

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002171-MR

HARGUS WAYNE GABBARD

APPELLANT

v.

APPEAL FROM LINCOLN CIRCUIT COURT  
HONORABLE ROBERT E. GILLUM, JUDGE  
ACTION NO. 96-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Hargus Wayne Gabbard appeals the order of the Lincoln Circuit Court denying his motions to vacate his conviction pursuant to RCr 11.42 and CR 60.02. On September 13, 1996, Gabbard was convicted following a jury trial of assault in the second degree and of being a persistent felony offender in the second degree. His conviction was affirmed by this Court on September 4, 1997.

Gabbard filed a CR 60.02 motion attacking his conviction in December 2002, alleging ineffective assistance of

counsel and newly discovered evidence in the form of a statement from a witness. He filed a RCr 11.42 motion on August 8, 2003 on the same grounds. The court below disposed of the motions in a single order. The court found that there was no showing of due diligence to locate the absent witness before time expired to move for a new trial. The court further stated that the statement from the absent witness, if as described, was not so conclusive of lack of guilt that it would with reasonable probability have made a difference in the verdict. The court found that Gabbard did not meet the standards for relief under the Rules and denied the motions.

On appeal, appellant raises the same arguments with regard to the witness statement. Gabbard was accused of committing the offense of assault in the second degree by striking his child with a piece of firewood, causing physical injury. The statement in question was purportedly obtained by an investigator in the Department of Public Advocacy. Gabbard states that the absent witness, Joyce Proctor, lived with him and was present at the time of the incident. She allegedly said that she did not recall seeing Gabbard whip his son with anything other than his hand, although she thought Gabbard whipped his child too much and too hard. Gabbard believes Proctor's statement refutes his conviction for assault in the

second degree because it shows he did not use a dangerous instrument.

First, we agree that Gabbard is not entitled to relief under CR 60.02(b). That rule states that motions based on newly discovered evidence cannot be brought more than one year after the judgment was entered. The trial court correctly determined that the motion was untimely.

Next, we agree that Gabbard's RCr 11.42 motion was also brought too late. The rule requires that a motion under the Rule shall be filed within three years after the judgment became final. Gabbard's RCr 11.42 motion was filed more than three years after the judgment was final. The Rule provides an exception if the motion alleges and the movant proves that the facts upon which the claim is predicated were unknown to him and could not have been ascertained by due diligence. RCr 11.42(10)(a). Gabbard does not show that he could not have known the information he raises on appeal through the exercise of due diligence.

We also agree with the court that Gabbard could not prevail on the ineffective assistance claim because this evidence was not of such import that it would have changed the verdict. The witness' statement did not indicate that she was present at all times and did not establish that he could not have used an object to strike the child when she was not

present. The "new" evidence was contradicted at trial by the physical evidence of photographs of the injuries and by Gabbard's admission to police that he beat the child with a piece of firewood. The RCr 11.42 motion was properly denied.

For the foregoing reasons we affirm the order of the Lincoln Circuit Court which denied appellant's RCr 11.42 and CR 60.02 relief.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hargus Wayne Gabbard, Pro Se  
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BRIEF FOR APPELLEE:

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