

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001113-MR
AND
NO. 2006-CA-000711-MR
AND
NO. 2006-CA-001044-MR

GEORGE A. GABBARD

APPELLANT

v.

APPEALS FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 02-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

THOMPSON, JUDGE: George A. Gabbard appeals from two orders of the Bell Circuit Court denying his motions for post-conviction judgment relief pursuant to Kentucky

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Rules of Criminal Procedure (RCr) 11.42, and Kentucky Rules of Civil Procedure (CR) 60.02. For the reasons stated below, we affirm.

In October, 2002, a Bell County jury found Gabbard guilty of first-degree rape, second-degree rape, third-degree rape, and incest. These crimes were committed against Gabbard's daughter, GLG, from the time she was nine until she reached the age of fourteen. In accordance with the jury's recommendation, the trial court sentenced Gabbard to twenty-five years' imprisonment.

On November 23, 2005, Gabbard filed a motion to vacate his sentence pursuant to RCr 11.42. In his motion, alleging ineffective assistance of counsel, Gabbard asserted nine claims in support of vacating his conviction. In this motion, Gabbard asserted law and facts in support of his first four claims but he did not assert any support for his remaining five grounds for claims. In its order denying the motion, the trial court substantively addressed Gabbard's first four claims and summarily dismissed the remaining five due to their complete lack of support. A subsequent motion, pursuant to CR 59.05, requesting the trial court to vacate this order was denied.

On April 13, 2006, Gabbard filed a motion to vacate his conviction pursuant to CR 60.02. In his motion, Gabbard asserted seven grounds for relief. On April 20, 2006, the trial court denied Gabbard's motion. The trial court ruled that Gabbard's CR 60.02 motion was nothing more than an impermissible attempt to relitigate issues that should have been addressed on direct appeal or in Gabbard's RCr 11.42 motion. Gabbard

appeals both orders, and his appeals have been consolidated and will be disposed of by this opinion.²

On appeal of his RCr 11.42 motion, Gabbard alleges the following grounds for relief: (1) that the trial court erred when it did not consider his claim regarding two tapes; (2) that the trial court erred when it summarily denied five claims of his motion; (3) that the trial court erred when it failed to consider his detailed claims of ineffective assistance of counsel; and (5) that the trial court erred by denying his claim that his counsel failed to introduce testimony regarding the victim's past sexual history. We will address each issue in turn.

Gabbard first alleges that the trial court erred when its order did not address his claim that he possessed two tape recordings containing the victim's recantations of her trial testimony. He further alleges that his motion clearly stated that he possessed these recordings and that the recordings were evidence of his innocence. Thus, he alleges that the trial court erred by failing to address this claim. We disagree.

In its order, the trial court noted that Gabbard's motion contained nine claims in support of his petition to vacate his conviction. The court substantively addressed Gabbard's first four claims but summarily denied the remaining five claims. Although Gabbard disagrees, the trial court addressed all of his claims that were properly brought before the court. From a review of his motion, Gabbard perfunctorily references

² In 2005-CA-001113-MR, Gabbard also appealed the order of the Bell Circuit Court, entered April 30, 2005, overruling his motion to obtain court records. However, in his appellate brief, he withdrew this appeal so we consider it abandoned.

the existence of two tape recordings. This manner of asserting a RCr 11.42 claim is insufficient to invoke the authority of the court to provide post-conviction relief.

RCr 11.42(2) provides, in pertinent part, that the movant shall “state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.” Gabbard's conclusory allegation regarding the taped recantations failed to meet this requirement; therefore, the trial court did not err when it did not address the claim. *Stanford v. Commonwealth*, 854 S.W.2d 742, 748 (Ky. 1993); *Taylor v. Commonwealth*, 175 S.W.3d 68, 71 (Ky. 2005) (the recanted testimony of a trial witness is viewed with skepticism).

Gabbard's next two allegations are that the trial court erred when it did not address five of the nine claims in his motion.³ As previously noted in this opinion, the trial court substantively addressed Gabbard's first four claims but summarily denied the remaining five. We conclude that these two allegations of error must fail for the same reason Gabbard's first allegation of error was rejected. RCr 11.42(2) requires that a defendant present specific support to demonstrate that he is entitled to post-conviction relief. Like his claim regarding the two tapes, his motion's final five claims were conclusory allegations unsupported by specific facts which warranted summary denial. *Mills v. Commonwealth*, 170 S.W.3d 310, 325 (Ky. 2005). Therefore, the trial court did not err in summarily denying these claims.

³ Although we have attempted to distinguish the two, Gabbard's second and third allegations are essentially the same allegation of error.

Gabbard's final allegation is that the trial court erred by denying his claim that he received ineffective assistance of counsel. Specifically, Gabbard alleges that his counsel failed to move the trial court to admit specific instances of the victim's past sexual behavior pursuant to the Kentucky Rules of Evidence (KRE) 412(b)(1). By presenting evidence of her possible sexual behavior with her adult boyfriend, Gabbard alleges that he could show that someone besides him could have been responsible for creating her vaginal injury which could have helped his defense. Therefore, he alleges that he was denied the effective assistance counsel.

In reviewing an allegation of ineffective assistance of counsel, we are governed by the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under this standard, the movant must show (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable likelihood that the outcome of the trial would have been different. *MacLaughlin v. Commonwealth*, 717 S.W.2d 506, 507 (Ky.App. 1986).

Moreover, this Court must “indulge a strong presumption that counsel acted reasonably and effectively.” *Mills v. Commonwealth*, 170 S.W.3d 310, 328 (Ky. 2005). “Finally, we must consider the totality of evidence before the jury and assess the overall performance of counsel throughout the case in order to determine whether the identified

acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.” *Id.*, citing *Foley v. Commonwealth*, 17 S.W.3d 878, 884 (Ky. 2000), overruled on other grounds by *Stopher v. Conliffe*, 170 S.W.3d 307 (Ky. 2005).

After reviewing the record, we conclude that the trial court did not err by denying Gabbard's ineffective assistance of counsel claim. In his motion, Gabbard stated that the victim's medical problems (vaginal infections) began to occur when the victim and her boyfriend began dating. Although Gabbard did not state whether the victim and her boyfriend had a sexual relationship during the time in question, he alleged that “[t]his is evidence that someone other than the Defendant/Movant, Gabbard might be responsible for the scarring and tearing . . .” of the victim's vagina. This allegation is insufficient to support post-conviction relief.

When asserting that defense, counsel failed to properly introduce testimony from a witness, a defendant must state what testimony the witness would have provided and how that testimony would have been helpful to his defense. *Mills v. Commonwealth*, 170 S.W.3d 310, 329-330 (Ky. 2005). Vague allegations of error do not constitute sufficient grounds for relief. *Id.* at 330. In this case, Gabbard offers scant circumstantial evidence to support his implicit assertion that the victim's boyfriend caused her injury. This is a highly speculative allegation that does not necessitate post-conviction relief; indeed, these kinds of unsubstantiated allegations are inadmissible. *Hall v. Commonwealth*, 956 S.W.2d 224, 226 (Ky.App. 1997).

Since we conclude that Gabbard's allegations are highly speculative, we will not second-guess the strategy of his defense counsel in how she sought to examine her witnesses. *Foley v. Commonwealth*, 17 S.W.3d at 885. Consequently, we conclude that Gabbard was not denied effective assistance of counsel.

In regard to the appeal of his 60.02 case, at the conclusion of his argument regarding his RCr 11.42 claims, Gabbard writes that “Appellant incorporates by reference all claims made in his CR 60.02 motion, which is consolidated into this appeal.” From a review of the record, the trial court denied the CR 60.02 motion, by order entered April 20, 2006, because it was “. . . simply a back door attempt to raise issues that should have been raised on appeal or reconsidered on appeal. The Court has also previously denied the Defendant's 11.42 motion and the 60.02 motion appears to also be a rehash of the 11.42 motion.” It is this order in which Gabbard took his appeal.

In *Grief v. Wood*, 378 S.W.2d 611, 612 (Ky. 1964), the court held that suggested matters, which are not supported by argument or by citation to authority, do not provide appellate courts with a basis for consideration. *See also Stewart v. Jackson*, 351 S.W.2d 53, 54 (Ky. 1961). In this case, Gabbard references his CR 60.02 claims but he failed to state any basis or cite any authority to establish that the trial court's order was erroneous. Since Gabbard has failed to advance any argument in support of his allegation of error, we decline to address the merits of his case. *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky.App. 2005) (our function as an appellate court is

not to research and construct a party's legal arguments). Accordingly, the trial court did not err by denying the CR 60.02 motion.

For the foregoing reasons, the orders of the Bell Circuit Court denying Gabbard's motions for post-conviction relief pursuant to RCr 11.42 and CR 60.02 are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

George A. Gabbard, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Assistant Attorney General
Frankfort, Kentucky