

# Commonwealth Of Kentucky

## Court Of Appeals

NOS. 1997-CA-002150-MR AND 1997-CA-002764-MR

LARRY WAYNE WEATHERS

APPELLANT

CONSOLIDATED APPEALS FROM WASHINGTON CIRCUIT COURT  
V. HONORABLE WILLIAM M. HALL, JUDGE  
ACTION NOS. 83-CR-8, 84-CR-16, AND 90-CR-19

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

\* \* \* \* \*

BEFORE: GUDGEL, Chief Judge; JOHNSON and MILLER, Judges.

GUDGEL, CHIEF JUDGE: In these consolidated appeals appellant, Larry Wayne Weathers (Weathers), appeals from orders of the Washington Circuit Court denying an RCr 11.42 motion to vacate and a motion filed pursuant to CR 43.07 and KRS 532.070 seeking to have his sentence reduced. We disagree with Weathers' contentions on appeal. Hence, we affirm.

In 1983, Weathers pled guilty to the offense of knowingly receiving stolen property over \$100 stemming from the theft of ten pairs of jeans. Weathers was sentenced to three years' imprisonment. The sentence was ordered probated subject to certain conditions.

In 1986, Weathers was found guilty of the offenses of second-degree burglary and terroristic threatening. He was sentenced to five years' hard labor for the burglary conviction and to six months' imprisonment for the terroristic threatening conviction. Subsequently, the trial court released him on shock probation for a period of five years.

In 1991, Weathers was convicted of the offenses of third-degree burglary, third-degree criminal mischief, and of being a persistent felony offender (PFO). He was sentenced to eight years' imprisonment in regard to those charges. At the same time, his earlier probated sentences were revoked.

On May 6, 1997, Weathers filed an RCr 11.42 motion seeking to vacate all of his previous convictions, arguing first that his 1983 conviction for knowingly receiving stolen property was invalid and could not support his PFO conviction because it was based upon perjured testimony. Specifically, he argued that the complaint relating to the conviction for knowingly receiving stolen property was signed by Detective Paul O'Bryan and stated that Weathers "unlawfully disposed of four pairs of jeans worth \$100 or more knowing them to have been stolen," while the indictment charged that he had knowingly received or disposed of ten pairs of stolen jeans. In effect, Weathers argued that O'Bryan must have perjured himself before the grand jury in regard to the number of stolen jeans in his possession. Additionally, Weathers argued that his 1986 convictions were

obtained under circumstances which violated the double jeopardy clause.

In response, the Commonwealth argued that even though the indictment appeared to be inconsistent with the complaint, Weathers nevertheless knowingly entered a plea of guilty. Further, the Commonwealth urged that there was no basis in the record for his claim that the 1986 convictions were obtained under circumstances which violated the double jeopardy clause. After a hearing, the trial court denied the RCr 11.42 motion.

On September 3, 1997, Weathers filed a companion motion to his RCr 11.42 motion which was based upon CR 43.07 and KRS 532.070. In this motion Weathers sought permission to recall Detective Paul O'Bryan to the witness stand to impeach him regarding his prior statements as to the number of pairs of stolen jeans in his possession. He also asserted that he had received ineffective assistance of counsel. The court denied the motion after conducting a hearing. These consolidated appeals followed.

Weathers first argues that the Commonwealth deprived him of the opportunity to obtain favorable evidence by way of discovery in 1983 as to the discrepancy in O'Bryan's statements regarding the number of stolen jeans in his possession. He claims that he is entitled at this late date to attack the sufficiency of the evidence relating to his 1983 conviction. He also argues that his counsel was deficient and failed to protect his rights. We disagree with both of his arguments.

A defendant must satisfy a two-prong test to establish an ineffective assistance of counsel claim. He or she must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, to successfully challenge a guilty plea based upon a claim of ineffective assistance of counsel, the defendant must establish that the counsel made errors so serious that his or her performance fell outside the range of professionally competent assistance, and that this deficient performance so seriously affected the guilty plea process that had it not been for the errors of counsel, there is a reasonable probability that the defendant would not have pled guilty, but rather, would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); accord, Sparks v. Commonwealth, Ky. App., 721 S.W.2d 726 (1986). Further, where an evidentiary hearing is held, as here, the issue on appeal is whether the trial court clearly erred by finding that the defendant did not receive ineffective assistance of counsel. Commonwealth v. Payton, Ky., 945 S.W.2d 424 (1997).

Here, Weathers attacks his 1983 guilty plea which served as the basis for his PFO conviction. However, it is settled that

[w]hen a defendant is charged with PFO, it is incumbent upon the defendant to challenge the validity of the prior conviction within the PFO proceeding. If a defendant fails to do so, the validity of the conviction is final

and cannot be challenged in a subsequent RCr 11.42 proceeding.

Graham v. Commonwealth, Ky., 952 S.W.2d 206, 208 (1997).

Weathers is therefore precluded from challenging his prior 1985 conviction by the instant RCr 11.42 motion because he did not attack it within his PFO proceeding.

In any event, Weathers' attempt to attack the sufficiency of the evidence forming the basis for his indictment and conviction for knowingly receiving stolen property lacks merit. Indeed, the entry of a voluntary, intelligent plea of guilty, as here, precludes a postjudgment challenge to the sufficiency of the evidence. Taylor v. Commonwealth, Ky. App., 724 S.W.2d 223 (1986). Therefore, Weathers is not entitled to question Detective O'Bryan regarding his statements before the grand jury.

Weathers has also not met his burden of establishing that he received ineffective assistance of counsel regarding any of his convictions. Weathers has not argued, and neither the record nor the videotape of the evidentiary hearing herein establish, that his guilty plea for knowingly receiving stolen property was anything other than intelligent and voluntary. Moreover, Weathers' mere unsupported allegation that his counsel's "performance was deficient" was not sufficient to establish his claims that he received ineffective assistance. Further, we do not perceive any basis in the record for such a claim.

For the reasons stated, the court's orders are affirmed.

ALL CONCUR.

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