

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002670-MR

GERALD GIBBINS

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 92-CR-00036

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

TACKETT, JUDGE: Gerald Gibbins appeals from an order of the Whitley Circuit Court denying his motion, pursuant to Kentucky Rule of Civil Procedure (CR) 60.03, for relief from a judgment that he is guilty of murder and first-degree robbery. Gibbins argues that he has demonstrated sufficient evidence from which the trial court could conclude that he was factually innocent of the charges. Finding no error in the trial court's decision to deny relief without a hearing, we affirm.

Gibbins was convicted by a jury in 1994 of the murder and first-degree robbery of Cleo Hill. A brief synopsis of the evidence presented at trial showed that Hill was murdered in 1992 during the robbery of a convenience store where she worked. Gibbins, along with James Randall Jones and Ronnie Brooks, planned the robbery. Brooks drove the getaway vehicle and waited outside with Jones while Gibbins entered the store to rob Hill. After a few minutes, Gibbins returned with the cash register saying that Hill had attempted to shoot him and that he had killed her. After removing approximately \$60.00 in cash and some food stamps from the cash register, Brooks threw it into the Cumberland River. The next day, Brooks was examining the shotgun used to kill Hill and discovered that the forearm was missing. He then took the gun to the river and threw it in at a different location from the cash register. Brooks later gave a statement to police indicating where the cash register and shotgun had been disposed of, and those items were recovered and used as evidence. Brooks testified against Gibbins in exchange for immunity from prosecution.

Hill's body was found by a group of kids who came into the convenience store to buy candy. There was evidence that she had been beaten before she was shot. She had gun powder residue on her hand and was clutching a revolver with a spent cartridge, indicating that she had fired one shot in self defense. Hill

had bled to death from a shotgun blast to her abdomen and the murder weapon's missing forearm was found on the floor beside her body. Two uninvolved eyewitnesses gave statements to the police indicating that a man matching Brooks's description was fleeing from the crime scene. At trial, they were unable to identify the person they had seen as Brooks or Gibbins. The defense presented no witnesses and Gibbins did not testify. The jury convicted him of murder and first-degree robbery. Although the Commonwealth had prepared to try a capital sentencing phase, Gibbins was allowed to waive his right to a jury sentencing in exchange for a sentence of fifty-five years' imprisonment. The Kentucky Supreme Court affirmed the conviction and sentence in an unpublished opinion, 94-SC-000243-MR.

Gibbins subsequently filed a motion, pursuant to CR 60.02, claiming that new evidence had been discovered tending to prove his factual innocence of the crimes of which he was convicted. Jones, who is also Gibbins's cousin, apparently was now prepared to testify that Brooks was actually the person who entered the convenience store and shot Hill while Gibbins and Jones waited outside in the car. Jones was not called as a witness at Gibbins's trial; however, during his guilty plea colloquy, Jones had given statements implicating Gibbins, and not Brooks, as the shooter. The trial court denied Gibbins's CR 60.02 motion, and we upheld that decision on appeal in an

unpublished opinion, 1999-CA-001394-MR. Gibbons's current CR 60.03 motion raised the same grounds; i.e., that Jones would give evidence implicating Brooks and exonerating Gibbins in the murder and robbery of Hill. The trial court determined that this motion was a subsequent collateral attack and denied it without a hearing. This appeal followed.

On appeal, Gibbins argues that Jones's evidence proves him factually innocent of the crimes of which he was convicted.

CR 60.03 reads as follows:

Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. **Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule.**

(Emphasis added.) Clearly, CR 60.03 provides no relief for Gibbins in that he has already presented the same ground for relief in his prior CR 60.02 motion which was decided adversely to him. Consequently, the trial court acted correctly in summarily denying his motion for relief pursuant to CR 60.03.

For the foregoing reason, the judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gerald Gibbins, *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ian G. Sonogo
Assistant Attorney General
Frankfort, Kentucky