court fully complied with the requirements of KRS 532.050. This is not a case where the trial court did not consider a PSI report, as in the *Brewer* case, or even where the trial court considered an outdated report, as in *Arnold v. Commonwealth*, 573 S.W.2d 344 (Ky. 1978). Rather, during the sentencing hearing, the trial court herein advised Appellant of the factual contents of the PSI report that had been completed on that day, and provided him and his counsel the opportunity to controvert them. Further, the trial court agreed with Appellant that the report contained misinformation and subsequently ordered the Department of Probation and Parole to correct such. It is plainly apparent that the trial court gave due consideration to the report before sentencing Appellant in accordance with the negotiated plea agreement. Thus, in accordance with *Brewer*, “the record of the proceeding . . . clearly disclose[d] the fact that the trial court . . . fully complied with KRS 532.050 by requesting a presentence investigation, examining and considering the written report as supplied, and informing defendant or his counsel of the factual contents and conclusions contained in the report and the fact that the defendant either requested or did not request time within which to controvert the factual data contained in the report.” *Brewer*, 550 S.W.2d at 476-77.

Appellant claims in his brief that the Department of Probation and Parole did not correct his PSI report as ordered by the trial court. The record does not reflect

whether such, in fact, ever occurred. Nevertheless, we are of the opinion that if Appellant was unhappy with the manner in which the trial court handled the PSI report or with the Department's failure to comply with the order to update the report, it was his burden to bring that to the trial court's attention or raise it on appeal. As previously noted, however, Appellant appealed the underlying convictions to this Court, which affirmed the judgment and sentence. In May 2006, Appellant filed a motion for post-conviction relief pursuant to RCr 11.42, which was denied by the trial court. This Court thereafter affirmed the denial in an unpublished opinion. *Price v. Commonwealth*, 2007-CA-000205 (January 18, 2008). Appellant then filed a CR 60.02 motion, which again was denied by the trial court in May 2013, and affirmed by this Court during the pendency of the instant appeal. *Price v. Commonwealth*, 2010-CA-1032 (May 17, 2014).

It is undisputed that Appellant did not raise any issue pertaining to the information contained in his PSI report on either the direct appeal or in any post-conviction motions. Further, the same PSI report that the trial court considered herein was also subsequently used for Appellant's sentencing in Indictment 01-CR-0095 that occurred on February 12, 2002, less than one month later. As he did in this case, Appellant filed a direct appeal, an RCr 11.42 motion, and a CR 60.02 motion challenging those convictions. Similarly, none of those pleadings raised any issue concerning the PSI report.

The trial court lost jurisdiction over the judgment ten days after it was entered and only a timely post-conviction motion could have reinstated

jurisdiction. *See Bush v. Commonwealth*, 236 S.W.3d 621, 623 (Ky. App. 2007).

Appellant's failure to raise the issue until twelve years after he was sentenced

clearly waived any error. Accordingly, the trial court did not abuse its discretion in

denying Appellant's motion to correct his PSI report. *See Chapman v.*

*Commonwealth*, 265 S.W.3d 156, 177 (Ky. 2007).

ALL CONCUR.

BRIEF FOR APPELLANT:

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