

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001554-MR

FREELAND THOMAS RILEY

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE CRAIG Z. CLYMER, JUDGE  
ACTION NO. 99-CR-00294

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: Freeland T. Riley filed this *pro se* appeal after the McCracken Circuit Court denied his motion for post-conviction relief pursuant to CR 60.02 and RCr 10.26. In his motion, he argued that the continued denial of an

“Operation Night Vision Agreement” entered into between the McCracken County probation and parole office and local authorities required that his conviction and sentence be vacated. Because an independent motion cannot be filed pursuant to RCr 10.26 and, in addition to his direct appeal, Riley has filed two prior post-conviction motions, we affirm.

The facts are recited in the Kentucky Supreme Court’s opinion in *Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003). In 1987, Riley was convicted of burglary in the third degree and felony theft and sentenced to three-years’ imprisonment. In 1994, he was convicted of one count of trafficking in a controlled substance in the first degree, three counts of trafficking in marijuana (less than eight ounces), and two counts of trafficking in marijuana (eight ounces or more, less than five pounds) and sentenced to thirteen-years’ imprisonment. Riley was paroled in 1997. As conditions of his parole, he agreed that he would not use illegal drugs and consented to the parole officer’s right to search his home and automobile.

On November 16, 1999, at approximately 8:45 p.m., a McCracken County probation and parole officer, accompanied by a deputy sheriff and his assistant supervisor, conducted a routine visit to Riley’s home. The visit

proceeded in accordance with “Operation Night Vision,” a cooperative agreement between the McCracken County probation and parole office and local police, permitting parole officers to make night-time home visits to parolee’s residences with police protection.

Upon their arrival at the home, Riley allowed them to enter. Immediately, the officers observed two guns lying across a basinet. Suspecting that Riley might be in possession of additional weapons and in violation of his parole, the parole officer opened a drawer and found a tin containing marijuana and drug paraphernalia. Riley then informed the parole officer that additional marijuana was in a potato bin. After discovering marijuana in the bin, the parole officer arrested Riley for parole violations. An extended search of the residence revealed twelve additional firearms. *Id.* at 624-25.

Riley was convicted of one count of possession of marijuana and one count of possession of drug paraphernalia. The jury further found that Riley was in possession of a firearm at time of the offenses and that he was a persistent felony offender in the first degree. He was sentenced to a total of twenty-years’ imprisonment.

In his direct appeal to the Kentucky Supreme Court, Riley presented the following issues:

1) the evidence obtained during the search of his residence should have been suppressed as the fruits of an illegal search; (2) there was insufficient evidence to support the firearm enhancement of the underlying offenses (thus, his convictions were for misdemeanors, which could not trigger PFO enhancement); (3) the jury should not have been instructed on PFO first-degree because the indictment charged him only with being a PFO in the second degree, and one of the prior convictions upon which the PFO enhancement was premised was invalid because he was never indicted for that offense; and (4) a twenty-year sentence for a misdemeanor offense (possession of marijuana) constitutes cruel and unusual punishment. *Id.* at 626.

In its opinion, the Court discussed Riley's assertion that "Operation Night Vision" was a "subterfuge to enable other police agencies to conduct unconstitutional searches of parolees' residences under the guise of a parole officers 'routine visit.'" *Id.* at 628. It concluded that in *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), the "stalking horse" defense was eliminated and, therefore, the search of Riley's home did not violate his constitutional right to be secure against unreasonable searches and seizures. *Id.* All other claims of error were also rejected.

Prior to the Supreme Court's decision, Riley filed his first post-conviction motion. Pursuant to CR 60.02, he argued that the persistent felony offender charges were not appropriate under Kentucky law. That motion was denied on February 25, 2002. Although Riley appealed to this Court, after he did

not respond to a show cause order, the appeal was dismissed for failure to file a brief.

In February 2004, Riley filed a second post-conviction motion pursuant to RCr 11.42, alleging that trial counsel was ineffective for a myriad of reasons, including failing to obtain a copy of the “Operation Night Vision Agreement.” The trial court denied the motion and Riley’s motion for reconsideration was denied as untimely. After an untimely notice of appeal was filed, this Court denied Riley’s motion to file a belated appeal.

In his third post-conviction motion filed pursuant to CR 60.02 and RCr 10.26, Riley argued that because he has been denied access to the “Operation Night Vision Agreement” his constitutional rights were violated. He relied on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963), to assert that he was denied his right to confront and cross-examination witnesses. We now consider the trial court’s denial of his motion.

We first discuss Riley’s request for relief pursuant to RCr 10.26.

Known as the palpable error rule, it provides:

“A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.”

In *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky.App. 2009), the Court explained the purpose of the rule as follows: “RCr 10.26 is a *standard of review* for either the trial court, on a motion for new trial, or the appellate court, when reviewing an appeal from a final judgment, because of a palpable error *during trial* that resulted in manifest injustice.” *Id.* at 598. Because the rule does not provide a procedural mechanism for an independent motion, Riley cannot seek relief pursuant to RCr 10.26.

“The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion.” *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky.App. 2000). Riley’s CR 60.02 motion was his third post-conviction motion. CR 60.02 is designed to provide defendants with the opportunity to obtain special and extraordinary relief when the particular circumstances of a case justify post-judgment relief. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). However, the rule only provides relief that is not available by direct appeal or through an RCr 11.42 motion. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

The trial court did not abuse its discretion by denying Riley’s CR 60.02 motion. Riley’s claim that he was denied access to the “Operation Night

Vision Agreement” is an issue that could have been raised in his direct appeal or in his prior RCr 11.42 motion.

Based on the foregoing, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Freeland Thomas Riley, *Pro se*  
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky