

RENDERED: AUGUST 31, 2001; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002813-MR

KERRY L. WALKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 98-CR-003144

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Kerry L. Walker, pro se, has appealed from an order entered by the Jefferson Circuit Court on October 28, 1999, which denied his RCr<sup>1</sup> 11.42 motion to vacate, set aside or correct his sentence. Having concluded that Walker's guilty plea was entered knowingly, intelligently, and voluntarily; that the elements of burglary in the second degree<sup>2</sup> were sufficiently

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<sup>1</sup>Kentucky Rules of Criminal Procedure.

<sup>2</sup>Kentucky Revised Statutes (KRS) 511.030.

established to support his guilty plea; and that Walker did not receive ineffective assistance of counsel, we affirm.

On September 28, 1998, Jackie Halsel requested and received a Domestic Violence Order (DVO) against Walker. Halsel and Walker were sharing a residence and were romantically involved. Walker was ordered to have a third party remove his personal items from the residence, to have no contact with Halsel and to stay away from the residence. On October 3, 1998, Walker violated the DVO by going to the apartment while Halsel was not home, waiting for her to return, and then forcing her to remain in the apartment with him against her will. Walker allegedly took from Halsel a Lorrin 9mm handgun which Halsel had purchased for her protection.

On October 4, 1998, Walker was arrested and charged with burglary in the first degree,<sup>3</sup> unlawful imprisonment in the second degree,<sup>4</sup> terroristic threatening,<sup>5</sup> assault in the fourth degree,<sup>6</sup> harassing communications<sup>7</sup> and violation of a protective order<sup>8</sup>. Between October 5, 1998, and December 2, 1998, Walker stalked and harassed Halsel. On December 16, 1998, Walker was indicted by a Jefferson County grand jury under indictment number

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<sup>3</sup>KRS 511.020.

<sup>4</sup>KRS 509.030.

<sup>5</sup>KRS 508.080.

<sup>6</sup>KRS 508.030.

<sup>7</sup>KRS 525.080.

<sup>8</sup>KRS 403.763.

98-CR-3144-2 for burglary in the first degree, unlawful imprisonment in the second degree, terroristic threatening, harassing communications, two counts of violation of a protective order and for stalking in the first degree.<sup>9</sup> While it is unclear from the record, apparently Walker was indicted by the Jefferson County grand jury under a separate indictment (98-CR-3150) for possession of a handgun by a convicted felon.<sup>10</sup>

On February 12, 1999, Walker signed the "Commonwealth's Offer on a Plea of Guilty" and the "Motion to Enter Guilty Plea." At a hearing held on February 12, 1999, the trial court accepted Walker's plea of guilty to the amended charge of burglary in the second degree; possession of a handgun by a convicted felon; stalking in the first degree; harassing communications; unlawful imprisonment; two violations of an Emergency Protective Order (EPO); and terroristic threatening. A final sentencing hearing was held on April 1, 1999. Walker moved the trial court for probation; and pursuant to the plea agreement, the Commonwealth took no position on probation. On April 2, 1999, the trial court entered the judgment of conviction sentencing Walker consistent with the plea agreement to prison for a total term of seven years.<sup>11</sup>

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<sup>9</sup>KRS 508.140.

<sup>10</sup>KRS 527.040.

<sup>11</sup>Walker's seven-year sentence included seven years for burglary in the second degree, five years for stalking in the first degree, 90 days for terroristic threatening, 12 months for harassing communications, 12 months for two counts of EPO  
(continued...)

On October 18, 1999, Walker filed a motion to vacate, set aside or correct his sentence pursuant to RCr 11.42. Walker raised three issues in his motion: (1) whether his guilty plea was entered knowingly, intelligently and voluntarily; (2) whether the evidence supported the elements of burglary in the second degree; and (3) whether he received ineffective assistance of counsel. The Commonwealth filed a response to this motion on October 19, 1999. Without holding an evidentiary hearing, the trial court entered an order on October 28, 1999, denying Walker's RCr 11.42 motion. This appeal followed.

In general, the Sixth and Fourteenth Amendments to the United States Constitution mandate that a defendant in a criminal case receive effective assistance of counsel.<sup>12</sup> To prove counsel's ineffectiveness, a movant must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as counsel was not performing as guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense so seriously that it affected the process whereby the end result would have been different.<sup>13</sup> For a motion alleging ineffective

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(...continued)

violation, five years for possession of a handgun by a convicted felon, with all sentences running concurrently with each other.

<sup>12</sup>United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Hopewell v. Commonwealth, Ky.App., 687 S.W.2d 153, 154 (1985).

<sup>13</sup>Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 (continued...)

assistance of counsel to state sufficient grounds for relief under RCr 11.42, the motion must allege sufficient facts to show that counsel's representation was inadequate.<sup>14</sup> If the record refutes the claims of error, there is no basis for granting an evidentiary hearing on an RCr 11.42 motion.<sup>15</sup> An evidentiary hearing is not required in a RCr 11.42 case where the issues presented can be fairly determined on the face of the record.<sup>16</sup>

A guilty plea must represent a voluntary and intelligent choice among the alternative courses of action open to a defendant.<sup>17</sup> The trial court must determine that a defendant's guilty plea is intelligent and voluntary, and this determination must be put in the record.<sup>18</sup> The validity of a guilty plea must be determined from considering the totality of

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(...continued)

L.Ed.2d 674 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Taylor v. Commonwealth, Ky.App., 724 S.W.2d 223, 226 (1986); Brewster v. Commonwealth, Ky.App., 723 S.W.2d 863, 864 (1986).

<sup>14</sup>Thomas v. Commonwealth, Ky., 459 S.W.2d 72 (1970); Evans v. Commonwealth, Ky., 453 S.W.2d 601 (1970); McCarthy v. Commonwealth, Ky., 432 S.W.2d 50 (1968).

<sup>15</sup>Glass v. Commonwealth, Ky., 474 S.W.2d 400. 401 (1971).

<sup>16</sup>Newsome v. Commonwealth, Ky., 456 S.W.2d 686, 687 (1970).

<sup>17</sup>North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); Centers v. Commonwealth, Ky.App., 799 S.W.2d 51, 54 (1990); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726 (1986).

<sup>18</sup>Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969); Centers, supra; Sparks, supra at 727.

circumstances surrounding it.<sup>19</sup> These circumstances include the accused's demeanor, background and experience, and whether the record reveals that the plea was voluntarily made.<sup>20</sup> The trial court is in the best position to determine if there was any reluctance, misunderstanding, involuntariness, or incompetence by the defendant in pleading guilty.<sup>21</sup>

After a thorough review of the record, we hold that Walker's claim that his guilty plea was not entered knowingly, intelligently, and voluntarily is without merit. The record reveals that the trial court conducted the necessary colloquy with Walker in order to ascertain whether he was fully informed and whether his plea was voluntary. Walker was informed of his constitutional rights and of the constitutional rights he would be waiving by entering the guilty plea. The trial court discussed the elements of the crimes and asked the Commonwealth to outline what proof it was prepared to present at trial. Thus, the trial court fulfilled its duty to ascertain whether Walker was entering his guilty pleas knowingly, intelligently and voluntarily.

Walker's claim that the trial court erred by accepting his guilty plea to burglary in the second degree because it

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<sup>19</sup>Commonwealth v. Crawford, Ky., 789 S.W.2d 779, 780 (1990); Centers, supra; Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978).

<sup>20</sup>Centers, supra; Sparks, supra; Littlefield v. Commonwealth, Ky. App., 554 S.W.2d 872 (1977).

<sup>21</sup>Centers, supra (citing Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)).

lacked "jurisdiction" due to the insufficiency of evidence is also without merit. For this contention, Walker relies upon Hedges v. Commonwealth,<sup>22</sup> where our Supreme Court held:

"[v]iolation of a DVO, without other evidence sufficient to show intent to commit a crime, may not be used to satisfy the elements of burglary. If it were otherwise, every indoor crime (or intended crime) would constitute burglary."<sup>23</sup> The Court further stated:

As 12A C.J.S. Burglary § 41 (1980) states:

To constitute burglary the  
requisite specific intent must  
exist at the time of the breaking  
and entry, or entry, or remaining.

. . .

The mere violation of the DVO without intent to commit an independent crime, is impermissible to support a finding of burglary. Justice Leibson appropriately affirmed this idea in his dissenting opinion in McCarthy[v. Commonwealth, Ky., 867 S.W.2d 469 (1993)]:

For the "intent" element of the burglary statute to have been satisfied in this case, "with the intent to commit any crime" must be understood to refer to intent to commit a crime in addition to criminal trespass. Criminal trespass is committed by "knowingly entering and remaining unlawfully in a building," the first element in the burglary statute. Since anytime someone "knowingly enters or remains unlawfully in a dwelling" that person would necessarily have the intent to

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<sup>22</sup>Ky., 937 S.W.2d 703 (1996).

<sup>23</sup>Id. at 706.

commit the crime of coming onto the property, the Majority Opinion has effectively written the intent requirement out of the burglary statute. . . .<sup>24</sup>

The case sub judice is distinguishable from Hedges on several grounds. First, in Hedges, the DVO, which had been obtained by Hedges' estranged wife, did not contain a "no contact" provision. In fact, Hedges had been allowed to have contact with his wife regarding their child and with her permission had spent the night at her residence on several occasions. In the present case, Walker was ordered not to have any contact with Halsel or to go to his former residence. Second, in Hedges, the underlying crime the Commonwealth relied upon in support of the burglary charge was a violation of the DVO. The Supreme Court held that "[v]iolation of a DVO, without other evidence sufficient to show intent to commit a crime, may not be used to satisfy the elements of burglary."<sup>25</sup>

In the present case, the Commonwealth claimed the evidence would have shown that Walker held Halsel against her will at gunpoint. Thus, there was clearly sufficient evidence to support a finding that Walker was guilty of unlawful imprisonment. Whether Walker entered the dwelling with the intent to commit the crime of unlawful imprisonment would have been a question of fact for the jury. Accordingly, the trial

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<sup>24</sup>Id. at 705-06.

<sup>25</sup>Id. at 706.



court did not err by finding that there was a factual basis to support burglary in the second degree.

Walker's claim of ineffective assistance of counsel is also without merit. For this argument, Walker makes no specific allegation against his counsel, but instead simply recites the general law on this issue and claims that his counsel was ineffective because his attorney advised him to plead guilty to the burglary and stalking charges without sufficient evidence to support a conviction. As stated previously, we believe the evidence would support such a conviction.

In order to support a claim of ineffective assistance of counsel, Walker needed to show (1) that his counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as counsel was not performing as guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense so seriously that it affected the process whereby the end result would have been different.<sup>26</sup> Walker is unable to show either.

First, Walker has not alleged nor is there anything in the record to indicate that his attorney made such serious errors. Second, since there was sufficient proof to support the burglary conviction, Walker is also unable to satisfy the second prong of the Strickland test. During the colloquy between the trial court and Walker, the trial court indicated that Walker was well represented and that he was receiving a fair sentence in

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<sup>26</sup>Strickland, supra.

light of the seriousness of the charged offenses. It is noteworthy that based on Walker's alleged possession of a deadly weapon, he was originally charged with burglary in the first degree. If Walker had been convicted of an offense involving the use of a weapon, he would not have been eligible for probation.<sup>27</sup> Thus, by getting the charge of burglary in the first degree reduced to burglary in the second degree, Walker not only got the possible maximum sentence for this charge reduced from 20 years to 10 years, but he was also eligible for probation. Walker has failed to show that he received ineffective assistance of counsel.

For these reasons, this order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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LaGrange, KY

BRIEF FOR APPELLEE:

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<sup>27</sup>KRS 533.060(1).