

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001762-MR

DONNIE RAY CAMPBELL

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 93-CR-00090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Donnie Ray Campbell appeals from the Franklin Circuit Court's denial of his third post-conviction motion. After careful review, we affirm the holding of the Franklin Circuit Court.

We initially note that the full trial record is not before the Court at this time. However, it is well-settled that the Court must assume that the silent record

supports the decision of the trial court. *Moody v. Commonwealth*, 170 S.W.3d 393, 398 (Ky. 2005); *Davis v. Commonwealth*, 795 S.W.2d 942, 948-49 (Ky. 1990); *Commonwealth v. Thompson*, 697 S.W.2d 143, 144-45 (Ky. 1985).

Because the record is scarce, and a brief factual history is pertinent to this appeal, we will utilize the statement of facts provided to us by the Commonwealth as set forth in its brief in the direct appeal in case number 1995-CA-002268-MR:

On June 4, 1993, Todd Duvall went to Winfred Moore's home, just around the corner, for his annual open house over the Capital Expo weekend. Duvall arrived at around 6:30 p.m. and stayed about 20 minutes before heading home. Duvall was in for the rest of the evening and went to bed at between 9:00 and 10:00 p.m.

Duvall arose the next morning at around 5:00 a.m. He discovered that his dining room window was open and that the table beneath the window had been pushed aside, with the telephone taken off the hook. A drawer of a china cabinet was open and its papers were on the dining room table. Duvall's wallet, credit cards, and papers from the wallet were strewn on the floor from the dining room to the den. The pants which Duvall had worn the night before, and which he had left in his bedroom, were on the floor of the den, with forty to fifty dollars missing from the pocket. Duvall's car, which he had parked in the street the night before, was parked in his driveway, with the keys in the ignition and the right front tire completely flat and almost off the badly damaged rim. A pair of cotton gloves taken from a cabinet on Duvall's back patio were [sic] left in the car. Also found in the car was a Dairy Mart ham and cheese sandwich wrapper, an audio tape, and a cigarette wrapper. Duvall's car was on empty that morning, while it had had a quarter tank of gas the night before.

Winfred Moore's home was also burglarized on the night in question. He was having his annual open house that weekend and people had started arriving at 5:00 or 6:00 p.m. on Friday. Moore had keg beer in his garage and 30 to 40 people came and went during the evening. Moore did not serve anything else and no one brought beer in bottles or cans. [Campbell] had stopped by for thirty minutes to an hour at around 6:00 p.m., and again for about five minutes at 10:00 p.m. [Campbell] was wearing loose-fitting pants, a Confederate cap with an insignia on the front, and had borrowed a dark T-shirt from Moore. [Campbell] had been antagonistic and argumentative.

Moore's guests left at around 11:00 p.m. or [m]idnight and he went to bed. At around 2:05 a.m., Moore was awakened by someone entering his bedroom door; Moore's first impression was that it was [Campbell]. Moore let out a yell and the person ran. Moore got out of bed and gave chase but did not catch the burglar. Moore saw a partial carton of Budweiser long-neck beer bottles, which had not been there earlier, on the plant stand next to his back door.

Moore arose the next morning between 8:00 and 9:00. Nothing was missing from his house. The beer bottles, which he had seen on his porch the night before, were gone. Moore walked over to Todd Duvall's house and told Duvall and Detective Terry Harrod that he thought [Campbell] had been in his house the night before.

Investigating the area near Moore's house, Sergeant Thomas Columbia found several long-neck Budweiser beer bottles and a carton. Sergeant Columbia found a broken bottle near a short wall at the rear of the apartment building next door to Moore's house. On the other side of the wall a full bottle of beer in a carton was found. Behind the privacy fence at the rear of Moore's property an empty, intact Budweiser bottle was found. A palm print found on the empty Budweiser bottle matched [Campbell's] left palm.

Detective Harrod went to the Dairy Mart on Schenkel Lane where the owner of the store, Robert Huff, and a clerk, Marcy Bowman, identified the sandwich wrapper which was found in Duvall's car as having come from that store. Ms. Bowman had wrapped and labeled the sandwich between 10:00 and 11:30 a.m. on June 4, 1993. Detective Harrod obtained a security video tape which had recorded the activity in the store from 10:00 p.m. to 6:00 a.m. on the night in question.

David Heightchew, the Dairy Mart night clerk for the night in question, worked from 10:00 p.m. to 6:00 a.m. [Campbell] came in the store about three hours into Heightchew's shift. [Campbell] was wearing a Rebel hat with crossed rifles on the front of it, loose-fitting pants, and a dark shirt. [Campbell] bought a six pack of Budweiser beer which was in a carton and a ham sandwich. After viewing the security tape, Heightchew was able to identify a photograph of [Campbell] shown to him by Detective Harrod.

Detective Harrod viewed the security video tape and saw [Campbell] about two and one-half to three hours into the tape. Winfred Moore also viewed the security video and identified [Campbell] in it. Moore stated that [Campbell] appeared to be wearing the shirt which Moore had loaned to him on the night in question.

[Campbell] was indicted for two counts of Second Degree Burglary on August 4, 1993. [Campbell] was convicted of two counts of Second Degree Burglary and sentenced to a total of sixteen years imprisonment on August 16, 1995.

This Court affirmed the trial court's decision by opinion rendered May 2, 1997. On June 21, 2004, Campbell filed a Kentucky Rules of Civil Procedure (CR) 60.02 motion to amend or vacate his sentence on the grounds that his sentence should have run concurrently instead of consecutively. The Commonwealth responded to the motion on August 23, 2004. On September 10,

2004, the trial court denied Campbell's first CR 60.02 motion as inappropriately taken, and Campbell did not appeal. On April 22, 2010, Campbell filed his second post-conviction motion, seeking to have his sentences run concurrently instead of consecutively. The Commonwealth filed a response on March 12, 2010, and Campbell filed a reply thereafter. On July 22, 2010, the trial court denied Campbell's second post-conviction motion. Again, no appeal was taken. On August 9, 2010, Campbell filed his third post-conviction motion, seeking jail time credit. The trial court denied this motion, and Campbell now appeals.

On appeal Campbell argues that the trial court improperly denied his motion for jail time credit for time served while incarcerated at the Franklin County Jail and did not abide by the terms of Kentucky Revised Statutes (KRS) 532.120. That statute does not provide an independent basis for reopening the jurisdiction of the trial court, and Campbell's motion was not styled as a Kentucky Rules of Criminal Procedure (RCr) 11.42 motion, so presumably it was brought under CR 60.02.

The standard of review concerning a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

A careful review of the record does not indicate that the trial court's denial of Campbell's motion for jail time credit was an abuse of discretion. To be sure, "[i]f either the defendant or the Commonwealth believes the trial court's jail-time

credit calculation to be erroneous, either the Commonwealth or the defendant may timely raise that issue on direct appeal.” *Winstead v. Commonwealth*, 327 S.W.3d 479,485 (Ky. 2010). The Supreme Court in *Winstead* went on to hold that because a CR 60.02 motion is reserved for issues that could not have been raised at trial, on direct appeal, or by a motion for relief under RCr 11.42, CR 60.02 is not the proper avenue for seeking jail time credit relief. In the instant case, Campbell has had numerous bites at the apple and has failed to articulate his arguments about any jail time credit he is owed either in his direct appeal or in his two prior post-conviction motions. Accordingly, the trial court properly denied his motion for jail time credit and we decline to disturb that ruling on appeal.

For the foregoing reasons, the order of the Franklin Circuit Court denying Campbell’s motion for additional jail time credit is affirmed.

ALL CONCUR.

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