

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002394-MR

SCOTTY ALLEN GABBARD

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 98-CR-00157

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Scotty Allen Gabbard, pro se, has appealed from an order of the Bell Circuit Court entered on October 15, 2003, which denied his RCr<sup>1</sup> 11.42 motion. Having concluded that the trial court correctly denied the motion as untimely, we affirm.

Gabbard was indicted on September 28, 1998, by a Bell County grand jury. The indictment charged him with rape in the

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

first degree<sup>2</sup> and burglary in the first degree.<sup>3</sup> At Gabbard's arraignment on October 5, 1998, upon defense counsel's motion, the trial court ordered Gabbard committed for a psychiatric examination at the Kentucky Correctional Psychiatric Center, for the purpose of determining if Gabbard was competent to stand trial.

At a pretrial conference on March 18, 1999, the record indicates that while Gabbard was found competent to stand trial, he could not hear and needed to be provided with a hearing aid. On August 10, 1999, the trial court ordered that Gabbard be transported to an appointment for the purpose of receiving a hearing aid.

The Commonwealth provided discovery to defense counsel on August 11 and 23, 1999. Discovery included witness interviews (including the victim), Gabbard's statement and a waiver of rights, and forensic laboratory results. On August 23, 1999, the Commonwealth made the following offer on a plea of guilty: 20 years on count one, rape in the first degree, and ten years on count two, amended to burglary in the second degree<sup>4</sup>, to run concurrently with each other and consecutively with any sentence received under Bell County Indictment No. 99-

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<sup>2</sup> Kentucky Revised Statutes (KRS) 510.040.

<sup>3</sup> KRS 511.020.

<sup>4</sup> KRS 511.030.

CR-00079. Gabbard signed a standard motion to enter a guilty plea indicating that by pleading guilty he gave up his right against self-incrimination, his right to a speedy and public trial, his right to cross examine witnesses, his right to produce evidence in his favor, and his right to appeal.

At a hearing in open court on August 23, 1999, the following colloquy occurred between the trial court and Gabbard:

THE COURT: Mr. Gabbard?

GABBARD: Yeah.

THE COURT: Can you hear me okay?

GABBARD: Oh, yeah.

THE COURT: Did that hearing aid help you any?

GABBARD: Yeah, they got me one.

THE COURT: Yeah. The Judge got you arrangements made over there for them to fix you up with a hearing aid. They did a pretty good job for you, didn't they?

GABBARD: Oh, yeah.

. . .

THE COURT: It is my understanding, from your attorney and the Commonwealth Attorney, that you want to enter a plea of guilty?

GABBARD: Yes, sir. I plead guilty to the rape charge.

On September 13, 1999, Gabbard appeared before the trial court for sentencing and affirmatively indicated that he had his hearing aid. The transcript of the sentencing hearing demonstrates that Gabbard was able to hear and understand the proceedings:

VAN DOREN: Where is your hearing aid?

GABBARD: It is here.

VAN DOREN: Oh, you've got it, okay.

. . .

VAN DOREN: Your emergency number is your brother George, right?

GABBARD: Yeah.

VAN DOREN: Is that your Social Security number?

GABBARD: Yeah.

On September 13, 1999, the trial court entered its final judgment, sentencing Gabbard to 20 years' imprisonment for his conviction for rape in the first degree and ten years' imprisonment for his conviction for burglary in the second degree. The trial court ordered both sentences to run concurrently with each other, but consecutively with any sentence Gabbard received under Bell County Indictment No. 99-CR-00079.

On October 13, 2003, four years and one month after the entry of final judgment, Gabbard filed a motion for

enlargement of time to file an RCr 11.42 motion. As a basis for this motion, Gabbard alleged that his deafness, his severe speech impediment, and his inability to read and write had prevented him from meeting the three-year time period required by RCr 11.42. Gabbard filed simultaneously with the enlargement motion his RCr 11.42 motion, which asserted due process and equal protection violations and an ineffective assistance of counsel claim. Gabbard alleged that his trial counsel's failure to secure the appointment of an interpreter during his guilty plea and sentencing proceedings rendered him incapable of understanding the nature of those proceedings. Gabbard also requested an evidentiary hearing and appointment of counsel.

On October 15, 2003, Gabbard's motion for enlargement of time to file his RCr 11.42 motion was denied by the trial court as untimely pursuant to RCr 11.42(10). The trial court concluded that the motion had not been filed within three years of the final judgment, and that it did not either allege or meet either of the two exceptions for filing the motion outside of the three-year period. This appeal followed.

In his brief on appeal, Gabbard raises the same arguments he raised before the circuit court. RCr 11.42(10) states in relevant part as follows:

Any motion under this rule shall be filed within three years after the judgment

becomes final, unless the motion alleges and the movant proves either:

- (a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or
- (b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

It is undisputed that Gabbard's final judgment and sentence was entered on September 13, 1999. Gabbard's motion for enlargement of time to file his RCr 11.42 motion, and his RCr 11.42 motion were not filed until October 13, 2003. Since the motion was filed more than three years after the sentence was entered, RCr 11.42(10) bars Gabbard's motion as untimely.<sup>5</sup> Gabbard concedes the untimeliness of his motion, but he claims he should nevertheless be allowed to file his motion under one of the exceptions to the rule. However, we conclude that Gabbard does not qualify for any exception. The exception provided in RCr 11.42(10)(a) is inapplicable since Gabbard knew of his alleged disabilities at the time of the original proceedings. He knew he needed a hearing aid and he was in fact provided with a hearing aid during the proceedings. Thus, his alleged hearing disability was addressed by the trial court, and Gabbard does not meet the exception outlined under RCr

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<sup>5</sup> Palmer v. Commonwealth, Ky.App., 3 S.W.2d 763, 764 (1999).

11.42(10)(a). The exception provided in RCr 11.42(10)(b) is also inapplicable since Gabbard does not identify or base his claim upon the violation of any newly ascertained constitutional right which was established outside of the three-year limitations period.

Regardless of the untimeliness of Gabbard's motion, however, we note that Gabbard has failed to establish that but for the alleged deficiency in the proceedings, the outcome would have been different, i.e., that he would not have entered guilty pleas, but would have instead insisted on going to trial. Furthermore, he has failed to demonstrate that his trial counsel made errors so egregious that the representation fell outside the range of professionally competent assistance, or that the alleged deficient performance prejudiced his defense to the extent that there is a reasonable probability that the outcome would have been different.<sup>6</sup>

In order to show actual prejudice in the context of a guilty plea, a defendant must demonstrate that there is a reasonable probability that but for counsel's errors, he would not have pled guilty, but would have instead insisted on going

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<sup>6</sup> Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Gall v. Commonwealth, Ky., 702 S.W.2d 37, 39 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986).

to trial.<sup>7</sup> Gabbard's own testimony refutes this argument. The record demonstrates that he understood the proceedings and the questions asked of him. Furthermore, the record shows that Gabbard admitted committing the offenses with which he was charged. Despite Gabbard's assertions, the record is clear that Gabbard had his hearing aid, that he could hear the proceedings, and that he wanted to plead guilty. He admitted that he raped the victim and that in doing so, he entered her house armed with a plastic knife. Gabbard also answered affirmatively that he knew he had the right to a jury trial, the right to counsel, and the right to appeal if convicted, but that he nonetheless wanted to plead guilty. Thus, even if timely, Gabbard's RCr 11.42 motion fails on its merits.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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<sup>7</sup> Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Sparks v. Commonwealth, Ky.App., 721 S.W.2d 726, 727-28 (1986).