

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000139-MR

STEVEN LYNN HEARLD

APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 04-CR-00146

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Steven Lynn Hearld appeals from an order of the Ohio Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for post-conviction relief. We affirm.

Our Court had, on another appeal of this case, previously set forth the facts as follows:

¹ Senior Judge E. Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On January 6, 2004, Appellant and his girlfriend, Rebecca Stevens, spent the day at the Budget Inn in Beaver Dam, Kentucky. With them was the couple's 22-month-old daughter, A.H. Evidence at trial established that Appellant was in and out of the motel throughout the day visiting with friends. That evening, however, the couple had an argument and Stevens thereafter left the motel to retrieve her vehicle, leaving A.H. in Appellant's care for approximately twenty to thirty minutes. When Stevens returned, Appellant advised her that he thought someone had "messed with" A.H. Upon examining A.H., Stevens discovered that there was blood in her diaper. Appellant objected to taking A.H. to the local hospital, instead suggesting that they take her to Evansville the next day. Nevertheless, Stevens immediately took A.H. to a hospital in Ohio County that evening.

An investigation revealed that A.H. had suffered perirectal bruising and tears measuring from one-half to one centimeter in length at the twelve o'clock and six o'clock positions. Also, during a search of the motel room, police seized a towel, which was tested and found to have Appellant's sperm on it.

On July 26, 2004, Appellant was arrested on charges of first-degree sodomy, second-degree assault, and first-degree sexual abuse. Following a trial in June 2005, a jury found Appellant guilty of first-degree sexual abuse. However, at the conclusion of the sentencing/persistent felony offender phase of the trial, the jury informed the court that it could not reach a decision on a sentencing recommendation. The trial court thereafter sentenced Appellant to five years (with three years of conditional discharge) on the sexual abuse charge, enhanced to sixteen years by virtue of the PFO conviction.

Hearld v. Com., 2006 WL 2924066 (Ky. App. 2006)(2005-CA-002112-MR).

This previous appeal was a direct appeal of the trial with nine reasons proffered that the trial court denied Hearld of due process and a fair trial. Hearld

was represented on appeal by the same attorney that represented him at trial, the same attorney that he is now alleging provided ineffective assistance of counsel. Our Court found no reversible error and affirmed the lower court. Subsequently, Hearld's motion for discretionary review of the Court of Appeals' decision was denied.

Next, in April 2007, Hearld filed a motion to vacate pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, alleging that he had been improperly sentenced and that counsel was ineffective because counsel did not ensure that his sentence met the requisites of the statutes. This motion was denied by the trial court on May 31, 2007. Hearld filed a notice of appeal but when his motion to proceed *in forma pauperis* was denied, he took no further action.

The current action commenced with several motions by Hearld in October 2009, including a motion to proceed *in forma pauperis*, a motion for an evidentiary hearing and the appointment of counsel, and a motion to vacate under RCr 11.42. In his RCr 11.42 motion, Hearld primarily alleged that his counsel was ineffective for two reasons. First, his attorney made no effort to remove a juror, whom Hearld, prior to the trial, had had an altercation. Second, Hearld claimed that his attorney was ineffective for failing to allow him to testify in his own defense at trial. On December 11, 2009, the trial court denied the motion, and thereafter, this appeal was filed.

Hearld argues, citing *Fraser v. Com.*, 59 S.W.3d 448 (Ky. 2001), that the circuit court erred by summarily denying his motion to vacate his judgment

because of ineffective assistance of counsel. He maintains that material issues of fact exist that cannot be resolved by the record and mandate an evidentiary hearing and appointment of counsel for him based on his indigency. Further, Hearld maintains that ineffective assistance of counsel co-opted his constitutional rights to an effective attorney and an impartial jury.

The Commonwealth responds, however, that the circuit court did not err in summarily denying Hearld's motion because a reversal is not warranted based on the limited record, which was designated by Hearld. Hearld did not designate any trial records or videotape. The record designated consists of two volumes of paper record without any trial proceedings or jury lists. Moreover, it also asserts that because he previously filed a motion to vacate alleging ineffective assistance of counsel, he cannot again argue the same issue.

In an RCr 11.42 proceeding, the movant has the burden "to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by the post-conviction proceedings[.]" *Dorton v. Com.*, 433 S.W.2d 117, 118 (Ky. 1968). "The motion . . . 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." RCr 11.42(2). A hearing is only required if the motion raises an issue that cannot be determined on the face of the record. RCr 11.42(5); *Stanford v. Com.*, 854 S.W.2d 742, 743-44 (Ky. 1993), *cert. denied*, 510 U.S. 1049, 114 S.Ct. 703, 126 L.Ed.2d 669 (1994).

On an appeal from an order overruling an RCr 11.42 motion wherein an evidentiary hearing was not held, “[o]ur review is confined to whether the motion on its face states grounds that are not conclusively refuted by the record and which, if true, would invalidate the conviction.” *Lewis v. Com.*, 411 S.W.2d 321, 322 (Ky. 1967). A trial court's findings will not be disturbed absent a finding of clear error. *Com. v. Payton*, 945 S.W.2d 424, 425 (Ky. 1997).

Both of Hearld’s arguments regarding ineffective assistance of counsel are based on circumstances that occurred during the actual trial. Although Hearld asserts that the trial record would not have been helpful because the occurrences happened off the record, his designation of the record was so limited that the record neither supports nor denies these assertions. Here, the absence of available information, which could have been provided, is fatal to Hearld’s motion to vacate his conviction. Since Hearld did not request any information about jurors or the trial record, nothing supports his contentions regarding the ineffective assistance of his attorney.

Even more damaging to Hearld’s claims is that a claim of ineffective assistance of counsel may only be raised once. “Where the collateral ineffective assistance of counsel claim is presented in the course of the direct appeal, . . . [the] issue cannot be re-litigated in a collateral attack.” *Leonard v. Com.*, 279 S.W.3d 151, 159 n.3 (Ky. 2009). The rationale behind this factor is that collateral issue of ineffectiveness itself had already been raised and rejected. *Id.* Hearld’s 2007 motion, albeit filed under CR 60.02, still incorporated an ineffective assistance of

counsel claim. The reasons behind the present ineffective assistance of counsel claim are not new and could have been enunciated in his 2007 motion. The rule itself provides:

The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

RCr 11.42(3). Therefore, we are of the opinion that the trial court's summary denial of these issues was proper. Accordingly, the order of the Ohio Circuit Court denying Hearld's RCr 11.42 motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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