RENDERED: OCTOBER 12, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000274-MR

GLENN A. PEELER, JR. APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KEN M. HOWARD, JUDGE
INDICTMENT NO. 11-CR-00114

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, J., JUDGE: In this post-conviction appeal, Glenn A. Peeler, Jr., seeks review of the January 9, 2017, order of the Hardin Circuit Court denying his motion for Kentucky Rules of Criminal Procedure (RCr) 11.42 or Kentucky Rules of Civil Procedure (CR) 60.02 relief without an evidentiary hearing. Finding no abuse of discretion, we affirm.

For our factual recitation, we shall rely upon the opinion rendered by the Supreme Court of Kentucky in Peeler's direct appeal:

> On July 14, 2010, a masked man robbed the Fort Knox Inn at gunpoint. The robber made off with about $200 cash and fired a warning shot as he left. On July 27, 2010, a similar robbery occurred at the Roadside Inn where a masked man demanded cash and, unsatisfied with the amount received, fired a bullet and demanded more money. The clerk handed the robber an extra $400 he had in his pocket and the robber left.
>
> Police found a pair of pants discarded near the Roadside Inn that they later linked to Appellant's cousin, Eric Pleasant, by tracing the dry cleaning label affixed inside. They also recovered a bandana matching the description of the one worn during the robberies; DNA evidence matching Pleasant was found on the bandana. Police also found ammunition consistent with the guns used during the robberies at Pleasant's home.
>
> In January 2011, Appellant's ex-girlfriend, Hope Rickman, gave a statement to police implicating herself, Appellant, and Pleasant in the robberies. Pleasant initially denied any involvement and was scheduled to be tried jointly as a co-defendant with Appellant; however, at the beginning of trial on February 13, 2012, Pleasant entered a guilty plea, gave a statement implicating Appellant as the getaway driver in both robberies, and agreed to testify against Appellant. Defense counsel moved for a continuance "of at least two weeks," but the trial court rescheduled the trial for two days later.
>
> The jury ultimately found Appellant guilty of two counts of complicity to first-degree robbery and one count of PFO II. It recommended an eleven-year sentence for each robbery conviction, enhanced to twenty-two years each by virtue of the PFO II conviction,

> to run concurrently. The trial court adopted the jury's recommendation and this appeal followed.

Peeler v. Commonwealth, 2013 WL 3155853 at *1 (2012-SC-000289-MR) (Ky. June 20, 2013).

The Supreme Court affirmed, holding that the trial court did not abuse its discretion in denying his motion for a two-week continuance after his co-defendant entered a guilty plea and agreed to testify against him. Rejecting Peeler's claims that this deprived him of his due process rights to a fair opportunity to defend against the Commonwealth's accusations and to confront and cross-examine witnesses, the Court explained:

> Pleasant's testimony was similar to Rickman's and consistent with the Commonwealth's theory of the case, *i.e.*, Pleasant robbed the motels and Appellant drove the getaway car. Thus, any additional defense preparation would have been minimal because, as the trial court noted, Pleasant's statement did not substantially change the structure of the case.
>
> Moreover, Pleasant allocuted on his guilty plea which provided Appellant with a statement of his position – one that Pleasant repeated at trial. The trial court gave Appellant two days to review and incorporate this statement. Also, Appellant admits that this case was not otherwise complex, and we do not believe that it became complex by virtue of Pleasant testifying. Simply put, Appellant has failed to establish why he needed two weeks to "revise trial strategy" in an otherwise simple, straightforward case.

Peeler, 2013 WL 3155853 at *3.

Regarding the directed verdict issue, the Court stated:

> Both Rickman and Pleasant testified that Appellant initiated each robbery, dropped Pleasant off prior to the robberies, and picked him up after the robberies. There was also evidence that Appellant and Rickman were previously guests at the Roadside Inn and knew the clerk kept cash on his person. This explains why Pleasant knew to demand more money after the clerk emptied the cash register. We conclude that the eyewitness testimony of two accomplices satisfies the Commonwealth's burden of producing a "mere scintilla of evidence" to defeat a motion for directed verdict. *See Harris v. Commonwealth*, 313 S.W.3d 40, 52 (Ky. 2010) ("Under current rules, the credibility of witnesses is left to the jury to assess, *Davis v. Commonwealth*, 147 S.W.3d 709 (Ky. 2004), and uncorroborated accomplice testimony can support a conviction, *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 1999).").
>
> With respect to Appellant's argument that the inconsistencies between Rickman and Pleasant's testimony rendered it unreliable, this argument concerns "an ordinary matter of credibility, which is within the exclusive province of the jury." *Potts v. Commonwealth*, 172 S.W.3d 345, 351 (Ky. 2002) (citing *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999); *Estep v. Commonwealth*, 957 S.W.2d 191, 193 (Ky. 1997); [*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991)]). On appellate review of a motion for a directed verdict, we are concerned not with the credibility but the sufficiency of the evidence, see *id*. at 349, and we conclude the evidence was sufficient to defeat Appellant's motion.

Peeler, 2013 WL 3155853 at *4 (footnote omitted).

Lastly, the Court rejected Peeler's jury instruction argument, in which he urged the Supreme Court to join other jurisdictions in requiring a trial court to give a cautionary instruction on accomplice testimony when requested. *Id.* at *4.

On August 21, 2013, Peeler filed a *pro se* pleading, captioned "11.42 MOTION FOR INEFFECTIVE COUNSEL."[1] In the motion, he asked the circuit court to appoint counsel from the Department of Public Advocacy "to help the Defendant properly file his 11.42 for Ineffective Counsel to the Court" and for an evidentiary hearing. Peeler listed several grounds in support of his claim for relief:

> 1. That the Defendant has issues that the record will show to be true as well as some that raise material questions such as failure to Investigate and properly prepare for trial that will need to be addressed at an Evidentiary hearing. [*Fraser v. Commonwealth*, 59 S.W.3d at 448, 452-53 (Ky. 2001).]
>
> 2. That the Defendants [sic] Attorney knew their [sic] was some type of relationship between the Co-defendants Hope Rickman, his Girl friend [sic] and Eric Pleasant the Defendants [sic] Cousin that led to them using the Defendant as a fall guy for their crimes.
>
> 3. That these statements were the only Evidence that the Commonwealth had against the Defendant to use at trial to convict him and the Attorney failed to file to suppress.
>
> 4. That it was proven by Court Records that these 2 had 2 entirely different stories that they told to the jury and the Police, such as different Cars, Clothes and of what happened and his Attorney had said they were alike

[1] The motion was filed in the record for a second time on September 27, 2013.

in Content when they were not and would have been shown at a Suppression Hearing. [*Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935).]

5. That the Defendants [sic] Attorney never objected to the Commonwealth using the Expert Witnesses to prejudice the Jury once Eric Pleasant had taken a Plea Deal the day of the trial and agreed to testifie [sic] against Mr Peeler and none of these expert witnesses knowing who Mr. Peeler was, thus violating his 14th Amendment rights to confront and provide witnesses for his to [sic] defense.

6. The Defendants [sic] own Attorney prejudice [sic] the Jury against him with his Ex-girlfriends [sic] Hope Rickmans [sic] testimony and the poor way she handled it before the Jury.

7. That had his Attorney objected properly to the fact that their [sic] was no evidence against the Defendant except these Statements and had them suppressed their [sic] would not have been a trial.

8. That the Defendants [sic] Attorney failed to object to one of the Female Jurors who was the Defendants [sic] 5th grade teacher and was picked for the Jury after the Defendant had ask [sic] she . . . be stricken.

9. That the Attorney failed to ask for a lesser Charge [to] be included in the Jury Instructions.

10. That the Defendant has limited resources at the prison such as 1 typewriter for 1000 Inmates to do legal work, and little access to case laws as they only allow around 2 hours a day after a person signs up for 1 computer to view them.

In his prayer for relief, Peeler asked the trial court to appoint counsel, who could then supplement the RCr 11.42 motion with caselaw, records, and video logs to prove the facts stated in the motion to establish ineffective counsel.

In an order entered October 14, 2013, the circuit court denied Peeler's motion for RCr 11.42 relief, finding no merit in his motion. Many of the grounds lacked sufficient specificity or were too vague to form the basis of his requested relief. Peeler attempted to appeal this decision, but his notice of appeal was untimely filed. This Court did not find Peeler had shown sufficient cause to excuse the late filing of his notice of appeal or that he had satisfied the criteria for a belated appeal. Therefore, the appeal was dismissed by order entered March 28, 2014.

On August 10, 2016, Peeler, this time represented by counsel, filed a motion for relief pursuant to RCr 11.42 and CR 60.02. In this motion, Peeler again argued that he had received ineffective assistance of counsel depriving him of his right to a fair trial. The grounds were:

- Failing to seek lesser included offenses in the jury instructions;
- Failing to seek jury instructions that included the requirement that the jury find him guilty on every element of the crime;
- Problems related to the revoked plea agreement;
- Failing to make an adequate record to support the motion to continue the trial;

- Failing to fully question one of the jurors, who was Peeler's former schoolteacher and who ultimately sat on the jury; and

- Appellate counsel's failure to raise any of these issues in the direct appeal.

Peeler included a memorandum in support of his motion. In addition, he filed an affidavit from his trial counsel, in which she addressed the guilty plea proceedings, the motion for a continuance, and the jury instructions. Based on the problems she identified, trial counsel did not believe that the jury instructions were correct or that Peeler had received constitutionally adequate advice during the guilty plea process. Peeler requested an evidentiary hearing, a new trial, or the entry of a ten-year sentence in accordance with the initial plea offer for first-degree robbery. Peeler filed a verification of the RCr 11.42 motion, the memorandum, and appendix two days later.

On August 24, 2016, Peeler moved to amend and supplement his motion for relief pursuant to RCr 11.42 and/or CR 60.02. The new ground was based upon allegations of perjury by witness Hope Rickman. Peeler alleged that she incorrectly stated and contradicted other testimony that he and Pleasant had obtained the firearm together, as opposed to Pleasant having obtained it alone from a third party. Rickman also denied that she had received any promises for her testimony, when an August 24, 2016, email from her former trial attorney to Peeler's counsel stated that she and the Commonwealth had agreed on probation

conditioned upon her testimony. Peeler argued that his trial counsel failed to thoroughly question Rickman on this issue. He stated that five days after Peeler's trial, Rickman entered a guilty plea and received a probated sentence, and that this constituted fraud and prosecutorial misconduct in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

The Commonwealth filed a response to Peeler's motion and supplement, arguing that the present motion was procedurally barred as a successive motion pursuant to RCr 11.42(3) and that, because the original motion was labeled as a motion for RCr 11.42 relief, the court did not need to advise Peeler of the consequences of filing the motion pursuant to *McDaniel v. Commonwealth*, 495 S.W.3d 115 (Ky. 2016). Peeler also failed to specify relief under any particular ground set forth in CR 60.02 and failed to seek relief in a timely fashion under this Rule. The Commonwealth went on to address the specific grounds raised in Peeler's pleadings.

In his reply, Peeler argued that his current motion was not procedurally barred because the 2013 motion was not for direct relief, but merely sought the appointment of counsel to help him in his post-conviction proceedings. In addition, he argued that the 2013 motion was premature because his sentence was not yet final.

In an order entered January 9, 2017, the circuit court denied Peeler's motion without an evidentiary hearing. The court held that Peeler's 2016 RCr 11.42 motion was successive and that his CR 60.02 motion was procedurally time-barred. The court rejected Peeler's argument, noting that he had unsuccessfully attempted to appeal the first order to this Court. Turning to Peeler's request for CR 60.02 motion for relief related to Rickman's allegedly false testimony, the court determined that this fell under CR 60.02(c), for which there is a one-year limitations period. As to the prosecutorial misconduct aspect of this allegation, the court determined that this fell under CR 60.02(f), which requires a motion to be filed in a reasonable amount of time. The court held that the three-year delay in seeking relief on this ground was not reasonable and that the motion was not timely filed. Even if Peeler had been timely in seeking such relief, the court found no merit in the perjury argument as the outcome of the trial would not have been different. Peeler had not been convicted solely on Rickman's testimony; rather, Pleasant had also testified against him regarding his role in the robberies. Therefore, the circuit court found no merit in Peeler's motion and denied him relief. This appeal now follows.

For his first argument, Peeler contends his RCr 11.42 motion was not a successive one and that the circuit court failed to address the elements set out in *McDaniel, supra*, when considering the 2013 motion. The Commonwealth argues

that Peeler's reliance on *McDaniel* is misplaced and that the circuit court properly found that his second motion was successive.

RCr 11.42(3) provides that a defendant must state all grounds for relief in his RCr 11.42 motion and is barred from bringing successive motions seeking relief under this Rule: "The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding." *McDaniel*, *supra*, explained this critical aspect of the Rule:

> In general, RCr 11.42 gives a person under sentence one, and only one, opportunity to "state all grounds for holding the sentence invalid." RCr 11.42(3). Generally, a second such motion is not allowed. *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (describing Kentucky's "organized and complete" set of procedures "for attacking the final judgment of a trial court in a criminal case"); *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997) (affirming the denial of a successive RCr 11.42 motion). Thus, characterizing the defendants' motions as RCr 11.42 motions would likely preclude the defendants from invoking RCr 11.42 "again" to attack their judgments on the ground, say, of ineffective assistance of counsel, which is perhaps the most common use of RCr 11.42.

McDaniel, 495 S.W.3d at 121-22 (footnote omitted). In order to protect *pro se* defendants, the Supreme Court added the following requirement for trial courts:

> We . . . invoke our supervisory power to hold, that before a trial court characterizes a *pro se* litigant's unlabeled motion as an "11.42" or recharacterizes a motion the *pro se* litigant has labeled some other way as

> an "11.42," it must advise the litigant that it is doing so, must warn the litigant about the possible subsequent-motion consequences, and must give the litigant an opportunity to withdraw or to amend his or her motion. If *pro se* litigants are not so admonished, the subject motion cannot later be used against them as a bar to a "subsequent" motion under RCr 11.42. *Accord*, *People v. Shellstrom*, 216 Ill.2d 45, 295 Ill.Dec. 657, 833 N.E.2d 863 (2005) (adopting a *Castro*-like admonition rule for *pro se* petitions deemed to come within the state's Post-Conviction Hearing Act); *Dorr v. Clarke*, 284 Va. 514, 733 S.E.2d 235 (2012) (requiring a *Castro*-like admonishment before recharacterization of a *pro se* pleading as a petition pursuant to the state habeas corpus statute); *and see Barker v. Commonwealth*, 379 S.W.3d 116 (Ky. 2012) (discussing this Court's supervisory power over the judicial branch and applying that power to require that probationers be admonished, before testifying at a revocation hearing, of the extent to which their testimony could be used against them at a subsequent criminal trial).

McDaniel, 495 S.W.3d at 124. The Court summarized its holding as follows:

> Trial courts may characterize or recharacterize a *pro se* litigant's pleading as an initial "11.42," to spare the litigant, for example, from the summary consequences of an inappropriate label, or simply to clarify for all concerned the procedural context and lay of the land. Before the trial court does so, however, it must advise the litigant of its intention, warn the litigant that the characterization will likely make it harder for the litigant to bring a subsequent motion under that Rule, and allow the litigant an opportunity to withdraw the pleading or to supplement it.

Id. at 128.

In the present case, we agree with the Commonwealth that the circuit court did not commit any error with relation to its ruling on Peeler's 2013 motion. First, *McDaniel* had not yet been rendered, and therefore the protections put in place by the Supreme Court had not taken effect. Second, Peeler clearly labeled his motion as one for RCr 11.42 relief. The caption was not blank, and the circuit court did not take it upon itself to caption the motion because it already had one. Also, Peeler made several substantive claims, albeit brief, in his motion. Therefore, the court was correct in treating the motion as a substantive one rather than one simply seeking appointment of counsel for a post-conviction proceeding. Third, Peeler's responses in his untimely appeal did not reflect that he was contesting the court's decision to rule on the merits of the motion. All of Peeler's arguments related to the nature of the 2013 motion, including whether it was ambiguous or unverified, could and should have been raised in his first appeal. Accordingly, we find no merit in Peeler's argument that his 2016 RCr 11.42 motion was not successive, and we shall not address any of his arguments related to the merits of his request for RCr 11.42 relief, including his claim of ineffective assistance of appellate counsel.

Next, we shall consider Peeler's argument that he is entitled to relief under CR 60.02 related to the testimony of witness and co-defendant Hope Rickman. Peeler contends that Rickman committed perjury when she denied that

she had received any promises or had made any deals related to her testimony in his trial. The circuit court found that Peeler's claim was untimely under both CR 60.02(c) and (f), and Peeler argues that the circuit court should have held an evidentiary hearing to determine whether his claim was timely under subsection (f). Peeler does not contest the circuit court's ruling that his attempt to seek relief under subsection (c) was untimely, meaning that our review is limited to whether he is entitled to relief under subsection (f).

CR 60.02 provides that a court may grant a party relief from a final judgment upon one of the following grounds:

> (a) mistake, inadvertence, surprise or excusable neglect;
>
> (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02;
>
> (c) perjury or falsified evidence;
>
> (d) fraud affecting the proceedings, other than perjury or falsified evidence;
>
> (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (f) any other reason of an extraordinary nature justifying relief.

In *Commonwealth v. Spaulding*, 991 S.W.2d 651, 657 (Ky. 1999), the Supreme Court of Kentucky held that "a criminal conviction based on perjured testimony can be a reason of an extraordinary nature justifying relief pursuant to CR 60.02(f) and subject to the reasonable time limitation of the rule."

A CR 60.02 motion "shall be made within a reasonable time," and the motion must be made "not more than one year after the judgment" for grounds (a), (b), and (c). *Id*. Under CR 60.02(f), "a judgment may be set aside for a reason of an extraordinary nature justifying relief from the operation of the judgment. However, because of the desirability of according finality to judgments, this clause must be invoked only with extreme caution, and only under most unusual circumstances." *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959). "The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion. For a trial court to have abused its discretion, its decision must have been arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Grundy v. Commonwealth*, 400 S.W.3d 752, 754 (Ky. App. 2013) (internal citations omitted). With this standard in mind, we shall review Peeler's argument.

The Commonwealth cites to *Stoker v. Commonwealth*, 289 S.W.3d 592 (Ky. App. 2009), to argue that the circuit court did not abuse its discretion in finding that Peeler's CR 60.02 motion was untimely filed approximately three

years after his judgment of conviction was finalized upon the conclusion of his direct appeal.

> Relief may be granted under CR 60.02(f) for any reason of an extraordinary nature justifying relief. A CR 60.02(f) motion must be made within a reasonable time. *See* CR 60.02 and *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). Further, the trial judge may properly consider, in granting or denying a CR 60.02 motion, whether the passage of time between judgment and motion was reasonable in light of the fading memories of witnesses. *Harris v. Commonwealth*, 296 S.W.2d 700 (Ky. 1956) and *Gross* at 858. An evidentiary hearing is not required to assess the reasonable time restriction inherent in CR 60.02 motions as such is left to the discretion of the Court. *Gross* at 858.

Stoker, 289 S.W.3d at 596.

In the present case, the circuit court concluded that there was "no reason why these allegations of perjury could not have been discovered much sooner than August of 2016." The gist of Peeler's argument was that Rickman's testimony at the 2012 trial that she had not received any promises for her testimony from the Commonwealth constituted perjury because she entered a guilty plea and received a probated sentence five days later. Peeler's counsel, F. Todd Lewis, did not discover this until 2016, when he asked and received an answer from Rickman's trial attorney, Joshua Cooper, regarding a recollection that they had perhaps reached an agreement of probation conditioned upon her testimony at Peeler's trial. Peeler offers little in his brief to justify the several year delay in

seeking CR 60.02 relief in this case, other than his assertion that "there must be leeway when we are talking about perjury on *the* fundamental impeachment point involving this witness, revealed only days before." We are inclined to give Peeler the benefit of the doubt and hold that the circuit court abused its discretion in finding the motion for CR 60.02(f) untimely. But this does not end our inquiry.

Although the circuit court found Peeler's CR 60.02 motion to be procedurally barred as untimely filed, it considered the merits of Peeler's motion for relief. "[T]he burden remains on the defendant to show both that a reasonable certainty exists as to the falsity of the testimony and that the conviction probably would not have resulted had the truth been known before he can be entitled to such relief." *Spaulding*, 991 S.W.2d at 657 (footnote omitted). The court concluded that there was no actual prejudice, even assuming the perjury allegation to be true. The court considered *Giglio*, *supra*, and *Spaulding*, *supra*, both cited by Peeler, and determined that "the outcome of the trial would have been the same even if the truth had been known." The court recognized that Peeler had not been convicted solely on Rickman's testimony, as Pleasant had also testified against him, and that Rickman had testified at trial that her own case remained pending, "leaving the inference that her testimony at Peeler's trial would likely have an [affect] on her own case. Thus, the impact of her testimony was likely lessened." Finally, the court found no merit in Peeler's argument that without Rickman's testimony, there

would not have been any testimony establishing he was aware a gun was being used in the commission of the burglary. Citing *Smith v. Commonwealth*, 370 S.W.3d 871, 877-78 (Ky. 2012), the court recognized that "an accomplice can be held liable even where he has no knowledge of a deadly weapon being used in the commission of the crime."

We agree with the Commonwealth the circuit court did not abuse its discretion in concluding that Peeler's claim lacked merit. The e-mail correspondence between the two attorneys that formed the basis of Peeler's argument that Rickman's testimony constituted perjury reads as follows:

- (from attorney Lewis to attorney Cooper, August 22, 2016, 10:28 am): "Hey, Josh thanks for the call this morning. . . . Again, just trying to figure out generally what Hope was promised by the Commonwealth before she testified in the trial (against Glenn Peeler, my current client), and to determine if it was the same thing she ultimately pled to about a week after the trial. I may have the plea sheets I can send you."
- (from attorney Cooper to attorney Lewis, August 23, 2015, 2:58 pm): "I went back thru my file today, and I don't have any notes about my discussion with the commonwealth. I do have a couple letters I sent to her stating I had requested an offer, and the prosecutor, England, said one would be coming soon, and that Det. Sloan had indicated she had spoken to

England on her behalf, to ask for a lenient offer. I am racking my brain, and other than a general sense that they agreed to probation on condition she testify I don't have any specific recollection."

- (from attorney Lewis to attorney Cooper, August 23, 2016, 3:00 pm): "I appreciate your help. Agreed to probation for testimony, but no details beyond that it sounds like."
- (from attorney Cooper to attorney Lewis, August 24, 2016, 9:30 am): "Yes, I couldn't swear to it, because I can't remember any of the specifics, but that is my general recollection."

We question whether this e-mail exchange constitutes a sufficient basis for Peeler's perjury allegation.

Even if Rickman's testimony were deemed sufficient to meet the *Spaulding* test, Rickman's testimony as to Peeler's knowledge of the gun was immaterial. In *Smith*, 370 S.W.3d at 877, the Supreme Court of Kentucky confirmed its holding in *Skinner v. Commonwealth*, 864 S.W.2d 290, 299 (Ky. 1993), that "an accomplice may be held liable for a confederate's aggravated offense, although having no knowledge of the aggravating circumstance." (Internal quotation marks omitted). *See also Conyers v. Commonwealth*, 530 S.W.3d 413, 422 (Ky. 2017), *citing Smith, supra* ("The *mens rea* for complicity, we have held, is that the complicitor intend the principal's commission of the basic

offense. If he does so and in addition aids or encourages the principal's act . . . then he exposes himself to liability for whatever degree of the offense the principal actually commits."). Because the jury found Peeler to be complicit in Pleasant's first-degree robbery, he was guilty of the same offense, including any aggravated offenses. Therefore, Richman's testimony as to Peeler's knowledge of the gun ultimately does not matter for purposes of his conviction.

For the foregoing reasons, the Hardin Circuit Court's January 9, 2017, order denying Peeler's motions for RCr 11.42 and CR 60.02 relief is affirmed.

TAYLOR, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN RESULT ONLY.

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