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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001716-MR

LEE A. STEWART

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 11-CR-00803

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: Appellant, Lee Stewart, appeals the September 5, 2013 judgment of the Kenton Circuit Court. Because the trial judge should have allowed Stewart an opportunity to controvert alleged errors in Stewart's Pre-Sentence Investigation (PSI) Report, we reverse the judgment and remand this matter to the trial court for additional proceedings consistent with this opinion.

I. Background

After being convicted on a host of charges stemming from his 2011 armed standoff with police, Stewart faced sentencing by the Kenton Circuit Court. Prior to his sentencing hearing, Stewart received his PSI Report, which included biographical information, his criminal history, and multifactor assessment of Stewart's risk level as an offender. Stewart maintains that much of the information in his PSI is inaccurate, particularly with regard to his prior criminal history and risk-assessment levels.

At his August 26, 2013 sentencing hearing, Stewart's counsel identified these inaccuracies to the trial court. The trial court, however, told Stewart's counsel that the court was not responsible for creating the PSI and that counsel must direct any proposed changes to the Department of Probation and Parole. The court then asked counsel whether Stewart was ready to proceed with sentencing. Stewart's counsel agreed to proceed and the trial court issued its sentence.

Now Stewart appeals, taking issue with the trial court's refusal to consider the alleged inaccuracies in his PSI Report. Stewart claims these errors, particularly with regard to his erroneously high risk assessment will negatively affect his chance of receiving parole. Importantly, Stewart does not challenge the trial court's sentence, only its refusal to consider his challenges to the PSI.

II. Analysis

Kentucky law explicitly requires that, upon request, trial courts must allow an offender fair opportunity to controvert alleged inaccuracies in the offender's

PSI:

Before imposing sentence, the court shall advise the defendant or his or her 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.

KRS¹ 532.050(6).

Here, the parties wrangle over whether Stewart's trial counsel properly preserved its objection to Stewart's allegedly erroneous PSI. Put in KRS 532.050's terms, the Commonwealth maintains that, by allowing the trial court to proceed with sentencing, Stewart's counsel failed to request "a reasonable period of time" to "controvert" the alleged inaccuracies in his PSI. However, this dispute is obviated by Stewart's request that we review this argument for palpable error.

"In order to demonstrate an error rises to the level of a palpable error, the party claiming palpable error must show a 'probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of law.' " *Allen v. Commonwealth*, 286 S.W.3d 221, 226 (Ky.2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky.2006)).

In this case, the trial court plainly erred in determining that it had no responsibility in determining whether Stewart's PSI needed correction. In the event a defendant challenges "*any* of the information contained in the PSI. . . the

¹ Kentucky Revised Statutes.

court may hear evidence and make appropriate findings.” *Bard v. Commonwealth*, 359 S.W.3d 1, 5 (Ky. 2011)(emphasis added); KRS 532.050(6). Moreover, Kentucky case law clearly explains that the trial court is not necessarily bound to Probation and Parole’s conclusions in a PSI. *Winstead v. Commonwealth*, 327 S.W.3d 479, 484 (Ky. 2010).

Here, the trial court’s incorrect belief it lacked responsibility to address errors in the PSI undoubtedly denied Stewart due process because, in effect, the trial court denied Stewart a hearing on the issue. Due process requires that a citizen receive notice and an opportunity to be heard. *See Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (“The fundamental requirement of procedural due process is simply that all affected parties be given ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’”) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976)). Accordingly, by denying Stewart due process, the trial court’s error was palpable.

III. Conclusion

The September 5, 2013 judgment of the Kenton Circuit Court is remanded to afford Stewart the fair opportunity, within a reasonable period of time, to controvert the findings contained in the PSI.

ALL CONCUR.

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