

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001307-MR

JOHN J. HUGHES

APPELLANT

v.

APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 03-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: KRAMER, D. LAMBERT, AND STUMBO, JUDGES.

KRAMER, JUDGE: John J. Hughes, Appellant, brings this *pro se* appeal of an order by the McLean County Circuit Court denying his request for post-conviction relief pursuant to CR¹ 60.02. After a careful review of the record, the procedural history, prior appeals filed by Hughes, and the applicable law, we reverse and remand for an evidentiary hearing to be held forthwith.

¹ Kentucky Rule of Civil Procedure.

A. RELEVANT FACTS AND PROCEDURAL HISTORY

Hughes has now filed his third pro se appeal in an attempt to have the Court review errors that he claimed were made by counsel in late 2003. The facts surrounding this case are disturbing, to say the least.

After confessing, Hughes was indicted for the murder of his father, John Hughes, Sr., tampering with physical evidence for the disposal of his father's body and two counts of forgery in the second degree on September 29, 2003. Less than two months later, on November 24, 2003, on advice of counsel, Hughes pled guilty to each count and received a total sentence of twenty years. He was finally sentenced on December 17, 2003.

Agreeing with Hughes that he is patently long overdue for at least an evidentiary hearing on his claims, we set forth the details Hughes has put before this Court and the circuit court on several occasions, which initiated a detailed review by this Court of the record, prior appeals, and the procedural history in this matter. As noted *supra*, Hughes confessed and pled guilty to the brutal murder of his father. However, the record before us is absolutely void of any arguments, motions, defenses, etc., made by counsel on Hughes's behalf regarding the alleged details of what led him to bludgeon his father to death with a baseball bat.

We were alerted to this by documents attached to Hughes's brief in the present appeal, including the Uniform Offense Report generated in the investigation of the disappearance and murder of his father. The report is highly detailed and very disturbing in its facts. And, we note it should have first been

brought to this Court's attention initially nearly a decade ago because Hughes attached it to his brief after he filed his first appeal on February 21, 2005.

We set forth the portions of that report that are relevant to the resolution of this appeal. Several local police officers and Kentucky State Police units were involved in executing a search warrant on John Hughes, Sr.'s home in the course of conducting an investigation into his disappearance after it was reported that he had been reported missing for some time. Relevant to the claims that Hughes has been making since he filed his first RCr² 11.42 motion on December 10, 2004, the officer who wrote the report stated that:

LEE HILL told me [the investigating officer] that he felt like JOHN HUGHES Jr., was the victim of some sort of physical and or sexual abuse by his father, however, [sic] had no concrete evidence of this. We located several nude photographs of juvenile males in the home. There were parenting type magazines stacked outside the residence that talked about and had pictures of small children in them. I felt like JOHN HUGHES, Jr. could have been the victim of sexual abuse by his father and killed him due to this fact.

Mr. GAMBLIN also thought JOHN Jr.^[3] was the victim of abuse, however; he also had no concrete evidence.

Evidence had been collected which would believe JOHN Jr. was the victim of sexual abuse due to the nude photographs of young boys, some of which appeared to be JOHN, Jr.

² Kentucky Rule of Criminal Procedure.

³ At different points in the record, Hughes is referred to as "John, Jr." and his father, the victim in this case, is referred to as "John Sr."

I advised JOHN Jr., that I believed that he might be the victim of abuse and possibly that is why he harmed his father. JOHN Jr. advised me that they did not have to [continue the search]. I ask[ed] JOHN Jr., if he would show me where his father's body was and he stated that he would. . . . JOHN Jr. stated that he murdered his father because he was going to rape him. JOHN Jr. stated that his father stated "I'm going to show you how to fuck a woman." JOHN Jr., said that [his father] was upset that he had moved out and in with a female. JOHN Jr. said his father was a pedophile and he had seen him perform oral sex on baby boys. . . . JOHN Jr. took me into the living room and told me the details about the incident. He stated he came over and found his father asleep in the living room. He woke him up and wanted to talk to him about why he molested him when he was a boy. JOHN Jr. said they got into an argument over him moving out and in with VICKIE. JOHN Jr. told me again that his father was coming at him and stated "I'm going to show you how it is to fuck a woman." JOHN Jr. stated that he just lost it and grabbed a small bat, that his father called him fish knocker, and began to beat his father in the head. JOHN Jr. stated that his dad died quick and that it didn't take long. . . . I took a taped statement from JOHN Jr., while evidence was being loaded. . . . The following is a summary of the taped [not legible] JOHN Jr. stated that he knew where his father was and admitted to murder[ing] him. [Hughes gave details of how he disposed of the body in a well]. JOHN Jr. said the reason he killed his father was that his dad was going to force himself on him one last time, show him what it was really like to be with a woman, and rape him. JOHN Jr. said that he just snapped and grabbed whatever was handy and killed Mr. HUGHES to prevent this attack on him. JOHN Jr. said that he has always taken abuse from his dad and after so much he just snapped. JOHN Jr. stated that when he arrived at his father's home he woke him up and that he was mostly unclothed. JOHN Jr.[s] reasoning for going to his father's home this day was that he just wanted to talk with him and see if had come to his senses yet. JOHN Jr. said he had been inquiring for sometime as to

why his dad sexually abused him as a child. JOHN Jr. stated that his dad was a pedophile. JOHN Jr. admitted that he had not been sexually abused[d] since he was 14 years old. JOHN Jr. stated that his father used to baby sit for kids and he recalled him holding babies up to his face and performing oral sex on the penis. JOHN Jr., said that he did observe the sexual abuse of babies and small boys. JOHN Jr. stated that he can remember his father “sucking him off” from about 6 to 7 years old. JOHN Jr. then stated he didn’t know if this was really abuse, but it wasn’t suppose[] to happen. JOHN told me that he did not have to perform oral sex on his father, but that his dad always done [sic] this to him. The abuse took place on a regular basis from this age on up to about the age of 14. When JOHN Jr. was 14 he stated that he realize[d] something was wrong when it was all right for “him to fuck me, but I couldn’t fuck him.” JOHN Jr. wanted his dad to explain to him why he was abused sexually, verbally, and mentally [not legible]....

I went inside the residence and was present when John Hughes, Jr. advised that he struck his father over the head several times. He also told Det. Nichols that his father had tried to force himself on him.

I interviewed Vickie Lane Antle The following is a summary of the interview. Antle advised that she had known John Hughes, Jr., since he was born. . . . She started dating John, Jr. since New Year’s Eve of 2001. About a week after their first date, he came to the house and told her about what had been going on with his dad for all of the years. . . . John, Jr. had told her about his relationship with his father. He told her that his father had been performing oral sex on him since he was born. . . .

Given the statements and evidence in the police report regarding abuse and Hughes’s statements to the police that he allegedly killed his father to thwart a rape, we reviewed the circuit court record further to determine if it

contained other information regarding the alleged abuse. The uniform citation for his arrest, dated September 4, 2003, included a reference to a taped confession, which appears to be the taped statement referenced *supra*. As noted, that statement included Hughes's allegations that he had been the victim of sexual abuse for years at the hands of his father and the allegations that he "snapped" when his father came at him with an intent to rape him.

The record also contains the presentencing report, dated December 15, 2003. In that report, Hughes again recounted his allegations of sexual and physical abuse at the hands of his father until the age of 14, and mentally abused until the age of 27. The report also included a statement Hughes made to the probation officer as follows:

My dad started me on pot at age 11 and meth at age 16. I was only supporting a habit my dad taught me. I lived with my dad for 27 years. He was my dad and I tried to get him to see the era [sic] of his ways. When I left home I started telling a gew [sic] people about what I'd been through. Abuse, sexually, physically, and worst mentally. I wanted to know why he did this to me but he had no answer for me. Time before last he was sticking a gun in my chest wanting me to kill him. I left. The last time I came around he came at me saying he was going to show me how to fuck a woman (rape me). I lost control and killed him. After thinking about it that's just what he wanted. He cheated me out of 27 years of my life. . . .

Hughes has alleged since his first RCr 11.42 motion, filed December 10, 2004, that he informed counsel of the sexual abuse and the allegations that his father was going to rape him. Regardless of what

Hughes may or may not have told counsel, presumably the public defender who was appointed on September 5, 2003, should have reviewed the police report, Hughes's taped statement,⁴ and the presentencing report, all of which detail the allegations of abuse and the allegations that his father was going to rape him. However, the written record is absolutely silent as to any efforts by counsel to use these allegations for his client's benefit and to fully protect his client's constitutional rights. Rather, two months after Hughes was indicted, a motion to enter a guilty plea was filed on November 11, 2003.⁵ The court entered an order on the guilty plea on November 26, 2003, to the charge of murder.

On December 17, 2003, the Judgment and Final Sentencing was entered. In this Judgment it states that

the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel an opportunity to make statements on the defendant's behalf and to *present any information in mitigation of punishment*, and the court . . . provided the defendant, *through his attorney*, with a copy of the presentencing investigation report prepared by the Probation and Parole Office. . . .”

(Emphasis added).

⁴ The record does not contain the taped statement, but it is referenced in the police report, so it presumably existed at that time. We note that unfortunately the record contains a “Destruction Order” dated November 8, 2004, which provides that “all evidence seized by the Kentucky State Police . . . shall be forfeited and destroyed or disposed of pursuant to statute.” We cannot know if that Order included the destruction of the taped statement.

⁵ This motion was file stamped on November 11, 2003; however, it was dated November 24, 2003, and it includes both Hughes and his counsel's signature.

We added emphasis to the above quotation from the circuit court's judgment to point out what may seem obvious, but for some reason has been overlooked by each court that has reviewed this case: counsel and the court had, at the very least, a copy of the presentence investigation report prior to sentencing. As noted *supra*, the record on its face does contain information that counsel should have been aware of Hughes's allegations of self defense when he "snapped" after his father said "he was going to show me how to fuck a woman (rape me). I lost control and killed him."

In the present appeal, this Court ordered the Clerk of the McLean Circuit Court to supplement the record to include any video recording of Hughes's sentencing hearing to review whether Hughes's counsel may have made oral arguments regarding mitigation. However, the Circuit Clerk of McLean County responded to the Order via affidavit that video recording equipment was not yet installed in the courthouse at the time when Hughes was sentenced. Accordingly, nothing exists on the face of the record that Hughes's counsel offered anything in mitigation for the benefit of Hughes.

Within a year of being sentenced, although acting *pro se*, Hughes filed a well-written and detailed motion under RCr 11.42 on December 10, 2004. In that motion he alleged, in relevant part, that his trial counsel coerced him into pleading guilty by advising him he was facing the death penalty and that his attorney was ineffective for several reasons, including failing to file a motion for a domestic

violence hearing under KRS⁶ 439.3401(5) and failing to prepare a defense of self defense. Hughes set forth the same facts that he alleged from his initial confession to law enforcement regarding abuse and what transpired on the day he killed his father. He stated that

on the day of John Sr.'s death, John Jr. went to the home of his father to attempt to talk to him and possibly find out a reason for the years of sexual abuse and physical abuse that his father subjected him to. John Jr. had grown up with memories of sexual abuse by his father, his whole life, from his earliest memory. John Sr. became enraged at his son's implication that it was wrong for John Sr. to have been sodomizing his son practically since birth. In fact, John Sr. became so enraged, he began yelling at John Jr. that he was going to show him "how a woman gets fucked," and went toward his son. John Jr. reacted by grabbing a bat that was kept in his father's living room and hit him several times in the head. John Sr. died as a result of the blows.

Hughes's motion further sets forth specific witnesses who would come forward to testify in detail regarding the abuse he suffered at the hands of his father. In this motion, Hughes specifically stated "he told his attorney" about the abuse.

The trial court overruled the motion without an evidentiary hearing on January 6, 2005, despite the fact that the record contained allegations that should have been more than sufficient to have garnered Hughes an evidentiary hearing on his motion. Unfortunately, this error was multiplied when this Court affirmed the

⁶ Kentucky Revised Statute.

circuit court on January 13, 2006. *Hughes v. Commonwealth*, No. 2005-CA-000416-MR, 2006 WL 73738 (Ky. Ct. App. Jan. 13, 2006) (unpublished).⁷

We do not lightly make statements of errors by the circuit court or this Court in prior appeals. However, these errors are patent, which is why we have methodically set forth in detail the information that was easily available to Hughes's counsel prior to the entry of his guilty plea—and what was available to the circuit court at that time and this Court at the time of the first appeal. We quote language from this Court's first opinion in this matter to illustrate the clear error:

If Hughes had alleged his attorney knew or should have known that Hughes was a victim of domestic violence or abuse, we might be inclined to vacate and remand for an evidentiary hearing on the issue of ineffective assistance. However, Hughes does not make such an allegation in his motion. For example, had he alleged he told his attorney there was a connection between his killing his father and his being a victim of his father's physical and sexual abuse, Hughes would likely have been entitled to a KRS 439.3401(5) hearing. Or, had Hughes related this information to law enforcement officers when he confessed to the crime, his attorney should have known about the information and asked for a hearing. Likewise, had the presentence investigation report from the probation and parole officer contained information concerning domestic violence or abuse, his attorney would again have been alerted to ask for a hearing.

But, Hughes does not allege in either his motion or his brief that his attorney had reason to believe Hughes might be subject to the domestic violence exception in the statute. Furthermore, having a client who had confessed to murdering his father with a baseball bat and who was also charged with other offenses including manufacturing methamphetamine, and having received a plea offer of 20 years in prison on all charges

⁷We note that there was a dissent in the first appeal regarding the failure to seek an exemption under KRS 439.3401(5).

combined to run concurrently, we fail to see how counsel could have rendered ineffective assistance by not investigating into facts that he did not know may have existed.

Hughes's second argument is that his counsel failed to prepare a defense. Since Hughes voluntarily pled guilty, there was no need for his attorney to prepare a defense. A valid guilty plea waives all defenses, except that the indictment does not charge an offense. *Bush v. Commonwealth*, 702 S.W.2d 46, 48 (Ky. 1986).

Hughes maintains there is no evidence to indicate the incident was intentional murder. Further, he contends that the defenses of self-protection and extreme emotional disturbance existed and should have been pursued by his attorney as valid defenses. Again, Hughes has not pointed to anything in either his motion or his brief that would lead us to conclude that his attorney was aware Hughes may have been a victim of domestic violence and abuse. Furthermore, prior to actually entering his plea, Hughes had signed the guilty plea forms indicating an understanding of the proceedings and his desire to plead guilty. It was not incumbent upon his attorney to conduct an independent investigation into facts he did not know existed so as to raise possible defenses to a crime to which his client had confessed. [N7].

Finally, Hughes argues his attorney told him that if he refused the Commonwealth's offer of 20 years for murder he could get the death sentence. He also argues that his attorney failed to explain the elements of the offense to which he was pleading guilty. Concerning the allegation that his attorney coerced him into pleading guilty by telling him that he could get the death sentence, this is refuted by the record. The plea agreement Hughes and his attorney signed stated that the penalty for murder was "20-50 years or life." Further, Hughes's allegation that his attorney failed to explain the elements of the offense of murder prior to his guilty plea is refuted by Hughes's statement in his signed motion to enter guilty plea that he understood "the charges and any possible defenses to them."

N7. Again, we have no indication that Hughes's confession contained any reference to domestic violence, self-protection, or extreme emotional disturbance.

Contrary to what the Court stated regarding what Hughes's initial

RCr 11.42 motion contained, Hughes alleged therein, *inter alia*, as follows:

“John Jr. was sexually abused by his father since birth. John Jr. told his attorney this. No one doubted this fact. There exists an abundance of evidence to substantiate this. Photos of nude young boys were found at John Sr.'s house. There was an abundance of people willing to testify, (and are still willing to testify), that they had knowledge of John Sr. being a pedophile and of the years of molestation suffered by John Jr. These people include, but are not limited to:

1. Vicki Antle – Friend of family
2. Bobby Antle – Friend of family
3. Kay Crager – RN
4. Kitty Burden – Friend of family
5. Donna Copely – Friend of family
6. James M. Simpson – Stepbrother

It is incredible that Defense Counsel failed to contact and interview these crucial witnesses. This testimony, at the very least, preclude[s] John Jr. from being calculated pursuant to KRS 439.3401. Defense Counsel simply ignored all the evidence at his disposal to indicate that John Jr. was not guilty of the offense for which he was charged. . . . Simply put, John Jr. after being molested his entire life by his father, confronted his father about the abuse. John Sr. became enraged [and] attacked John Jr.,] threatening to rape him. John Jr. reacted by grabbing a bat, kept by his father in the room . . . and protected himself. There cannot exist a more clear cut example for qualification under “self-protection.” There cannot exist a more clear cut example for the exception as provided in KRS 439.3401(5).”

John Jr. was sexually abused by his father since birth.
John Jr. told his attorney this.

Beyond what Hughes argued in his first RCr 11.42 motion, we have also dug into the archives of Hughes's prior appeals and reviewed the brief that was filed in his first appeal to determine whether he made claims at that time of alleged domestic violence and abuse. As noted earlier the police report, which was detailed *supra*, was attached to his first appellate brief. This report contains precisely what the Court at that time said was not included in Hughes's allegations. And, as earlier noted, the presentence report filed in the written record also contains the allegations of abuse and claims of self defense: allegations, which over a decade ago, this Court said did not exist.

Unfortunately, the opinion rendered by this Court was inaccurate in its statements about what the record contained and about the allegations that Hughes had in fact made. That opinion was thereafter regrettably cited as the law of the case, as will be detailed *infra*.

On January 3, 2008, Hughes, with the assistance of counsel, filed a motion entitled "Verified motion for relief pursuant to RCr 11.42[.]" in which he again alleged that he was entitled to a hearing under KRS 439.3401(5). He attached to this motion the investigative police report, wherein he confessed, as

noted *supra*. The trial court denied Hughes's motion on February 14, 2008, relying on the first *Hughes* decision from this Court. Hughes did not appeal.

On November 26, 2012, Hughes filed a third motion; again sought an evidentiary hearing under KRS 439.3401(5); and again made claims that he acted in self defense. As he had in earlier motions, Hughes specifically detailed the witnesses who would testify to support his claims and attached the police report, outlining his allegations of abuse and what allegedly transpired on the day he killed his father. On December 5, 2012, the trial court denied that motion, concluding that the issue had been decided by this Court in Hughes's appeal of his first RCr 11.42. Hughes again appealed, and this Court affirmed that decision⁸ for the reasons provided by the trial court: that this matter had already been decided by the Court's decision in the first appeal.

Hughes filed a *pro se* CR 60.02 motion on May 12, 2014, requesting to modify his judgment. He argued, among other things, that his guilty plea was not voluntary because he had not been made aware that he may be entitled to the exemption under KRS 439.3401(5), that his sentence was disproportionate to similarly situated individuals, that he was entitled to a hearing under KRS 439.3401(5) and that he was entitled to a defense of the castle doctrine. The trial court denied Hughes's motion on June 6, 2014, holding that Hughes had

⁸ *Hughes v. Commonwealth*, No. 2013-CA-000068-MR, 2013 WL 5777142 (Ky. Ct. App. Oct. 25, 2013) (unpublished).

previously requested a hearing under KRS 439.3401(5), and that his other claims could have been or were raised in prior proceedings.

Having set forth the facts and proceedings that bring us the present appeal, we turn to Hughes's arguments that (1) the circuit court erred in denying his CR 60.02 motion because pursuant to KRS 439.3401(5), he is exempt from "violent offender" status and, accordingly, he is not required to serve eighty-five percent of his sentence before becoming parole eligible; (2) he is actually innocent under the "castle doctrine," pursuant to KRS 503.050; and (3) his sentence is disproportionate to other criminal defendants charged with similar offenses.

B. ANALYSIS

On appeal, we review the denial of a CR 60.02 motion for an abuse of discretion. *See White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). "Civil Rule 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal or RCr 11.42 proceedings." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (internal quotation marks omitted). Civil Rule 60.02 "is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *Id.* "The [CR 60.02] movant must demonstrate why he is entitled to this special, extraordinary relief. Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief." *Gross v. Commonwealth*, 648 S.W.2d

853, 856 (Ky. 1983). Additionally, claims brought under CR 60.02(a), (b), or (c) must be brought within one year after the judgment is entered, and claims brought under the remaining sections of CR 60.02 must be brought within a “reasonable time.” *See* CR 60.02.

Regarding whether Hughes brought these claims within a reasonable time, we note that Hughes initially brought this claim in his first RCr 11.42 motion, which was timely filed approximately one year after his judgment became final, and through no fault of his own, his motion was denied without a hearing and this Court erred in its decision on appeal. Because of these procedural problems, we conclude that his current claim was filed within a reasonable time under the facts of this case.

1. KRS 439.3401(5)

Hughes first contends that the circuit court erred in denying his CR 60.02 motion because pursuant to KRS 439.3401(5),⁹ he is exempt from “violent offender” status and, accordingly, he is not required to serve eighty-five percent of his sentence before becoming parole eligible. Hughes argued in his CR 60.02 motion that he is entitled to the exemption under KRS 439.3401(5) because he was

⁹ KRS 439.3401(5) states:

This section [specifying who is considered to be a “violent offender”] shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim. The provisions of this subsection shall not extend to rape in the first degree or sodomy in the first degree by the defendant.

the victim of domestic violence abuse, and he was not made aware of the exemption before he entered his guilty plea, thus rendering his guilty plea invalid. Although he did not expressly claim in his CR 60.02 motion that his counsel rendered ineffective assistance, his claim that he was not made aware of the exemption was essentially an ineffective assistance of counsel claim, because counsel had a duty to apprise Hughes of any substantial defenses before advising him to plead guilty. *See Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356, 368-69, 130 S.Ct. 1473, 1483, 176 L.Ed.2d 284 (2009). Pleadings prepared by *pro se* prisoners are not held to the same standard as those prepared by legal counsel, and rules are frequently construed liberally in the *pro se* prisoner's favor. *See Case v. Commonwealth*, 467 S.W.2d 367, 368 (Ky. 1971). Thus, we construe Hughes's claims as claims that the circuit court erred in denying his CR 60.02 motion because his guilty plea was invalid due to counsel's ineffectiveness in failing to: investigate Hughes's claims of sexual abuse and self defense; advise Hughes of the domestic violence victim exemption under KRS 439.3401(5); and request a hearing to determine if Hughes was eligible for the exemption, which could remove him from the classification of a "violent offender," entitling him to parole consideration much earlier.

As detailed *supra*, the written record contained numerous reports of allegations that John Jr. was a victim of domestic violence. The written record is silent, however, regarding whether Hughes's attorney investigated these

allegations and pursued defenses, exemptions, or claims of mitigating factors based upon them. Rather, Hughes's attorney recommended that he plead guilty to murder, with a recommended twenty-year sentence, within two months after Hughes was charged. There certainly are not hard and fast rules regarding the effective assistance of counsel in considering the time frame between charges and a guilty plea; however, the two-month interval between Hughes's being charged with murder and pleading guilty to murder charges, without any apparent defenses or mitigating factors being presented on his behalf, at the very least, should present questions to be answered at an evidentiary hearing regarding whether Hughes received the ineffective assistance of counsel, even in light of his confession. Accordingly, we reverse the circuit court on this issue and remand for an evidentiary hearing on Hughes's claims of the ineffective assistance of counsel for allegedly failing to pursue an exemption pursuant to KRS 439.3401(5).

2. Actual Innocence and Self-Defense

Hughes next alleges he is actually innocent of intentional murder pursuant to the "castle doctrine."¹⁰ Kentucky Revised Statute 503.050 provides:

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.

¹⁰ Hughes claims actual innocence under "the castle doctrine," but cites to KRS 503.050. Kentucky Revised Statute 503.055 pertains to "the castle doctrine." *Jones v. Commonwealth*, 366 S.W.3d 376, 379 (Ky. 2011). Because "the castle doctrine" is inapplicable in this case, we will review this claim pursuant to KRS 503.050.

(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055.

(3) Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abuse as defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section.

(4) A person does not have a duty to retreat prior to the use of deadly physical force.

In *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140

L.Ed.2d 828 (1998), the United States Supreme Court stated that establishing actual innocence requires demonstrating that “in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Id.*, 523 U.S. at 623, 118 S.Ct. at 1611 (internal quotation marks and citation omitted).

Furthermore, “‘actual innocence’ means factual innocence, not mere legal insufficiency.” *Id.*, 523 U.S. at 623-24, 118 S.Ct. at 1611.

Hughes does not contest that he took his father’s life. Instead, Hughes asserts that he is not guilty of murder because he acted in self defense under KRS 503.050. In support of Hughes’s claim, he attaches a signed affidavit which asserts that he believed that his father was going to rape him prior to the time of his father’s death. Further, one of the officers who had investigated Hughes’s case

apparently said that he would not have charged Hughes with murder given the facts in this case.

Based upon the unique and flawed procedural history of this case, we will reverse on this issue also and remand to the circuit court with instructions that the court should also hold an evidentiary hearing regarding whether Hughes received the ineffective assistance of counsel for failing to argue self defense on behalf of his client.

3. Disproportionality of Sentence

Lastly, Hughes claims that his sentence was vastly disproportionate to sentences that other criminal defendants who were sentenced to lesser included offenses of murder have received. Because we are reversing and remanding based upon Hughes's other claims, we decline to review this claim at this time.

4. Law of the case

Given that we are departing from the well-worn path of the law of the case doctrine herein, we pause to explain why it is appropriate to do so under the facts of this case.

Law of the case is a prudential doctrine, however, not a jurisdictional one. Law of the case directs a court's discretion, it does not limit the tribunal's power. . . . As such, the doctrine is subject to exceptions. A court is not bound by the doctrine, for example, where there has been an intervening change in the law. . . . An appellate court, moreover, may deviate from the doctrine if its previous decision was clearly erroneous and would work a manifest injustice.

Brown v. Commonwealth, 313 S.W.3d 577, 610 (Ky. 2010) (internal quotation marks and citations omitted). Even if a prior ruling is the law of the case, a court “may reexamine an earlier ruling and rescind it if [the court] has a reasonable conviction that it was wrong and it would not cause undue prejudice to the party that benefited from it.” *Davidson v. Castner-Knott Dry Goods Co.*, 202 S.W.3d 597, 602 (Ky. App. 2006) (internal quotation marks and citation omitted).

In the present case this Court's ruling on appeal from the denial of Hughes's first verified RCr 11.42 motion was erroneous, and it appears to have

resulted in a manifest injustice given that Hughes has been denied an evidentiary hearing to which he is entitled. Moreover, there is no allegation that reexamining this issue would cause undue prejudice on the Commonwealth. Therefore, this is the rare case wherein we will not apply the law of the case doctrine, for the reasons as set forth herein.

C. CONCLUSION

Perhaps, each of Hughes's allegations of abuse and self defense may not be believed by the trial court or may be discredited. However, from the genesis of this case, Hughes has put forth precisely what the law requires to have his allegations of the ineffective assistance of counsel reviewed via an evidentiary hearing, as his allegations cannot be refuted on the written record.

For the reasons as stated, the order of the McLean Circuit Court is hereby REVERSED. This case is hereby REMANDED for an evidentiary hearing to be held forthwith to determine whether Hughes received the ineffective assistance of counsel regarding the assorted claims reviewed herein; for the appointment of counsel to represent Hughes at the proceedings at the trial court; and for further proceedings not inconsistent with the foregoing opinion.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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