

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002250-MR

ALBERT JAMES VOUTE, III

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE JOHN D. MINTON, JR., JUDGE  
INDICTMENT NO. 92-CR-00416

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: DYCHE, JOHNSON, AND PAISLEY, JUDGES.

DYCHE, JUDGE. In June 1992 Albert James Voute III was indicted for first degree escape and first degree assault for assaulting a female prison guard in order to escape from the Warren County Regional Jail three months prior. Voute entered a plea to the amended charges of attempted escape and fourth degree assault. He received eleven months' incarceration for these misdemeanor convictions. They were ordered to run concurrently with each other and with sentences originating in Metcalfe County, Kentucky, and New York.

In 2002 Voute filed a motion for postconviction relief, arguing that his 1992 convictions were used improperly to enhance the sentence he was then serving in Texas. He maintained that at the time of his guilty plea he was not advised that the sentences could be used subsequently for enhancement purposes under the Federal Sentencing Guidelines. His appointed counsel later supplemented Voute's pro se motion to argue that the conviction was infirm because the plea colloquy form lacked information that Voute was advised that he was waiving his right to confront his accusers. The Warren Circuit Court denied relief, and Voute appeals.

We agree with the trial court that Voute's motion is untimely. See RCr 11.42(10) and CR 60.02. Moreover, the videotape of the plea colloquy has been destroyed pursuant to the housekeeping policies of the Kentucky Administrative Office of the Courts. Thus by his own delay Voute has kept the record from being complete. Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985). He cannot now complain that the record does not comport with Boykin v. Alabama, 395 U.S. 238 (1969).

Most importantly, however, is the fact that Voute has failed to establish that, but for the alleged deficiency in the proceedings, the outcome would have been different, namely, that he would have not entered guilty pleas to the misdemeanors but instead have insisted on going to trial for two felonies

carrying the possibility of twenty year sentences. Hill v. Lockhart, 474 U.S. 52 (1985); accord Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). The trial court correctly denied Voute's requested relief.

The order of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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