

RENDERED: JANUARY 24, 2003; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-002587-MR

PAUL DUCRET

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 01-CR-00232

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

BAKER, JUDGE. Paul Ducret brings this appeal from an October 29, 2001 judgment of the Laurel Circuit Court. We affirm.

In Indictment No. 00-CR-00208, the Laurel County Grand Jury indicted appellant upon first degree criminal mischief, third degree burglary, two counts of theft by unlawful taking over \$300.00, and for being a first degree persistent felony offender (PFO I). As the Commonwealth failed to present evidence regarding the PFO I charge to the grand jury, appellant moved for dismissal of said charge. The circuit court

ultimately granted the motion and dismissed the charge. The court failed to specify whether the dismissal was with or without prejudice.

Subsequently, the Commonwealth re-indicted appellant on the PFO I charge, Indictment No. 01-CR-00232. Pursuant to a plea bargain, appellant moved to enter a guilty plea to theft by unlawful taking over \$300.00, and to being a persistent felony offender in the first degree. The Commonwealth agreed to recommend a twelve year sentence. At final sentencing, appellant personally informed the court that he felt "pressured" to enter the guilty plea because of the PFO I charge, and wished to withdraw the guilty plea. The circuit court denied the oral "motion" to withdraw the guilty plea and entered judgment sentencing appellant to twelve years' imprisonment. This appeal follows.

Appellant argues that the circuit court committed error by concluding that he could be re-indicted upon the PFO I charge.<sup>1</sup> We observe that appellant did not enter a conditional guilty plea; thus, his right to appeal was not adequately preserved. Ky. R. Crim. P. 8.09. We shall, nevertheless, address the appeal on the merits.

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<sup>1</sup> We note that appellant's counsel filed an Anders brief and appellant filed a pro se brief. See Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

We initially recognize that the circuit court could only have properly dismissed the PFO I charge without prejudice. See Commonwealth v. Baker, Ky., 11 S.W.3d 585 (2000). As such, we view the case of Price v. Commonwealth, Ky., 666 S.W.2d 749 (1984) as dispositive. Therein, the Court held:

While it is true that KRS 532.080 is an enhancement provision and that a present felony conviction is required to trigger its operation, this does not mean that a PFO charge cannot be set out in a separate indictment. If the legislature had intended that PFO charges be presented only in the indictment which charges the underlying substantive offense, it could have set out this requirement in specific terms just as it stated that a defendant's status as a PFO is to be determined in a proceeding ancillary to the proceeding in which the defendant's guilt on the substantive offense is decided.

We interpret the PFO statute as requiring that if the Commonwealth seeks enhancement by proof of PFO status, the defendant is entitled to notice of this before the trial of the underlying substantive offense. A separate indictment meets this requirement just as does a separate count in the indictment charging the substantive offense to which it refers.

Id. at 750.

Accordingly, we attach no merit to appellant's argument that he was inappropriately re-indicted upon the PFO I charge.

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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