

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001008-MR

GROVER C. GABBARD

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 02-CR-00013

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: KELLER, NICKELL, AND STUMBO, JUDGES.

KELLER, JUDGE: Grover C. Gabbard (Gabbard) appeals from the circuit court's denial of his Kentucky Rule of Civil Procedure (CR) 60.02 motion to vacate and the court's denial of his motions to appoint counsel and for an evidentiary hearing. For the following reasons, we affirm.

FACTS

We take our recitation of the underlying facts from the Supreme Court of Kentucky's opinion affirming Gabbard's conviction.

Appellant's estranged wife, Phyllis Gabbard, disappeared on January 22, 2000. Officers canvassed McLean County in search of the victim and the victim's vehicle. On February 3, 2000, Ms. Gabbard's automobile was pulled from the Green River and her body was found inside. The autopsy revealed that she had suffered two gunshot wounds to the back. Despite numerous inconsistencies in Appellant's statements to the police, no useful evidence was obtained and the investigation stalled for about two years. At that point, two of Appellant's associates-Melvin Edmonds and Gary Hunt-made statements to the police implicating him in the murder. Hunt initially contacted police, stating that Edmonds had once revealed some sort of involvement in Ms. Gabbard's death. Edmonds later revealed that Appellant came to his home on the morning of January 22, 2000, and asked that Edmonds drive him out to the river. According to Edmonds, he drove to the guardrail where Appellant exited the car and proceeded alone to the bank of the river. Edmonds thereafter heard two gunshots. Appellant was indicted by a McLean County grand jury on May 2, 2002, on the charges of murder and persistent felony offender in the second degree.

Gabbard v. Commonwealth, 2002-SC-1091-MR, 2005 WL 1185255 (Ky. May 19, 2005). A jury convicted Gabbard of murder and sentenced him to life imprisonment.

Following his conviction, Gabbard filed a Kentucky Rule of Criminal Procedure (RCr) 11.42 motion asserting ineffective assistance of counsel, arguing, in part, that counsel failed to effectively impeach the credibility of two of the Commonwealth's witnesses, Melvin Edmonds and Gary Hunt. After reviewing the

record, this Court concluded that Gabbard failed to meet his burden of proving that counsel had been ineffective. In doing so, this Court stated that "[t]he record shows that Gabbard's counsel questioned Hunt and Edmonds extensively regarding their deals with the Commonwealth and duly revealed that both of them are convicted felons. He made it clear that they had strong motives to cooperate with the prosecution and argued forcibly that they were not to be believed." *Gabbard v. Commonwealth*, 2005-CA-001782-MR, 2007 WL 289156, *2 (Ky. App. Feb. 2, 2007).

Gabbard then filed his CR 60.02 motion. In support of that motion, Gabbard stated that two witnesses came forward with evidence regarding his case. According to Gabbard, Debbie Dennison

stated that sometime after Phyllis Gabbard's death, she was cooking meth with Gary Hunt and Melvin Edmonds in an outbuilding on Melvin's property when they had a conversation about the murder. Ms. Dennison stated that Melvin and Gary started talking about Phyllis and Hunt said the police would never find her because he and [sic] already put one car in the river and it had never been found. Ms. Dennison said that either Edmonds or Hunt said the murder weapon was in the Green River and would not be found either. Ms. Dennison stated that Phyllis was a "pill head" who used oxycontin, lortab, and valium. Phyllis Gabbard had called Hunt and Edmonds on at least two occasions demanding they give her pills and money or she was going to turn them in to the police. Ms. Dennison said that Hunt and Edmonds set up a meeting with Phyllis and killed her when she arrived. Ms. Dennison doesn't know who pulled the trigger but suspects it was Hunt. Ms. Dennison also added that she is scared of Gary Hunt and since she moved back to Owensboro, Kentucky she has been told at least twice "by people" that it was "not a smart idea to testify." Ms.

Dennison ended her conversation by saying she knows Grover C. Gabbard is innocent.

The second witness, Vanessa Edge Eaves, claims she was really "strung out" during that time period in her life. Ms. Eaves also remembers Gary Hunt talking about putting more than one car in the Green River. Ms. Eaves said Melvin Edmonds frequently offered her drugs in exchange for sex but she never took him up on the offer and that she is more scared of Gary Hunt because he is more likely to have killed Phyllis Gabbard.

Gabbard argued that these statements by Dennison and Eaves revealed that Hunt and Edmonds had committed perjury.

We note that Gabbard did not attach any affidavits or other statements by Dennison or Eaves to his motion. Furthermore, Gabbard did not state: whether he spoke directly with Dennison and Eaves or if he obtained the information in his motion from a third person or persons; when the alleged conversations among Dennison, Eaves, Edmonds, and Hunt took place; or why it had taken more than ten years after the murder for Dennison and Eaves to come forward.

Based solely on the record, the circuit court denied Gabbard's motion. In doing so, the court found that Gabbard failed to submit any verified documents or affidavits to support his argument. The court also found that the statements made by Gabbard would, at most, "consist of impeachment evidence" and would not constitute evidence "of such decisive value or force to suggest that [Gabbard's] judgment of conviction should be set aside." We set forth additional facts as necessary below.

STANDARD OF REVIEW

“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); *see also Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002); and *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). To amount to an abuse of discretion, the trial court’s decision must be “arbitrary, unreasonable, unfair, or unsupported by sound legal principals.” *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Absent a “flagrant miscarriage of justice”, the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

ANALYSIS

With the above standard in mind, we address each issue raised by Gabbard in turn.

1. Entitlement to Counsel

Gabbard argues that he is a needy person who is being detained under conviction of a serious crime and, pursuant to Kentucky Revised Statute (KRS) 31.110, the circuit court should have provided him with counsel to assist him with prosecution of his CR 60.02 claim. However, in *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983), the Supreme Court of Kentucky held that the legislature did not intend to extend the right to counsel to indigent defendants in CR 60.02

proceedings. While we recognize that the facts in *Gross* differ from the facts herein, the Court's broad holding regarding the application of KRS 31.110 to CR 60.02 is clear and we are constrained to follow that holding. Rule of the Supreme Court 1.030(8)(a). Therefore, we discern no error in the trial court's denial of Gabbard's motion for appointment of counsel.

2. Perjury

Gabbard argues that the information he sets forth in his unverified CR 60.02 motion establishes that Edmunds and Hunt gave perjured testimony at trial. At the outset, we note that, for Edmunds and Hunt to have committed perjury, they must have made a materially false statement at trial. KRS 523.010, *et seq.*; *see also Commonwealth v. Stallard*, 958 S.W.2d 21, 24-25 (Ky. 1997). A "[m]aterial false statement" [is] any false statement, regardless of its admissibility under the rules of evidence which could have affected the outcome of the proceeding. Whether a falsification is material in a given factual situation is a question of law." KRS 523.010.

Having noted the preceding, we review the trial testimony of Edmonds and Hunt to determine whether the allegations in Gabbard's motion, if true, support his contention that their testimony was perjured. Edmonds testified, in pertinent part, that he drove Gabbard to the river. Gabbard got out of the car and walked toward the river. Edmonds, who remained in the car, heard two gunshots approximately fifteen minutes after Gabbard got out of the car. Gabbard returned to the car

fifteen to twenty minutes after Edmonds heard the shots and said that he had taken "care of it."

As to Mrs. Gabbard, Edmonds testified that he did not have much contact with her because she disapproved of his drinking. He was not asked whether he ever supplied any drugs to Mrs. Gabbard or if he knew whether Mrs. Gabbard used illegal drugs.

When we compare Edmonds's testimony with Gabbard's statement regarding what Dennison and Eaves would testify to, we find nothing to support Gabbard's claim of perjury. According to Gabbard, Dennison made a conclusory statement that Hunt and Edmonds set up a meeting with Mrs. Gabbard and that Hunt likely killed her. However, Dennison does not set forth how she came to this conclusion, nor does she attribute any statements regarding Mrs. Gabbard's death directly to Edmonds. Furthermore, the statement Dennison alleges Edmonds might have uttered, that the murder weapon was in the Green River, does not contradict any of Edmonds's trial testimony.

Eaves's statement, that Edmonds offered her drugs in exchange for sex, has nothing to do with Edmonds's testimony at trial. Furthermore, whether Eaves's testimony regarding Edmonds would be admissible is a tenuous proposition at best. Therefore, nothing in the purported statements by Dennison and Eaves would establish that Edmonds gave perjured testimony.

Hunt testified that his car was stolen from a Madisonville hospital parking lot in 1989 or 1990. After the theft, he contacted police and filed a claim with his

insurance company. The police discovered that car in the river when they found Mrs. Gabbard's car.

Regarding Mrs. Gabbard's death, Hunt testified that he overheard Gabbard tell Edmonds that they had nothing to worry about as long as Edmonds "kept his mouth shut." He also testified that Edmonds told him about driving Gabbard to the river and that Gabbard had told Edmonds that he was going to either break Mrs. Gabbard's neck or kill her.

As with Edmonds's testimony, nothing in the statements by Dennison and Eaves directly contradicts Hunt's testimony regarding Mrs. Gabbard's death. Dennison's and Eaves's statements that Hunt said he had "put one car in the river" might have brought into question the veracity of Hunt's stolen car story. However, Gabbard has not shown how this testimony, if admissible, would have affected the outcome of the proceedings. Therefore, Gabbard has failed to establish that Hunt gave perjured testimony.

3. Entitlement to Hearing

A defendant is only entitled to an evidentiary hearing on a CR 60.02 motion if he has affirmatively alleged facts that, if true, would justify the extraordinary relief sought. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). As noted above, the facts alleged by Gabbard, even if true, would not entitle him to the relief sought. Therefore, the trial court correctly denied his motion for a hearing.

CONCLUSION

Gabbard has failed to establish that, even if true, the alleged statements by his newly discovered witnesses would have contradicted trial testimony or affected the outcome at trial. Therefore, we discern no abuse of discretion or error in the trial court's denial of Gabbard's CR 60.02 motion and affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Rachelle N. Howell
Melinda Brooke Buchanan
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway,
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky