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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000436-MR

WILLIAM TIMMS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 14-CR-00149

COMMONWEALTH OF KENTUCKY — APPELLEE

AND NO. 2017-CA-000144-MR

WILLIAM J. TIMMS — APPELLANT

v.

APPEAL FROM TRIGG CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 14-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: William Timms appeals from orders of the McCracken Circuit Court and Trigg Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motions without evidentiary hearings. Timms argues he received ineffective assistance of counsel because his counsel in each case gave him affirmative misadvice that he would receive concurrent sentences in both counties. He also argues that the Trigg Circuit Court erred in denying his claim of ineffective assistance of counsel regarding restitution where there was a factual dispute as to what amounts were due after items purchased with forged instruments were recovered. We determine that his claims of ineffective assistance of counsel regarding concurrent sentences are refuted by the record and affirm the denial of his motions on those grounds, but reverse and remand on the restitution issue.

Timms was indicted in McCracken County and Trigg County for a string of crimes occurring in October 2013. In McCracken County case number 14-CR-00149 (the McCracken County case) he was indicted for second degree criminal possession of a forged instrument and being a persistent felony offender in the first degree (PFO-1) for having committed five previous felonies. In Trigg County case number 14-CR-00025 (the Trigg County case) he was indicted for two

counts of theft by deception over $10,000, eight counts of theft by deception under $10,000, theft by deception under $500 and three counts of second degree criminal possession of a forged instrument. In the Trigg County case, it was alleged that Timms used fraudulent checks to purchase various items from four victims, including tools, a semi-truck, fuel, food and other items. This included the purchase at least $22,887.25 worth of items from a Snap-On Tool franchise on four separate dates in October 2013 as established by an itemized receipt, which was used in conjunction with a search warrant in an attempt to locate these items.

In June 2014, Timms accepted a plea agreement in the McCracken County case. He agreed to enter a guilty plea in exchange for five years on his second-degree criminal possession of a forged instrument increased to ten years for being a PFO-1. While Timms sought concurrent sentencing with the Trigg County case, the Commonwealth was only willing to agree conditionally to concurrent sentencing. Thus, the plea agreement specifically stated Timms would receive a "total 10 years to run concurrent with sentences in Trigg County if Trigg Circuit Court also orders its sentence concurrent with this sentence." The McCracken Circuit Court quoted this exact language when it accepted Timms's plea. In the order and judgment on plea of guilty, the terms of the plea agreement were set out in bold print and specifically stated "total sentence of ten (10) years and concurrent

with sentences in Trigg County if Trigg Circuit Court also orders sentences to run concurrent with this sentence."

In July 2014, Timms accepted a plea agreement in the Trigg County case on all charges "all concurrent for a total of 10 yrs., waive PSI—consecutive to any sentence the defendant is now serving (including upcoming McCracken County sentence)." The plea agreement made no mention of restitution.

The Trigg Circuit Court reviewed the agreement with Timms, confirmed Timms agreed and confirmed Timms waived his right to have a separate sentencing hearing. The Trigg Circuit Court then explained that it was sentencing Timms consistent with the plea agreement. After reviewing the sentences on each count, the following exchange took place about whether these sentences would be consecutive or concurrent to those forthcoming in McCracken County:

> Judge: All of that time to run concurrently for a total of ten years and that time would be consecutive—and I just want to be sure there isn't any ambiguity here when we say consecutive it will be consecutive to the time you get in McCracken County. Is that your understanding?
>
> Defense Attorney: Judge, my understanding of what we have discussed is this, is clearly that's going to be the Court's order that it's going to be consecutive but frankly I don't, I've got some idea of what McCracken County may do, if McCracken runs theirs consecutive then he's going to have a total of twenty, if McCracken runs theirs concurrent, Judge, then that McCracken would run concurrent with Trigg as last in time. So, I don't think the fact that it's consecutive, there's nothing for it to run

consecutive with right now, 'cause he's not a state inmate.

Judge: Exactly, so that is why I ask the question, it says the defendant is now serving and technically you are not serving on any felony offense yet until after right now. Now from the Commonwealth's standpoint . . .

Commonwealth: I still want it to say consecutive, Judge.

Judge: But, and it . . . what I want to do so there is no question about it, is to interline here that that includes a sentence from McCracken County if that is in fact everybody's understanding.

Defense Attorney: It is, Judge, I don't see that being an issue. I do think for the record on this that part of the reason I think that we took this is that I think the McCracken County I think Judge Kaltenbach down there I guess just due to the timing of this case, his decision about how that's going to run, I think my understanding is it would be controlling.

Judge: And that may well be and I just I want to be sure that Mr. Timms . . .

Defense Attorney: If the Department of Corrections comes back and says we don't care about what Judge Kaltenbach says, we may be back in front of you, Judge, but I think the odds of that are very slim.

Judge: All right, all right. So, your sentence here Mr. Timms is consecutive, from our standpoint here in Trigg, to what you may receive in McCracken County.

As to restitution, the following exchange took place:

Judge: Is there restitution separately?

Commonwealth: There's restitution orders prepared for each victim.

Judge: All right and [defense attorney] have you and Mr. Timms had a chance to look at those?

Defense Attorney: We have not, Judge.

Judge: Let's pass those off just to be sure.

. . .

[Defense attorney can then be seen retrieving the restitution orders and then showing them to Timms, naming the total for each, and Timms can be seen reviewing them.]

Defense attorney: Judge, the only issue that he has is this, this one at least he believes . . . some of the property may have been recovered either may be some diminished, I think a truck and bus possibly, obviously if that property was recovered that's something that if it became an issue, Judge, we could deal with it.

Judge: All right.

Commonwealth: We, obviously [defense counsel] and court's aware . . .

Judge: Sure.

Commonwealth: Of the time of day [approximately 3:30 p.m.]. We have to have those restitution orders signed.

Judge: Correct.

Commonwealth: I told [defense attorney] if any credit's due I'd be glad to . . .

> Judge: All right. We will fight about that another day if need be.

In the final judgment and sentence in the Trigg County case, the Trigg Circuit Court stated Timms was receiving a ten-year sentence "consecutive to any sentence the Defendant may now be serving." The commitment order stated that Timms's total sentence was ten years "[c]onsecutive to any other offenses." The same day as he was sentenced, four orders establishing restitution were entered: (1) $11,000 to Douglas Meredith; (2) $2,000 to Mr. Greenwood; (3) $23,155.02 to Snap-On; and (4) $3,891.34 to Hilltop. In each order, it was left blank at what rate the sum would be payable and when it would begin, with the words "to be determined on release" written in.[1] It is unclear from the record what, if any, items Timms obtained with the fraudulent checks were seized pursuant to the executed search warrant and what became of any recovered items.

In August 2014 at the sentencing hearing in McCracken Circuit Court, Timms's counsel represented that Timms's plea agreement in the McCracken County case was to a ten-year sentence, concurrent with the sentence in the Trigg

[1] We note that although Kentucky Revised Statutes 532.033(4) specifies that in ordering restitution the court is to set the time and amount for repayment of restitution, in *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986), the Kentucky Supreme Court held that the final establishment of the restitution payment schedule could properly be deferred until the defendant's release from custody even though this is not mentioned in the restitution statute because "it is implicit that the court, once empowered to order restitution, may make such act workable, meaningful and considerate of the rights of all the parties."

County case, explained Timms previously pled in the Trigg County case to ten years and asked that the Court hold the Commonwealth to that agreement. The McCracken Circuit Court in sentencing Timms, stating as follows:

> Judge: [F]or a total sentence of ten years, and concurrent with sentences in Trigg County if Trigg Circuit Court also orders to run the sentences concurrent with this sentence. That looks like that was the agreement, right [defense counsel]?
>
> Defense Counsel: Yes.

In the written judgment and sentencing order, the McCracken Circuit Court ordered the exact sentence set out in the plea agreement, including the specific wording of a "total sentence of ten (10) years and concurrent with sentences in Trigg County if Trigg Circuit Court also orders sentences to run concurrent with this sentence."

In January 2015, Timms filed a letter in the Trigg County case requesting the assistance of the Trigg Circuit Court. He stated "[u]pon my taking the plea I asked [my Trigg County defense attorney] if this was going to effect my pleas in McCracken County and he advised me that it would not and that my sentences would be run concurrent like I agreed to." He further stated "[my Trigg County defense attorney] did inform Judge Woodall that if there [were] any problems with my sentences that we would be back in front of him to get Trigg

County's sentence run concurrent instead of consecutive that way I only have 10 years."

The Trigg Circuit Court interpreted this letter as an RCr 10.10 motion to correct a clerical error and denied it based upon the wording of the plea agreement and final judgment. After the Trigg Circuit Court received a second letter from Timms raising this same argument, the court again denied his motion, explaining:

> The Court has reviewed the plea colloquy from July 9, 2014, and it is clear from that colloquy that Mr. Timms was interested in his Trigg County time and his McCracken County time, but he clearly understood that as far as the Trigg County sentence was concerned, it would be consecutive to the McCracken County time.
>
> During that colloquy, counsel for the Defendant did express that McCracken County could run its time concurrent with the Trigg County time since he had not yet been sentenced there. The other possibility was of course that McCracken County would run its time consecutive to the Trigg County time and that is apparently what happened.
>
> There was no discussion on the record that if McCracken County sentenced Mr. Timms consecutively that the Trigg County plea would be changed. In fact, the conversation was just the opposite—the Commonwealth Attorney expressed his intent that the Trigg County time be consecutive to everything else, including McCracken County and the judge interlined that language so there would be no ambiguity. Mr. Timms said that he understood that.

In May 2015, Timms filed a *pro se* RCr 11.42 motion in the McCracken Circuit Court on the basis that he was misadvised by his counsel in the McCracken County case that the agreement was for ten years to run concurrent with the Trigg County case and he would not have accepted the plea if he knew he would have to serve twenty years instead of ten. The court denied the motion, finding "the grounds for his motion are based upon the Trigg County sentence not McCracken County[.]"

In November 2016, Timms filed an RCr 11.42 motion in the Trigg Circuit Court arguing he received ineffective assistance of counsel in the Trigg County case and requesting an evidentiary hearing. He argued he asked his Trigg County defense counsel if his plea in the Trigg County case would "mess up" his plea in the McCracken County case and he was assured that the McCracken Circuit Court, as the last in time court, could order that his Trigg and McCracken sentences run concurrent and that it was in his best interest to be sentenced in the Trigg Circuit Court first. Timms argued this representation was a misrepresentation of his McCracken County plea. He asserted his counsel could be seen on the record informing the Trigg Circuit Court that he had some idea what McCracken Circuit Court was going to do and that if the McCracken Circuit Court ordered the sentences to be concurrent, as the order entered last in time, it would be controlling. Timms argued this shows that his counsel erred by failing to become

familiar with the McCracken County plea and affirmatively misadvised him. He argued he would have rejected the plea had he received correct advice.

Timms also argued that he received ineffective assistance of counsel regarding the entry of the restitution orders in the Trigg County case where his defense counsel indicated he had not had the opportunity to review the proposed orders, defense counsel informed the Trigg Circuit Court that Timms did not agree with the amounts listed as much of the property had been recovered, but the orders were signed and entered without any presentation of proof on the amount of damages. Timms stated the forged checks were used to purchase a semi-truck, fuel and tools, the semi-truck and tools were recovered in a substantially undamaged condition and the search warrant filed in this case shows that the police seized a large number of items. Timms argued this demonstrated that he was prejudiced where his counsel allowed the orders to be entered without objection and never filed any subsequent motions to correct the restitution orders.

The Trigg Circuit Court denied Timms's motion without an evidentiary hearing. The Trigg Circuit Court found that although Timms sought a concurrent sentence, he agreed to a plea offer for a consecutive sentence and his plea was entered knowingly, intelligently and voluntarily. As to the restitution orders, the Trigg Circuit Court found that Timms contested the amounts, "but he

has shown no prejudice because he has not been released to begin making any payment and has not requested a hearing specifically on restitution."

Regarding Timms's claims that he received ineffective assistance of counsel regarding his guilty pleas in McCracken County case and the Trigg County case, we apply a modified *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), test.

> To be entitled to relief on [the ground that his plea was invalid], an RCr 11.42 movant must allege with particularity specific facts which, if true, would render the plea involuntary under the Fourteenth Amendment's Due Process Clause, would render the plea so tainted by counsel's ineffective assistance as to violate the Sixth Amendment, or would otherwise clearly render the plea invalid.

Stiger v. Commonwealth, 381 S.W.3d 230, 234 (Ky. 2012). The defendant must establish:

> (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001) (quoting *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986)).

Advising a defendant to plead guilty may be sound trial strategy to minimize the defendant's sentence where a conviction after trial is likely. *Russell*

v. Commonwealth, 992 S.W.2d 871, 875-76 (Ky.App. 1999). "A reasonable probability exists [that the defendant would not have pled guilty, but would have insisted on going to trial] if the defendant convinces the court 'that a decision to reject the plea bargain would have been rational under the circumstances.'" *Padilla v. Commonwealth*, 381 S.W.3d 322, 328 (Ky.App. 2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010)). The defendant must "demonstrate that he rationally would have insisted on a trial, not that an acquittal at trial was likely." *Id.*

"If the record refutes the claims of error, there is no need for an evidentiary hearing." *Bowling v. Commonwealth*, 981 S.W.2d 545, 549 (Ky. 1998). "[An evidentiary] hearing is required only if there is an issue of fact which cannot be determined on the face of the record." *Stanford v. Commonwealth*, 854 S.W.2d 742, 743-44 (Ky. 1993).

In *Commonwealth v. Rank*, 494 S.W.3d 476, 487 (Ky. 2016), the Kentucky Supreme Court held in an RCr 11.42 appeal based on ineffective assistance of counsel that even if a defendant was induced to plead guilty as a result of inaccurate advice provided by counsel, if the trial court "clearly and correctly informed" the defendant about his sentence and the defendant "acknowledged that his guilty plea was knowing, intelligent and voluntary[,]" an evidentiary hearing is not required. It relied on its holding in another case that:

> If the information given by the court at the plea hearing corrects or clarifies the earlier erroneous information given by the defendant's attorney and the defendant admits to understanding the court's advice, the criminal justice system must be able to rely on the subsequent dialogue between the court and defendant.

Id. (quoting *Edmonds v. Commonwealth*, 189 S.W.3d 558, 568 (Ky. 2006) (quotation and citations omitted)).

We agree with the McCracken and Trigg Circuit Courts that Timms's claims of ineffective assistance of counsel regarding his pleas are refuted by the record. While we can conceive of a situation where counsel may give a defendant advice that is different than what the defendant is told by the court and there is sufficient ambiguity in what the court tells the defendant that an evidentiary hearing will be needed to clear up what advice the defendant was in fact given in deciding to enter a plea, here the two circuit courts were clear about what the results of the plea agreements in each case would be in conjunction with the other county's case and Timms indicated his understanding. Timms's attempt to obfuscate the issue now does not warrant an evidentiary hearing in either circuit court on ineffective assistance of counsel regarding the pleas.

Although Timms desired to receive concurrent sentences, he was not able to negotiate a concurrent sentence in the Trigg County case and agreed to the plea agreement. By entering into the plea agreement for consecutive sentencing in Trigg Circuit Court, Timms forfeited any realistic chance to receive concurrent

sentencing. However, as a matter of trial strategy, Timms's Trigg County counsel advised him to waive a separate sentencing in Trigg County to capitalize on the slim chance that Timms might receive concurrent sentences by the McCracken Circuit Court sentencing him last.

In Timms's argument to the Trigg Circuit Court, he stated his Trigg County counsel was ineffective for telling him that the McCracken Circuit Court, as the last in time court, could order his sentences to run concurrent. Such advice was correct and not ineffective as his Trigg County counsel was correct that as the last in time sentencing court that the McCracken Circuit Court could choose to run its sentence concurrent with the Trigg County sentence. Being advised that this could happen is not the same as counsel advising Timms that it would happen, and in fact there was no realistic reason to think that Timms would receive consecutive sentencing, given the wording of the McCracken County case plea agreement that he would only be sentenced concurrently in the McCracken County case only if the Trigg County case also provided for concurrent sentencing.

Additionally, there was no realistic chance that Timms would have rationally insisted on a trial even if he knew with absolute certainty that he would receive consecutive sentences totaling twenty years because if convicted he faced maximum combined sentences of forty years. The evidence against Timms was

overwhelming and he had an extensive prior record, making convictions and maximum sentences a real possibility.

If Timms proceeded to trial in the McCracken County case, in which he was charged with second degree criminal possession of a forged instrument which is a class D felony pursuant to Kentucky Revised Statutes (KRS) 516.060(2), he was subject to a maximum sentence of twenty years for being a PFO-1 charged with a class D felony pursuant to KRS 532.080(6)(b). By pleading guilty, he received the minimum PFO-1 sentence of ten years.

If Timms proceeded to trial in the Trigg County case, in which the highest class of offense he was charged with, theft by deception over $10,000, was a Class C felony pursuant to KRS 514.040(8)(b), the maximum aggregate of consecutive indeterminate terms he faced there was twenty years pursuant to KRS 532.110(1)(c) (which caps the aggregate sentence at the maximum for a PFO-1 under KRS 532.080). Additionally, if he delayed accepting a plea in the Trigg County case, Timms could have also been indicted as a PFO-1 in that case.

While Timms could receive probation for his PFO-1 class D felony in the McCracken County case pursuant to KRS 532.080(7), if he was convicted of being a PFO-1 in the Trigg County case for class C felonies, he would not be eligible for parole until he served a minimum of ten years on that sentence. Thus, even with Timms's plea agreements resulting in consecutive sentencing, he still

halved the maximum sentence he was facing had he proceeded to trial and maintained his maximum parole eligibility. Therefore, we affirm the McCracken Circuit Court's and Trigg Circuit Court's denials of Timms's claims of ineffective assistance of counsel regarding his plea agreements.

As to the restitution orders in the Trigg County case, Timms is not arguing that he would not have accepted the plea agreement in that case if he had known the restitution amounts he would have to pay. Indeed, the plea agreement was silent on the issue of restitution. Timms is also not arguing that the restitution totals for the goods he obtained using the forged instruments were inaccurate. Instead, Timms is alleging that his counsel was ineffective for failing to have these totals reduced by getting him credit for items that were recovered and returned to their owners as he was entitled to pursuant to KRS 533.030(3)(a). While the Commonwealth correctly argues that Timms could have raised the restitution issue on direct appeal because he did not receive an adversarial hearing to determine the correct amount of restitution, *see Brown v. Commonwealth*, 540 S.W.3d 374, 377 (Ky. 2018), we agree with Timms that he did not have a reason to appeal this issue if he reasonably believed based on his counsel's, the Commonwealth's and the Trigg Circuit Court's assurances that this matter could be corrected post-sentencing as there was no reason for him to believe it could not be corrected after expiration of the time for taking an appeal.

In applying the standard *Strickland* test to Timms's allegation of ineffective assistance of counsel regarding restitution, Timms must show that his counsel's performance was deficient, and this prejudiced him. It is his burden to establish that he was deprived of some substantial right which would justify the extraordinary relief of RCr 11.42. *Commonwealth v. Pelfrey*, 998 S.W.2d 460, 463 (Ky. 1999).

As explained in *Fields v. Commonwealth*, 123 S.W.3d 914, 916 (Ky.App. 2003), pursuant to KRS 532.032, ordinary sentencing procedures should be used in determining restitution. This would include the circuit court considering a presentence investigation report (PSI), which should provide the appropriate predicate for restitution and whether items were recovered and returned to the victims. *Fields*, 123 S.W.3d at 917.

Timms chose to knowingly and voluntarily waive a PSI before a separate sentencing in the hope that by being sentenced in McCracken Circuit Court last, he might receive concurrent sentencing. This was a rational choice and clearly done as part of a broader strategy to give Timms his best chance at concurrent sentencing despite his Trigg County plea agreement to consecutive sentencing. In furthering this strategy, even though it was ultimately unsuccessful, his Trigg County counsel was not deficient in advising Timms to waive his right to a separate sentencing hearing. However, as was clear at the combined plea and

sentencing hearing, Timms wanted proof to be produced as to what was owed in restitution based on his understanding that certain expensive items were recovered and restored to their original owners. While that could not be done during the abbreviated process on that day, the Commonwealth, his counsel and the circuit court were all in agreement that this could be done later.

Timms has adequately alleged prejudice where he claims the ordered restitution was too high based on the return of items for which he was being charged restitution and his counsel refused to bring the matter before the circuit court for a hearing. Therefore, Timms is entitled to an evidentiary hearing on this issue. Unless his counsel failed to move for a restitution hearing as a matter of strategy, Timms is entitled to a proper full restitution hearing to determine the correct amount he should pay.

Timms argues that he was entitled to restitution credit for any recovered items pursuant to KRS 533.030(3)(a); while this is technically incorrect, we hold that he was entitled to receive restitution credit for any items that were returned to the victims less depreciation and damage. Timms is foreclosed from relying on KRS 533.030(3)(a) to require that the Trigg Circuit Court order the return of stolen items in lieu of monetary restitution based upon *Jones v. Commonwealth*, 382 S.W.3d 22 (Ky. 2011).

In *Jones*, the Court explained that KRS 533.030, the statute that governs restitution when probation or conditional discharge is imposed, does not also govern restitution when a defendant is sentenced to imprisonment. Therefore, in *Jones*, 382 S.W.3d at 32-33, the Kentucky Supreme Court ruled that the $100,000 restitution limitation in KRS 533.030(3) did not limit the amount of restitution that could be ordered when a defendant was sentenced to imprisonment. Although the Court acknowledged that it was not apparent why the legislature decided to limit the maximum restitution to be imposed when a defendant was placed on probation or conditional discharge and let restitution be unlimited when a defendant was sentenced to imprisonment, it opined "when the meaning of the law is clear from the language of the statute, and its effects are not absurd, we need not attempt to explain why the General Assembly chose to legislate as it did." *Jones*, 382 S.W.3d at 33.

In *Anderson v. Commonwealth*, No. 2015-CA-001867-MR, 2017 WL 3834864, 1-2 (Ky.App. 2017) (unpublished),[2] our Court followed *Jones* in rejecting the argument of a defendant who was sentenced to imprisonment that because the stolen property had been recovered monetary restitution was not required pursuant to KRS 533.030(3)(a). The Court explained there was no error

[2] We cite this unpublished opinion pursuant to Kentucky Rules of Civil Procedure 76.28(4) because there is no published opinion that adequately addresses this issue.

in ordering an incarcerated defendant to pay restitution instead of returning the stolen property to its owners because "[p]ursuant to *Jones*, we find the statute effectively provides a different set of restitution terms for those under probation or conditional discharge than for those facing imprisonment." *Id.* at 2. The Court further opined that the circuit court did not abuse its discretion by ordering the sale of the stolen items, which had minimal value to the owner as they had been replaced, and the proceeds applied towards the restitution ordered. It was reasonable to order monetary restitution via this method as, by then, the owner's losses were monetary. *Id.*

However, we cannot extend the reasoning in *Jones* and *Anderson* to allow the double recovery to victims that would result if items stolen from them were both returned and defendants were still ordered to pay them for these same items. Such a result would be the very absurd effect that *Jones*, 382 S.W.3d at 33, warned would not be upheld. Instead, we read KRS 533.030(3)(a), which provides that "[w]here property which is unlawfully in the possession of the defendant is in substantially undamaged condition from its condition at the time of the taking, return of the property shall be ordered in lieu of monetary restitution[,]" as mandating restoration of property to victims when they are placed on probation or conditionally released and expressing no intent as to whether restoration of property to victims is appropriate when restitution is ordered in other situations.

KRS 532.032 is silent on whether restitution can consist of the return of property in lieu of monetary restitution. Therefore, to resolve this issue, we must examine the definition and purpose of restitution. By statute, "restitution" is defined as "any form of compensation paid by a convicted person to a victim for counseling, medical expenses, lost wages due to injury, or property damage and other expenses suffered by a victim because of a criminal act[.]" KRS 532.350(1)(a).

The purpose of restitution is to "restore property or the value thereof to the victim." *Commonwealth v. Bailey*, 721 S.W.2d 706, 707 (Ky. 1986). "[R]estitution is intended to fully compensate [the victim] for the loss incurred" and "[m]ake the victim whole." *Hearn v. Commonwealth*, 80 S.W.3d 432, 436 (Ky. 2002).

"Though the legislature did not define what constitutes a victim for purposes of ordering restitution, it is clear from KRS Chapter 532 and 533 that 'victim' in this context is one who is *directly* harmed by the criminal conduct for which the defendant has pled or been found guilty." *Blevins v. Commonwealth*, 435 S.W.3d 637, 640 (Ky.App. 2014). Thus, if a victim has stolen property returned in the same condition, that victim is no longer harmed by the property being missing and has no right to restitution. *See Bentley v. Commonwealth*, 497 S.W.3d 253, 257-58 (Ky.App. 2016) (holding insurer who made payments to

homeowner victim for a loss was not a victim entitled to restitution and homeowner was only entitled to restitution for the deductible).

Courts properly act within their discretion to order the return of property when appropriate rather than award monetary restitution when KRS 533.030 does not apply. If the property is damaged or depreciated, it may be more appropriate to award monetary restitution rather than the return of property. Even when a victim wants property returned, it may be appropriate to order it returned and order some restitution based upon its diminished value. *See Russell v. Commonwealth*, 239 S.W.3d 578, 579-80 (Ky.App. 2007) (affirming award of restitution to auto dealership which repossessed vehicle obtained through identity theft for the cost required to repair damage to the vehicle).

Courts may also decline to order the return of property and require monetary restitution if there are other reasons that the return of the property is not appropriate. In *Anderson*, the trial court struck a proper balance by refusing to order property returned which had already been replaced and instead ordered the property sold and the defendant's restitution reduced by the proceeds. A defendant might also retain certain items, essentially having "bought" them by paying restitution. The goal is for the victim to be made whole. What cannot be done is for items to both be returned and for the defendant to also have to pay victims for the full value of those items, what Timms is alleging occurred here.

Accordingly, we affirm the order of the McCracken Circuit Court which denied Timms's RCr 11.42 motion without evidentiary hearing. We affirm in part and reverse in part the order of the Trigg Circuit Court denying Timms's RCr 11.42 motion without an evidentiary hearing. We affirm the portion of its decision determining that there was no ineffective assistance of counsel regarding the plea agreement but reverse the portion of its decision determining that there was no ineffective assistance of counsel in failing to move for a restitution hearing, and remand for an evidentiary hearing on ineffective assistance of counsel regarding failure to move for a restitution hearing to reduce the amount of restitution owed based on recovered items, with a restitution hearing to follow should ineffective assistance of counsel be established.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Heather Hodgson
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Thomas A. Van De Rostyne
Assistant Attorney General
Frankfort, Kentucky