

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

06/30/2017

Clerk of the
Appellate Courts

DAVID HEARING v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Greene County
No. 05CR193 Thomas J. Wright, Judge**

No. E2016-01297-CCA-R3-ECN

The pro se Petitioner, David Hearing, appeals as of right from the Greene County Criminal Court's order summarily dismissing his petition for writ of error coram nobis challenging his guilty-pleaded convictions for first degree murder. The State has filed a motion to affirm the trial court's order pursuant to Rule 20 of the Rules of the Tennessee Court of Criminal Appeals. Following our review, we conclude that the State's motion is well-taken and affirm the order of the trial court.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals.**

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

David Hearing, Clifton, Tennessee, Pro Se.

Herbert H. Slatery III, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

This court has detailed previously the procedural history of the Petitioner's challenges to his first degree murder convictions:

The Appellant pleaded guilty to two counts of first degree murder and pursuant to a plea agreement, was sentenced to serve a life sentence of incarceration. Less than thirty days after accepting a guilty plea, the Appellant filed a motion to withdraw his guilty plea. The trial court interpreted this motion as a petition for post-conviction relief, and denied the motion. This court reversed and remanded for the trial court to view the motion as a motion to withdraw a guilty plea. *David Wayne Hearing v. State*, No. E2006-00362-CCA-R3-PC, 2006 WL 3813625, at *1 (Tenn.

Crim. App. December 28, 2006). Following a hearing, the trial court denied the Appellant's motion to withdraw his guilty plea, and this court affirmed the trial court's decision. *David Wayne Hearing v. State*, No. E2007-00778-CCA-R3-PC, 2008 WL 481781, at *1 (Tenn. Crim. App. February 22, 2008), *perm. app. denied* (Tenn. June 23, 2008).

Next, the Appellant filed a petition for post-conviction relief, which the trial court denied. This court affirmed the trial court's denial of the Appellant's petition for post-conviction relief. *David Wayne Hearing v. State*, No. E2009-02430-CCA-R3-PC, 2010 WL 3837535, at *1 (Tenn. Crim. App. October 4, 2010), *perm. app. denied* (Tenn. March 9, 2011).

Thereafter, the Appellant filed a petition for a writ of error coram nobis. The trial court denied this petition and the Appellant appealed. Before this court issued its opinion affirming the denial of error coram nobis relief, the Appellant filed a motion to correct an illegal sentence under Rule 36.1 (first Rule 36.1 motion). The trial court appointed counsel, and the State filed a response arguing "that the trial court should dismiss the motion without a hearing because the issue had been previously raised and determined and because the appellant's judgments of conviction showed that he pled guilty to two counts of first degree murder and received life sentences." Thereafter, the trial court dismissed the Appellant's motion finding that the motion failed to state a colorable claim. On appeal, this court affirmed the dismissal. *State v. David Wayne Hearing*, No. E2014-01908-CCA-R3-CD, 2015 WL 2128600, at *1 (Tenn. Crim. App. May 6, 2015).

On September 29, 2014, nineteen days after the trial court denied the Appellant's first Rule 36.1 motion and seven days after counsel for Appellant filed the notice of appeal in the Appellant's first Rule 36.1 case, the Appellant filed pro se a second Rule 36.1 motion. On January 9, 2015, the trial court summarily dismissed the Appellant's motion finding the motion was "a rehash of the same issue about release eligibility that has been litigated in this Court before." The Appellant filed his notice of appeal on January 23, 2015.

State v. Hearing, No. E2015-00173-CCA-R3-CD, 2015 WL 4710393, at *1-2 (Tenn. Crim. App. Aug. 7, 2015), *perm. app. denied* (Dec. 10, 2015). On appeal, this court affirmed the trial court's summary dismissal of the appellant's second Rule 36.1 motion, concluding that

The Appellant in his second Rule 36.1 motion argues that his sentence was illegal because he bargained for life with possibility of parole but was sentenced to life. That is the same argument he made in the first Rule 36.1 motion. That argument has no more merit now than it did when his first Rule 36.1 motion was denied by the trial court and the trial court's decision was affirmed on appeal by this court.

Id. at *2. The Petitioner currently has an appeal pending concerning a motion to correct clerical error concerning the same allegation relative to the release eligibility of his life sentence. *State v. David Wayne Hearing*, E2016-0566-CCA-R3-CD.

On February 26, 2016, the Petitioner filed a petition for writ of error coram nobis alleging as newly discovered evidence the trial court's ruling that the original sentencing judge had misspoken when referring to the life sentence as one "with parole" during the Petitioner's plea colloquy. The Petitioner also filed a motion for recusal of the trial judge in the error coram nobis proceeding. On May 3, 2016, the trial court denied the motion to recuse, ruling that the judge was not a witness based upon his findings in the prior Rule 36.1 matter. The trial court also ruled that the court's finding was not newly discovered evidence and, therefore, the Petitioner was not entitled to coram nobis relief.

In the Rule 20 motion for summary affirmance, the State asserts that the trial court correctly denied the motion to recuse. We agree. The trial court's prior findings concerning the nature of the Petitioner's release eligibility do not provide a basis for recusal of the court. *See, generally, Herrera v. Herrera*, 944 S.W.2d 379, 397 (Tenn. Ct. App. 1996) (adverse rulings do not provide a basis for recusal). Furthermore, the State correctly asserts that coram nobis relief is not available to guilty-pleaded convictions, *Frazier v. State*, 495 S.W.3d 246, 253 (Tenn. 2016), and, therefore, the trial judge was not a witness to the error coram nobis allegation by nature of his previous ruling. To quote the trial court, the Petitioner's latest filing is yet "a rehash of the same issue about release eligibility that has been litigated in this Court before." *Hearing*, 2015 WL 4710393, at *1-2.

Accordingly, we affirm the judgment of the Greene County Criminal Court pursuant to Rule 20 of the Rules of the Tennessee Court of Criminal Appeals.

ROBERT H. MONTGOMERY, JR., JUDGE