

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-000287-MR

LARRY HUTTON

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 10-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, D. LAMBERT AND NICKELL, JUDGES.

D. LAMBERT, JUDGE: This is an appeal from the January 8, 2015 order of the Knox Circuit Court denying the motion of appellant, Larry Hutton, to vacate his criminal sentence based on ineffective assistance of counsel. After review, we affirm.

## I. BACKGROUND

On May 28, 2010, Hutton was indicted for possession of a firearm by a convicted felon, alcohol intoxication, carrying a concealed deadly weapon, criminal mischief in the third degree, and being a persistent felony offender in the second degree. Hutton had previously been convicted of first-degree robbery: one count on November 13, 1982, and two more counts on July 23, 1983. He was also convicted in 2005 of fleeing or evading police in the first degree, a felony offense.

Rather than stand trial for the indicted crimes, Hutton accepted a plea deal on February 16, 2012. In so doing, Hutton acknowledged that he knowingly and voluntary was pleading guilty to the possession of a firearm by a convicted felon, carrying a concealed deadly weapon, and persistent felony offender charges in exchange for an eight-year aggregate sentence. His alcohol intoxication and criminal mischief charges were dismissed. Hutton was advised by counsel throughout his proceedings; and during his plea colloquy, Hutton declared in open court that his counsel had explained the facts of his case and his applicable defenses to him. Hutton was formally sentenced to serve eight years in a penitentiary on March 26, 2012.

On August 15, 2014, Hutton filed a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion alleging that his trial counsel was ineffective. According to his supporting memorandum, Hutton claimed he never would have accepted the plea deal had his counsel informed him the eight-year sentence included an unlawful enhancement of his prior felony offense. Hutton also claimed his trial

counsel failed to perform any investigative work. The trial court denied the motion without holding an evidentiary hearing. This appeal followed.

## II. STANDARD OF REVIEW

*Strickland v. Washington*, 466 U.S. 668, 687 (1984), sets forth the following two-prong test courts must apply when analyzing claims of ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

When conducting this analysis, bare allegations that trial counsel failed to prepare an adequate defense are insufficient to grant relief. *Harris v. Commonwealth*, 456 S.W.2d 690, 692 (Ky. 1970). The defendant must instead "demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Commonwealth v. Pridham*, 394 S.W.3d 867, 875 (Ky. 2012)(quoting *Strickland*, 466 U.S. at 694). In the context of a guilty plea, this means the defendant must prove he would have gone to trial but for his counsel's error. *Pridham*, 394 S.W.3d at 876.

## III. DISCUSSION

On appeal, Hutton claims that he agreed to serve an unlawful prison sentence because the Commonwealth utilized one of his prior felony convictions to serve as both the offense underlying his possession of a firearm by a convicted felon charge and the offense enabling an enhanced sentence as a persistent felony offender. According to Hutton, this practice is specifically prohibited by *Boulder v. Commonwealth*, 610 S.W.2d 615 (Ky. 1980), and he would not have pleaded guilty had his attorney informed him of this case law. For the following reasons, however, Hutton's position is unpersuasive.

While *Boulder* held that a felony conviction giving rise to the offense under Kentucky Revised Statutes (KRS) 527.040 for possession of a firearm by a convicted felon could not be used to doubly enhance his sentence, such a double enhancement did not take place in this case. Unlike the *Boulder* defendant who only had one prior felony conviction, Hutton had three. Any one of his surplus convictions not utilized to create an offense under KRS 527.040 was thus eligible to sentence him under KRS 532.080, Kentucky's persistent felony offender statute. *See Eary v. Commonwealth*, 659 S.W.2d 198, 200 (Ky. 1983). The Commonwealth could have established Hutton was a convicted felon in possession of a firearm with either one (or both) of his prior robbery convictions and still used the conviction for fleeing or evading police to enhance his penalty under KRS 532.080. Accordingly, Hutton's trial counsel did not commit a *Strickland* error in not advising Hutton he was eligible to receive an enhanced sentence in the event a jury found him guilty. Moreover, as Hutton has failed to specifically allege what

an investigation by his trial counsel would have revealed, the bare assertion that his trial counsel did not perform any investigative work is meritless. Hutton's guilty plea was therefore valid, and the trial court's decision to deny RCr 11.42 relief without an evidentiary hearing was proper. We hereby affirm the Knox Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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