

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001058-MR

GEORGE T. HARRISON

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT  
HONORABLE JULIA HYLTON ADAMS, JUDGE  
ACTION NO. 98-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. George Harrison ("Harrison") appeals from orders of the Madison Circuit Court denying his motions for RCr 11.42 and RCr 60.02 relief. We affirm.

On December 10, 1998, Harrison was indicted in Madison Circuit Court on charges of receiving stolen property and second degree persistent felony offender. The charges arose from the theft of two toolboxes occurring on October 12, 1998. It was

alleged that Harrison stole the toolboxes from the residence of Noah and Deborah Johnson and then returned the toolboxes without the Johnsons' knowledge the following day.

At trial, testimony was proffered that the value of the toolboxes exceeded \$300. Deborah Johnson stated the toolboxes were almost brand new, and a sales person where the toolboxes were purchased produced a receipt indicating that Deborah Johnson had paid approximately \$560 for them. A witness also stated that he observed Harrison in possession of the stolen items and recorded the license plate number of Harrison's truck which he gave to the police. At the conclusion of the trial, the jury returned a guilty verdict on both charges, and Harrison was sentenced to seven years in prison. This Court affirmed the conviction in an unpublished opinion rendered August 25, 2000 (Case No. 1999-CA-001046-MR).

On March 29, 2001, Harrison filed an RCr 11.42 motion seeking relief from judgment, arguing that he received ineffective assistance of counsel at trial. On October 25, 2001, he sought a reduction of the sentence pursuant to CR 60.02. Upon considering Harrison's arguments, the Madison Circuit Court rendered separate orders denying both motions. This appeal followed.

Harrison first argues that the trial court committed reversible error in failing to conduct an evidentiary hearing on his allegation that his trial counsel did not investigate and present expert testimony as to the value of the toolboxes. He maintains that reasonable discovery by counsel would have uncovered the fact that the toolboxes were valued at under \$300. If the toolboxes were worth less than \$300, he would not have been convicted of a felony and the resultant PFO. He seeks to have his conviction reversed on this issue, and/or remanded for an evidentiary hearing.

As the parties are well aware, where there is no factual basis contained in the motion to vacate the judgment, the motion should be summarily overruled without a hearing. Stanford v. Commonwealth, Ky., 854 S.W.2d 742 (1993). Similarly, no evidentiary hearing is required where the appellant's allegations are refuted by the record. Beecham v. Commonwealth, Ky., 657 S.W.2d 234 (1983). In the matter at bar, there is nothing in the record upon which one may reasonably conclude that Harrison's trial counsel improperly failed to create an issue relating to the value of the toolboxes. Testimony was adduced from both the seller and the buyer of the toolboxes as to their value, and counsel's failure to contest this issue may have either been trial strategy or simply recognition that no plausible issue existed. Either way,

Harrison's contention was justiciable by reference to the record, and accordingly no hearing on this issue was required.

Harrison next argues that his trial counsel improperly failed to object to the prosecutor's statement during closing argument vouching for the veracity of a witness, and counsel's failure to object to the prosecutor's inaccurate characterization of the testimony of witness Monty Brock ("Brock"). Harrison contends that the prosecutor should not have told the jury that the Commonwealth's witnesses gave truthful testimony. He further maintains that the prosecutor inaccurately stated that Harrison told Brock that he (Harrison) had returned the toolboxes to the Johnsons, when Harrison actually said that "they're back out there" at the Johnson's property. Harrison contends that these failures to object constituted ineffective assistance of counsel entitling him to RCr 11.42 relief.

We find no error. The standard for addressing a claim of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). In order to be found ineffective, counsel's performance must be below the objective standard of reasonableness and must be so prejudicial as to deprive the defendant of a fair trial and a reasonable result. Id. In considering ineffective

assistance, the reviewing court must focus on the totality of evidence before the lower court and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

Under Strickland, the movant must show that but for the ineffective assistance, there is a reasonable probability that the outcome of the proceeding would have been different. Strickland, supra. We cannot conclude that a reasonable probability exists that the jury would have returned a verdict of not guilty if Harrison's trial counsel had objected to the prosecutor's statements. This is especially true given the requirement set forth in Kimmelman, supra, that we focus on the totality of the evidence before the trial court in assessing counsel's performance. Arguendo, even if counsel's performance fell below the objective standard of reasonableness, which we do not find to be the case, there is no basis for concluding that the outcome of the proceeding would have been different if counsel objected to the prosecutor's statements. As such, we find no error on this issue.

Harrison next argues that the trial court erred in finding that his counsel did convey a plea offer to Harrison.

He notes that though the trial counsel testified at the evidentiary hearing that he conveyed an offer from the Commonwealth, counsel's testimony was not corroborated by any writing, and he suggests that counsel had a motive to lie, i.e., to protect his reputation. Harrison relies on this offer as a basis for claiming that the trial court erred in denying his motions for relief.

Harrison's argument on this issue is specious and is wholly unsupported by the record. Without entering into a protracted discussion of this claim, suffice it to say that the trial court was presented with the testimony of Harrison, who claimed not to have received an offer, and his trial counsel, who claimed to have conveyed an offer. The trial court is vested with the authority to examine the weight and credibility of the evidence adduced and to render findings based on that judgment. Thomas v. Platt, Ky., 282 S.W.2d 354 (1955). In so doing, the court found the trial counsel's testimony to be more credible. We may not disturb this finding without a showing of an abuse of discretion. Id. No such showing has been made, and accordingly we must affirm on this issue.

Lastly, Harrison maintains that the trial court erred in overruling his CR 60.02 motion to reduce his sentence. He argues that a seven year sentence is excessive given that he was

convicted of being in possession of two empty toolboxes for less than 24 hours. As a basis for the motion, he again maintains that he is innocent of the charges and that even if he did commit the crime, the toolboxes were worth less than \$300.

Harrison brings this argument under CR 60.02(f), which provides that a party may be relieved from a final judgment for any reason of an extraordinary nature justifying relief. Section (f) must be invoked only with extreme caution, only under the most unusual circumstances, Cawood v. Cawood, Ky., 329 S.W.2d 569 (1959), and only where a clear showing of an extraordinary and compelling nature is made. Bishir v. Bishir, Ky., 698 S.W.2d 823 (1985).

The two grounds for Harrison's motion, i.e., his claimed innocence and the value of the toolboxes, were resolved by the jury verdict and this Court on direct appeal. These claims do not constitute the type of extraordinary and compelling evidence sufficient for relief under CR 60.02(f), and the trial court did not err in so finding.

For the foregoing reasons, we affirm the orders of the Madison Circuit Court denying Harrison's motions for RCr 11.42 and CR 60.02 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

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