

RENDERED: JUNE 8, 2001; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001857-MR

DAVID LIENHART

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE GREGORY M. BARTLETT, JUDGE  
INDICTMENT NO. 95-CR-00513

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BUCKINGHAM, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge. David Lienhart appeals from an order of the Kenton Circuit Court that denied his motion to vacate judgment or correct sentence brought pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42, RCr 10.26 and Kentucky Rule of Civil Procedure (CR) 60.02. Lienhart sought a new sentencing procedure based on alleged errors by his attorney in the sentencing phase of his trial.

In September 1995, Lienhart assisted his brother, Steven, in burglarizing a residence. When Steven was seen inside the house by a neighbor, the brothers fled from the residence with two witnesses in pursuit. During their attempt to prevent the suspects' escape, the two witnesses received physical injuries in a struggle with Lienhart. In November 1995, Lienhart was charged in an indictment with burglary in the first degree.<sup>1</sup> His brother was also indicted for burglary in the first degree and being a persistent felony offender in the first degree (PFO I), and eventually pled guilty to burglary in the second degree and being a PFO I. In December 1995, Lienhart was indicted for being a persistent felony offender in the second degree (PFO II),<sup>2</sup> and the two indictments were consolidated. The PFO II charge was predicated on an October 1989 conviction in Oldham County for promoting contraband in the first degree for which he received a one-year sentence.

On January 22, 1996, Lienhart's attorney filed a motion to dismiss the PFO II count. Counsel contended that the Commonwealth could not establish the PFO offense because the 1989 felony conviction did not statutorily qualify to support the charge inasmuch as Lienhart had completed service of the one-year sentence more than five years prior to commission of the underlying burglary offense.<sup>3</sup>

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<sup>1</sup> Ky. Rev. Stat. (KRS) 511.020.

<sup>2</sup> KRS 532.080.

<sup>3</sup> See KRS 532.080(2)(c).

On January 29, 1996, the circuit court held a hearing to consider the motion to dismiss. The Commonwealth argued that according to official court records the maximum expiration date for the 1989 conviction was September 1991.<sup>4</sup> Defense counsel maintained that the maximum expiration date referred to by the Commonwealth was based on a 1987 felony conviction for which Lienhart received a five-year sentence when he was 16 years old, which could not be used for PFO purposes. The court continued consideration of the motion to allow defense counsel an opportunity to resolve matters in Oldham County with respect to the 1989 conviction. No further proceedings were conducted on the motion prior to trial.

The trial, conducted on April 23-24, 1996, followed the bifurcated procedure required by the Truth In Sentencing statute, KRS 532.055, which provides for an initial guilt phase on the underlying substantive felony charge and a second separate sentencing phase. Under KRS 532.055(3), the prosecution of a PFO charge may be combined with the sentencing phase on the initial felony charge. In this case, after the jury found Lienhart guilty of burglary in the first degree in the guilt phase, the trial proceeded to the combined penalty/PFO stage. The prosecutor explained in his opening statement the dual nature of the proceeding and the fact that conviction on the PFO II charge would serve to enhance the range of sentence from the 10-20 year range

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<sup>4</sup> This was based on the fact that the one-year 1989 felony sentence was treated by the Department of Corrections as running concurrently with a five-year sentence for a 1987 felony conviction for receiving stolen property and burglary in the second degree imposed in Kenton County.

for burglary in the second degree alone to 20 years to life imprisonment. Prior to the introduction of evidence, defense counsel again raised the issue of the valid use of the 1989 felony conviction for use as a predicate offense for the PFO count, but the parties decided to delay further consideration of the issue until the close of the Commonwealth's evidence.

The Commonwealth introduced evidence of Lienhart's prior criminal convictions including the 1987 felony conviction for receiving stolen property and burglary in the second degree and the 1989 felony conviction for promoting contraband in the first degree. Lienhart offered no evidence during this combined phase of the trial. Lienhart's attorney made a motion for directed verdict again arguing that the 1987 conviction could not be used for PFO purposes because Lienhart was less than 18 years old at the time of the conviction and the sentence for the 1989 conviction expired more than five years prior to commission of the underlying 1995 burglary offense. The Commonwealth argued that the discharge date of September 1991, which included both the five-year sentence for the 1987 conviction and the one-year sentence on the 1989 conviction, was the relevant date for purposes of Lienhart's PFO status. The circuit court denied the motion to dismiss and stated its ruling also applied to the written pretrial motion to dismiss filed by defense counsel in January 1996. The circuit court allowed defense counsel, however, to argue in closing argument that the Commonwealth had not proven Lienhart's PFO status based on his 1989 felony conviction. The jury found Lienhart guilty of being a PFO II and recommended a sentence of 20 years for burglary in the

first degree and 20 years for PFO II. On June 12, 1996, the circuit court entered a final judgment sentencing Lienhart to 20 years for burglary in the first degree and 20 years for being a PFO II to be served in lieu of the sentence on the burglary conviction.

On October 2, 1997, the Kentucky Supreme Court reversed Lienhart's conviction on the PFO II charge on direct appeal.<sup>5</sup> Accepting the argument that defense counsel had raised before the circuit court, the Supreme Court held that the Commonwealth failed to establish an element of the PFO II offense by showing that Lienhart had been discharged from a prior felony within five years from commission of the underlying burglary in the first degree offense. The Court held that the one-year sentence for the 1989 conviction had expired in 1988 because as a concurrent sentence, it was treated as beginning in 1987 with service of the sentence imposed on the 1987 conviction.<sup>6</sup> The Court held the circuit court erred by denying the motion for directed verdict and reversed the PFO II conviction, but affirmed the judgment and sentence for the burglary in the first degree.<sup>7</sup> On May 14, 1998, the circuit court entered an order modifying the final judgment in conformity with the Supreme Court's opinion by dismissing the PFO II conviction and sentence, but reaffirming the conviction and sentence for burglary in the first degree.

On March 10, 1999, Lienhart filed a motion to vacate or correct sentence pursuant to RCr 11.42, RCr 10.26, and CR 60.02

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<sup>5</sup> Lienhart v. Commonwealth, Ky., 953 S.W.2d 70 (1997).

<sup>6</sup> Id. at 71.

<sup>7</sup> Id. at 71-72.

based on ineffective assistance of counsel during the sentencing phase of the trial. While not challenging the burglary guilty verdict, he sought a new sentencing hearing before a jury. He alleged that counsel was ineffective for not objecting to the combined penalty/PFO procedure and not presenting mitigating evidence during the sentencing phase. On August 3, 1999, the circuit court entered an order denying the motion stating that Lienhart had suffered no prejudice because of the PFO component of the penalty/PFO proceeding. This appeal followed.

Lienhart argues on appeal that defense counsel rendered ineffective assistance of counsel with respect to the sentencing proceeding. In order to establish ineffective assistance of counsel, a person must satisfy a two-part test showing both that counsel's performance was deficient and that the deficiency resulted in actual prejudice resulting in a proceeding that was fundamentally unfair.<sup>8</sup> The burden is on the defendant to overcome a strong presumption that counsel's assistance was constitutionally sufficient.<sup>9</sup> A court must be highly deferential in reviewing defense counsel's performance and should avoid second-guessing

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<sup>8</sup> Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985), cert. denied, 478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1985); Foley v. Commonwealth, Ky., 17 S.W.3d 878, 884 (2000).

<sup>9</sup> Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Moore v. Commonwealth, Ky., 983 S.W.2d 479, 482 (1998), cert. denied, 528 U.S. 842, 120 S. Ct. 110, 145 L. Ed. 2d 93 (1999); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905, 912 (1998), cert. denied, 526 U.S. 1025, 119 S. Ct. 1266, 143 L. Ed. 2d 361 (1999).

counsel's actions based on hindsight.<sup>10</sup> In assessing counsel's performance, the standard is whether the alleged acts or omissions were outside the wide range of prevailing professional norms based on an objective standard of reasonableness.<sup>11</sup> In order to establish actual prejudice, a defendant must show a reasonable probability that the outcome of the proceeding would have been different.<sup>12</sup> A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding considering the totality of the evidence before the jury.<sup>13</sup> In an RCr 11.42 proceeding, the defendant "must do more than raise a doubt about the regularity of the proceedings under which he was convicted. He must establish convincingly that he has been deprived of some substantial right which would justify the extraordinary relief afforded by this post-conviction proceeding."<sup>14</sup>

Lienhart contends that defense counsel was ineffective for failing to challenge the combined penalty/PFO procedure and

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<sup>10</sup> Harper v. Commonwealth, 978 S.W.2d at 311, 315 (1998), cert. denied, 526 U.S. 1056, 119 S. Ct. 1367, 143 L. Ed. 2d 527 (1999); Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 875 (1999).

<sup>11</sup> Strickland, 466 U.S. at 688-89, 104 S. Ct. at 2064-65; Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 878 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993); Harper v. Commonwealth, supra, n. 10, at 315.

<sup>12</sup> Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Bowling v. Commonwealth, Ky., 981 S.W.2d 545, 551 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

<sup>13</sup> Strickland, 466 U.S. at 694-95, 104 S. Ct. at 2068-69. See also Moore, 983 S.W.2d at 484, 488; Foley, 17 S.W.3d at 884.

<sup>14</sup> Commonwealth v. Pelphrey, Ky., 998 S.W.2d 460, 462 (1999) (quoting Commonwealth v. Campbell, Ky., 415 S.W.2d 614, 616 (1967)); Foley, supra, n. 8, at 884.

failing to present certain mitigating evidence during the sentencing phase. He contends that combining the penalty and PFO prosecution in a single proceeding interjected prejudicial information concerning the PFO charge into the proceeding that should not have been introduced given the subsequent decision by the Kentucky Supreme Court that there was insufficient evidence to support the PFO II charge. He asserts that the mere mention of the PFO indictment and charge so tainted the proceeding that the jury was improperly influenced to recommend a higher sentence for the burglary in the first degree offense. Lienhart maintains that because defense counsel knew he was not eligible for PFO prosecution, he should have objected to the combined penalty/PFO procedure given the obvious prejudicial effect of references to the PFO charge.

First, we note that defense counsel first raised Lienhart's eligibility for prosecution as a PFO II in a pretrial motion to dismiss the PFO count. He raised it again at the beginning of the combined penalty/PFO proceeding in an attempt to limit the proceeding solely to evidence relevant to sentencing on the burglary. At that time, the circuit court decided to allow the Commonwealth to proceed with prosecution on the PFO charge reserving the defense's right to challenge the sufficiency of the evidence on a motion for a directed verdict. At the close of the evidence, defense counsel moved for a directed verdict on the PFO count, which the circuit court denied. While the Kentucky Supreme Court eventually accepted defense counsel's argument that the 1989 felony conviction could not support the PFO charge, Lienhart's



situation was unique without clear precedent. Defense counsel argued the issue vigorously in the circuit court in an attempt to exclude references to the PFO charge in the penalty phase. KRS 532.055(3) explicitly provides for a single combined Truth in Sentencing and persistent felony offender proceeding.<sup>15</sup> Defense counsel clearly acted reasonably within the wide range of prevailing professional norms based on the facts and the existing state of the law.

In addition, we agree with the circuit court that Lienhart has not shown actual prejudice from the combined penalty/PFO proceeding. In a Truth In Sentencing proceeding, the Commonwealth may offer evidence of all the defendant's prior offenses.<sup>16</sup> The court in Commonwealth v. Reneer approved of the combined proceeding "because the same evidence that is pertinent toward fixing the penalty is also pertinent for consideration in the enhancement of sentence . . . ." <sup>17</sup> Consequently, even if the proceeding had been bifurcated and information of the PFO charge excluded, the Commonwealth could have offered the same evidence of Lienhart's prior felony convictions including the 1987 conviction for burglary and receiving stolen property. The jury was already aware that David Lienhart, not Steven Lienhart, was responsible for injuring the two witnesses during the burglary. Finally, the jury did not enhance or increase the term of the sentence based on its

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<sup>15</sup> See Lemon v. Commonwealth, Ky. App., 760 S.W.2d 94 (1988); Commonwealth v. Reneer, Ky., 734 S.W.2d 794 (1987).

<sup>16</sup> KRS 532.055(2) (a).

<sup>17</sup> Supra, n. 15, at 798.

having found him guilty of being a PFO II. Lienhart's assertion that the mere mention of the PFO charge unfairly prejudiced him is unfounded. As a result, Lienhart has not demonstrated that counsel's performance was deficient or that he suffered actual prejudice in that the outcome of the sentencing proceeding probably would have been different absent errors by counsel.

Lienhart's second complaint is that counsel was ineffective in failing to offer mitigation evidence. Lienhart alleges that he and his wife could have testified that he had been working for the previous four years, he had just gotten married, he had been a good husband, he was sorry for his actions, and one of his prior convictions occurred before he was 18 years old. He contends that there is a reasonable probability the jury would have recommended a lesser sentence if counsel had offered this evidence.<sup>18</sup>

When the trial was conducted in May 1996, the type of mitigation evidence that could be presented in the penalty phase was circumscribed. At that time, KRS 532.055(2)(b) provided:

The defendant may introduce evidence in mitigation. For purposes of this section, mitigating evidence means evidence that the accused has no significant history of criminal activity which may qualify him for leniency. This section shall not preclude the introduction of

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<sup>18</sup> See, e.g., Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (defense counsel's failure to present mitigation evidence that was available could constitute ineffective assistance of counsel), cert. denied, 523 U.S. 1079, 118 S.Ct. 1526, 140 L.Ed.2d 677 (1998); Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000).

evidence which negates any evidence introduced by the Commonwealth[.]<sup>19</sup>

The evidence identified by Lienhart, such as his family and work condition and his alleged feeling of remorse, simply was not admissible mitigation evidence. The only arguably admissible evidence dealing with his young age at the time of his prior felony convictions was introduced by the Commonwealth and highlighted by questions and argument by defense counsel during the penalty phase. Because the information identified by Lienhart was either inadmissible or admitted through the prosecutor's witness, he was not prejudiced by any omission by defense counsel. Therefore, Lienhart has not shown either that defense counsel rendered deficient performance or that he was actually prejudiced by any erroneous conduct of counsel with respect to his alleged failure to offer mitigation evidence during the penalty phase of the trial.

In conclusion, Lienhart has not demonstrated that he is entitled to a new sentencing proceeding based on ineffective assistance of counsel.

The order from which this appeal is prosecuted is affirmed.

ALL CONCUR.

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<sup>19</sup> This provision of the statute was later amended in 1998 to expand the scope of admissible mitigation evidence. Effective July 15, 1998, KRS 532.055(2)(b) states: "The defendant may introduce evidence in mitigation or in support of leniency[.]"

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