

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001208-MR

TODD STOUDEMIRE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NOS. 10-CR-000401, 10-CR-000894

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, GOODWINE, AND TAYLOR, JUDGES.

COMBS, JUDGE: Appellant, Todd Stoudemire, appeals from an order of the Jefferson Circuit Court that denied his motion for judgment *nunc pro tunc*. After our review, we affirm.

We limit our discussion of the record to the single issue before us. On November 28, 2012, the trial court entered a “JUDGMENT OF CONVICTION

AND SENTENCE (AFTER PLEA AND REVIEW OF PRESENTENCE INVESTIGATION) SEX OFFENDER” (emphasis original). It provided in relevant part as follows:

On *October 4, 2012*, by agreement of the Commonwealth and upon advice of counsel, the Defendant entered a guilty plea (pursuant to North Carolina v. Alford^[1]) to:

- **KIDNAPPING (THREE COUNTS)**
- **SODOMY I (TWO COUNTS)**
- **RAPE I (FIVE COUNTS)**
- **WANTON ENDANGERMENT I**
- **TERRORISTIC THREATENING III**
- **ASSAULT IV (TWO COUNTS)**

The Court found that the Defendant’s plea was knowingly and voluntarily entered and that there was a factual basis for it. The Court accepted the Defendant’s guilty plea.

The Court ordered a Presentence Investigation Report and a Sex Offender Evaluation and granted the Defendant the right to controvert the factual contents of the reports.

(Emphasis original.)

The Presentence Investigation Report (PSI) under the section entitled “Education” stated that it was taken from an April 26, 2012, PSI. It also set forth the following details:

Transcripts reflect the defendant withdrew from Dupont Manual High School after completing the tenth grade during May 1979. He received below average or failing

¹400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

grades in almost all subjects. . . . [Stoudemire] advised that he has been enrolled in GED courses both at the institution and while confined in jail, but has never acquired his GED certificate.

An “Update” reflected that Stoudemire reported “that he cannot read or write and that someone at the jail helped him fill out his paperwork.”

Information regarding Stoudemire’s mental health taken from an earlier PSI dated April 25, 2006, reflected that while awaiting trial, Stoudemire was ordered to “undergo a competency evaluation at the Kentucky Correctional Psychiatric Center (this office has not been privy to the report of the evaluation).”

An “Update” stated that Stoudemire “reports that his current mental health diagnoses are: Bipolar Disorder, Multiple Personality Disorder, Depression and he also experiences auditory and visual hallucinations”; also that “[s]ince the writing of [his] 2006 PSI, he has not received any additional mental health treatment within the community.”

The PSI further recited that Stoudemire had seven prior felony convictions, but most recently he was returned as a parole violator on January 22, 2010, and that he has remained a state inmate since that date. He participated in the following programs while incarcerated: “substance abuse program, AA, N/A, On-the-Job Training, Academic School, Group Counseling, Pathfinders, GED Program, Individual Counseling/Outpatient Services, Life Without a Crutch, Life Skills Development Program, Inmate Workmate, and Malachi Dads Program.” A

list of liabilities included Stoudemire's mental health issues and lack of education and literacy issues.

The PSI stated that:

If incarcerated, it is recommended that [Stoudemire] register as required by law, enroll in sex offender treatment and successfully complete the program . . . and follow all recommendations from the Comprehensive Sex Offender Presentence Evaluation, . . . work toward his GED, . . . and attend vocational training.

Stoudemire, by counsel, filed an acknowledgment to the PSI dated November 20, 2012, which stated that “[t]he defendant, in person and by counsel, agrees that the factual information contained in the presentence report has been correctly reported with the following exceptions: Page 16 – finished only 9th grade.” The only other exceptions that were raised pertained to spouse and sibling information.

The court sentenced Stoudemire to twenty (20) years, all counts to run concurrently, and “required that he complete the Sexual Offender Treatment Program while incarcerated.” The November 28, 2012, judgment further reflected that:

The Court gave due consideration to the nature and circumstances of the crime, the history[,] character and condition of the Defendant, the Presentence Investigative Report and the Sex Offender Evaluation. . . .

The Court asked the Defendant and his counsel whether they had any legal reason why judgment should

not be pronounced and gave the Defendant and his counsel the opportunity to make statements in the Defendant's behalf and to present any information in mitigation of punishment. No sufficient cause was shown why judgment should not be pronounced.

...

The Defendant was also advised and acknowledged that he understood that upon his release he would have to report to the Division of Probation and Parole to be put on the Sex Offender Registry and that he would have to keep the Division of Probation and Parole advised of his current address. He further understood that he will be under a period of conditional discharge for three years upon his release from the penitentiary.

On July 10, 2013, Stoudemire, by counsel, filed a motion to modify the Judgment of Conviction and Sentence to conform with the plea agreement reached between the parties, specifically that "all sentences imposed would run **concurrently** both to each other and to cases 04CR2589 and 06CR0362." (Emphasis original). On July 24, 2013, the trial court entered an Amended Judgment of Conviction and Sentence accordingly.

On March 13, 2018, Stoudemire, *pro se*, filed a motion for judgment *nunc pro tunc* "relieving him from having to enroll in, or complete the Sex Offender Treatment Program[.]" Stoudemire argued as follows:

1. On October 4, 2012, Stoudemire appeared with his counsel at a hearing where he pled guilty to the charges . . . during which time the matter of an Alford plea came up.
2. To this the Court made the statement: He is going to have to do the sex offender stuff; 09:58:46[.]

3. At the bench, defense counsel stated: The DOC has him diagnosed as mentally retarded, meaning that he does not have to do the sex offender classes, 09:58:55-58:59; He can't read or write; 09:59:02.
4. The Commonwealth at this time stated: He can't do the class anyway; 09:59:21. ^[2]
. . . .
6. Despite the unrefuted facts . . . somehow, the Sex Offender Evaluation while rightfully classifying Stoudemire as a sex offender as a matter of law, failed and/or the KDOC is misperceiving, or refusing to acknowledge these facts, that due to Stoudemire's mental retardation and intellectually [*sic*] he is unable to attend SOTP before he can become eligible for parole, or receive and [*sic*] good time award. . . .

Stoudemire argued that because of his mental retardation, he is not an eligible sex offender who must complete the SOTP pursuant to KRS³ 197.045(4) and that he is entitled to a judgment *nunc pro tunc* accordingly.

²After Stoudemire's counsel advised that he asked to enter an *Alford* plea, the court requested that counsel approach the bench. The following exchange occurred:

The court: Here's what I need to put on the record. I don't know if it's a big deal or not for him. He's going to have to do the sex offender stuff in prison. He's going to have to admit, or if he doesn't admit, they're not going to let him in.

Defense counsel: Let me tell you, your honor, that the Department of Corrections has diagnosed him as mentally retarded, meaning that he does not have to complete the sex offender classes. He would still have to be a lifetime registrant, but he can't read and write, so he can't pass the classes.

The court: So it's not going to be an issue, okay.

³ Kentucky Revised Statutes.

On June 26, 2018, the court entered a handwritten order stating, “Motion considered and Denied[.]”

Stoudemire appeals and contends that the trial court abused its discretion in denying his motion. He contends that he is entitled to a judgment *nunc pro tunc*, because his “mental retardation and exemption from being subjected to KRS 197.045(4) requirements, are matters of fact in law that are absent from the July 24, 2013, Judgment of Conviction and Sentence.” We do not agree.

KRS 197.045(4) provides as follows :

Upon the successful completion of the sex offender treatment program, as determined by the program director, the offender shall be eligible for all sentencing credit earned but not otherwise forfeited under administrative regulations promulgated by the Department of Corrections. After successful completion of the sex offender treatment program, an eligible sexual offender may continue to earn sentencing credit in the manner provided by administrative regulations promulgated by the Department of Corrections. Any eligible sexual offender, as defined in KRS 197.410, who has not successfully completed the sex offender treatment program as determined by the program director shall not be entitled to the benefit of any credit on his or her sentence. A sexual offender who does not complete the sex offender treatment program for any reason shall serve his or her entire sentence without benefit of sentencing credit, parole, or other form of early release. **The provisions of this section shall not apply to any sexual offender convicted before July 15, 1998, or to any sexual offender with an intellectual disability.**

(Emphasis added.) KRS 197.410(2) provides that:

A sexual offender becomes an “eligible sexual offender” when the sentencing court or department officials, or both, determine that the offender:

(a) Has demonstrated evidence of a mental, emotional, or behavioral disorder, but not active psychosis or an intellectual disability; and

(b) Is likely to benefit from the program.

In the case before us, the PSI noted Stoudemire’s mental health issues -- but not an intellectual disability or mental retardation *per se*. The PSI recommended that he enroll in the SOTP. After Stoudemire said that he wanted to enter an *Alford* plea, his counsel advised that Corrections had diagnosed him as mentally retarded, which meant he did not have to complete the SOTP.⁴ However, the court made no such finding and **specifically required** Stoudemire to complete the SOTP while incarcerated. Stoudemire did not raise any issue regarding his eligibility for the SOTP in the exceptions that he filed to the PSI, nor did he do so by way of a post-judgment motion.

“[A] nunc pro tunc order can only be used to place in the record evidence of judicial action that has actually been taken. It cannot correct an error or supply the record with action that the court failed to make.” *Harden v.*

⁴ As the Commonwealth notes, defense counsel’s statements alone do not establish that Stoudemire is intellectually disabled, and he has failed to point to anything in the record to support this contention.

Commonwealth, 885 S.W.2d 323, 325 (Ky. App. 1994). The relief that Stoudemire seeks simply is not available by recourse to a *nunc pro tunc* order. “A nunc pro tunc order cannot be used for the purpose of correcting a judicial error or to make the record speak what it did not speak but ought to have spoken.” *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 94 (Ky. 1956).

We are compelled to AFFIRM.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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