

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002170-MR

DARRYL TIMMERING

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 98-CR-000475

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: COMBS AND DYCHE, JUDGES; AND POTTER, SPECIAL JUDGE<sup>1</sup>.

POTTER, SPECIAL JUDGE. This is a pro se appeal from an order entered by the Jefferson Circuit Court denying appellant's motion for RCr 11.42 relief. For the reasons stated hereafter, we affirm.

Appellant entered a guilty plea in July 1998 to first-degree burglary, two counts of second-degree burglary, three counts of receiving stolen property over \$300,

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<sup>1</sup> Senior Status John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

second-degree unlawful transaction with a minor, two counts of theft by unlawful taking over \$300, and possession of burglary tools. As part of his plea, appellant admitted to the commonwealth's description of the facts as follows:

On 11-13-97, the defendant & Joshua Dossey unlawfully entered a residence located at 5601 Cane Run Rd. #85 and stole property valued in excess of \$300. On 12-5-97, the defendant & Jason Tomes & Joshua Dossey unlawfully entered a residence located at 5311 Mt. Holyoke & stole property valued in excess of \$300. On 12-11-97, the defendant & Joshua Dossey unlawfully entered a residence located at 5601 Cane Run Rd. #109 & stole property valued in excess of \$300 including a 22 caliber rifle. On 12-12-97, the defendant & Joshua Dossey broke into two vehicles parked at 3813 Oaklawn Drive & stole property valued in excess of \$300. Also on 12-14-97, the defendant was in possession of bolt cutters and pry tools.

Pursuant to the commonwealth's recommendation, appellant was sentenced to ten years' imprisonment for first-degree burglary, and the sentences for the remaining nine charges were ordered to run concurrently therewith.

Appellant subsequently sought RCr 11.42 relief on the ground that he was afforded ineffective assistance of counsel during the proceedings below. He alleged that counsel failed to adequately discuss the case or possible defenses with him; that his guilty plea was induced by his attorney's provision of defective advice; that his attorney erroneously informed him that he was "under" a first-degree persistent felony offender

(PFO) charge; that the evidence was inadequate to support the charges against him; that counsel failed to talk with appellant's witnesses or to investigate the charges against him; that an adequate investigation of the charges would have prompted counsel to advise appellant to go to trial; that the alleged stolen property was valued at less than, rather than more than, \$300; and that the grand jury indictment was defective. The trial court denied appellant's motions for relief and for an evidentiary hearing. This appeal followed.

A defendant who seeks RCr 11.42 relief based on allegations of ineffective assistance of counsel must show not only that counsel's performance fell below an objective standard of reasonableness considering all of the case's circumstances at the time of trial, but also that such "deficient performance prejudiced the defense" and deprived the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The prejudice prong of the Strickland test is satisfied in a guilty plea case by the defendant's showing that but for counsel's errors, the defendant would not have pled guilty but instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). See also Taylor v. Commonwealth, Ky., 724 S.W.2d 223 (1986).

Appellant has failed to provide specifics to support his allegations that he was afforded ineffective assistance of counsel, that he would have gone to trial rather than pleading guilty if not for counsel's errors, and that he was prejudiced by such errors. The record shows that appellant was indicted on nine felonies and one misdemeanor, including a Class B felony charge of first-degree burglary stemming from the taking of a rifle during the course of committing a burglary. KRS 511.020(1)(a). See Hayes v. Commonwealth, Ky., 698 S.W.2d 827 (1985). The statutory term of imprisonment for such a Class B felony conviction is "not less than ten (10) nor more than twenty (20) years." KRS 532.060(2)(b).

The videotape of the guilty plea hearing shows that appellant pled guilty to each of the charges against him, that he waived his rights, and that he expressed his satisfaction with the legal representation provided to him. Appellant now asserts that counsel erroneously advised him that he was subject to a PFO charge, and that counsel failed to challenge the value of certain stolen items. However, the record clearly shows that appellant was not charged with or convicted of a PFO charge, and appellant does not dispute that the evidence supported the most serious charge against him, i.e., that of first-degree burglary. Moreover, the values of the stolen gun and other items were immaterial to the first-degree burglary charge, and appellant's

aggregate terms of imprisonment for the ten charges did not exceed the minimum term of imprisonment applicable to the first-degree burglary charge. Not only did appellant fail to show any prejudice resulting from the alleged errors, but it is clear on the face of the record that counsel's performance was not deficient under these circumstances. Hence, the trial court did not err by denying appellant's motions for an evidentiary hearing and for RCr 11.42 relief. See RCr 11.42(6).

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT - Pro Se:

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BRIEF FOR APPELLEE:

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