RENDERED: JULY 13, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000779-MR

MIKE THOMPSON;
GRANT THOMPSON — APPELLANTS

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, SPECIAL JUDGE
ACTION NOS. 01-CR-00140 & 01-CR-00141

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Mike Thompson and Grant Thompson appeal from an order of the Marshall Circuit Court denying their Kentucky Rule of Civil Procedure (CR) 60.02 motions to vacate the judgments wherein each of them was convicted and

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.850.

sentenced for misdemeanor offenses after having been indicted for felony offenses. We affirm.

On September 17, 2001, Mike Thompson and his son, Grant Thompson, as well as Brian Strow and Walter Jaco, were indicted by a Marshall County grand jury on charges of knowingly receiving stolen property over $300 and tampering with physical evidence. Both charges are Class D felonies.

Pursuant to a plea agreement, the Thompsons each entered guilty pleas to amended misdemeanor charges on September 29, 2003. In exchange for the pleas, the original charges were amended to one count of knowingly receiving stolen property under $300 and one count of criminal attempt to commit tampering with physical evidence, both counts being Class A misdemeanors. Further, the plea agreement provided that each would be sentenced to 12 months in the county jail on each count, with the sentences to run concurrently with each other and with the sentences to be conditionally discharged for a two-year period. In addition, the Thompsons were ordered to pay restitution.

On March 21, 2005, the Thompsons filed a motion to vacate their convictions and sentences pursuant to CR 60.02(c) and (d), alleging that the law enforcement officer who had testified before the grand jury rendering the indictment had committed perjury by not revealing that a co-defendant had given a statement to the officers that he had acted alone in connection with the stolen property. On March 9,

2006, the court entered an order denying the Thompson's CR 60.02 motion. This appeal followed.

A court may vacate a judgment under CR 60.02(c) and (d) if a defendant is wrongly convicted because of perjury or falsified evidence or if the conviction is based on fraud affecting the proceedings. The Thompsons argue that the indictment was fraudulently obtained and therefore relief under CR 60.02 (c) and (d) is appropriate.

The function of the grand jury is to determine whether the evidence offered by the state is sufficient for bringing a criminal charge. *United States v. Calandra,* 414 U.S. 343, 94 S.Ct. 617, 38 L.Ed.2d 561 (1974). *See also Pankey v. Commonwealth*, 485 S.W.2d 513, 518 (Ky. 1972).

The Thompsons rely on the case of *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky.App. 2000). In that case, this court upheld the dismissal of an indictment for second-degree assault where the detective who testified before the grand jury stated that the defendant had beaten her children with an aluminum baseball bat when, in fact, there was no evidence of such. *Id*. at 590. This court in *Baker* noted that the U.S. Supreme Court has recognized the federal court's inherent authority to dismiss an indictment based on nonconstitutional irregularities, including prosecutorial misconduct occurring before a grand jury.[2] *Id*. at 588, *citing Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). This court further cited the U.S. Supreme Court as holding that "[u]nder this standard, dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict',

[2] In this case, there is no allegation of prosecutorial misconduct.

or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Baker*, 11 S.W.3d at 585, *quoting Bank of Nova Scotia*, 487 U.S. at 256.

We reject the Thompsons' arguments for two reasons. First, the officer's testimony before the grand jury did not amount to fraud such as to entitle the Thompsons to relief under CR 60.02. The Commonwealth (and the officers) were under no duty to present exculpatory evidence, such as the evidence in question, to the grand jury. *See U.S. v. Williams*, 504 U.S. 36, 51, 112 S.Ct. 1735, 1744, 118 L.Ed.2d 352 (1992).

Second, the judgments against the Thompsons were not procured by fraud affecting the proceedings; rather, they were procured by their guilty pleas. By pleading guilty to offenses, the Thompsons waived all defenses except that the indictment did not charge an offense. *See Centers v. Commonwealth*, 799 S.W.2d 51 (Ky.App. 1990).

Finally, this case is distinguishable from the *Baker* case. Here, the Thompsons had pled guilty and their cases had been concluded. In *Baker*, the indictment was still pending against the defendant and the court still had authority to act on the indictment. The Thompsons, however, had pled guilty and had waived all defenses to the charges in the indictment.

The order of the Marshall Circuit Court is affirmed.

ALL CONCUR.

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