

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001832-MR

JAVON HEARN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, SENIOR JUDGE
ACTION NO. 02-CR-001962

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

NICKELL, JUDGE: Javon Hearn has appealed from the Jefferson Circuit Court's denial of his motion for post-conviction relief pursuant to RCr² 11.42 and CR³

¹ Senior Judge Sheila R. Isaac 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.

² Kentucky Rules of Criminal Procedure.

³ Kentucky Rules of Civil Procedure.

60.02 without first convening an evidentiary hearing. For the following reasons, we affirm in part, and remand for further proceedings consistent with this opinion.

Javon was convicted following a jury trial of murder,⁴ robbery in the first degree,⁵ and tampering with physical evidence.⁶ Upon the advice of counsel, after the jury returned its verdict, Javon entered into a sentencing agreement with the Commonwealth whereby he would receive a sentence of life imprisonment without the possibility of parole for twenty-five years on the murder charge, twenty years on the robbery charge, and five years on the tampering with physical evidence charge, all to run concurrently. Javon retained his right to appeal from the conviction. The trial court entered a judgment of conviction and sentencing order on July 22, 2005, in conformance with the agreement.

The Supreme Court of Kentucky unanimously affirmed Javon's conviction on direct appeal in an unpublished opinion.⁷ On February 13, 2009, Javon filed a sixty-one page *pro se* motion for post-conviction relief pursuant to RCr 11.42 and CR 60.02. He simultaneously requested he be allowed to proceed *in forma pauperis*, for the appointment of counsel and for an evidentiary hearing on his claims. On March 10, 2009, the trial court summarily denied Javon's

⁴ KRS 507.020, a capital offense.

⁵ KRS 515.020, a class B felony.

⁶ KRS 524.100, a class D felony.

⁷ *Hearn v. Commonwealth*, 2005-SC-000708-MR, 2008 WL 3890035 (rendered August 21, 2008).

motion for relief, finding that the issues raised were identical to those raised and decided in his direct appeal. This appeal followed.

Javon contends the trial court erred in denying his claims for relief based on prosecutorial misconduct, perjury, and fraud. He also claims the trial court erred in not finding his trial counsel was ineffective for failing to investigate and present witnesses who could have substantiated his alibi. It appears Javon has abandoned the remaining issues raised in his motion for relief before the trial court as they are not included in his brief to this Court. Therefore, we will not discuss these other allegations of error as they are not properly before us for review.

Javon first contends the trial court erred in denying his claims for relief based on prosecutorial misconduct, perjury, and fraud. Our review of the record reveals that, contrary to Javon's assertion, his arguments are merely restatements of the arguments heard and decided in his direct appeal. "It is an established principle that this Court [Court of Appeals] will not address an issue which was raised in a direct appeal or which should have been raised in a direct appeal." *Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990). *See also Baze v. Commonwealth*, 23 S.W.3d 619, 626 (Ky. 2000). Additionally, RCr 11.42 motions are "limited to the issues that were not and could not be raised on direct appeal." *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003). As Javon raised the issues of prosecutorial misconduct, perjury and fraud on direct appeal, he is now prohibited from attempting to re-litigate those issues in this post-conviction proceeding.

Next, Javon argues his counsel was ineffective in failing to investigate, interview or subpoena three potential alibi witnesses—his mother, brother, and future mother-in-law. He argues that had counsel presented testimony from these witnesses “it is probable that [he] would have been acquitted.” He claims all three of these witnesses would have corroborated his story to police regarding his whereabouts at the time of the victim’s death and undermined the credibility of his accomplice, the Commonwealth’s chief witness against him.

The trial court made no mention of this issue in its order denying Javon the relief he sought. Further, the trial court did not convene an evidentiary hearing on Javon’s claims, and we are unable to conclude from the record before us whether trial counsel investigated or interviewed the purported alibi witnesses. Because Javon’s claims are not refuted on the face of the record, the trial court should have held an evidentiary hearing to explore the matter. *See generally Stanford v. Commonwealth*, 854 S.W.2d 742 (Ky. 1993); *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (Ky. App. 1986) (citing *Hopewell v. Commonwealth*, 687 S.W.2d 153, 154 (Ky. App. 1985)). Thus, we must remand this case for an evidentiary hearing on the limited issue of whether counsel investigated the potential alibi witnesses. The trial court may then use its discretion in determining whether Javon’s claim of ineffective assistance of counsel has merit and whether relief is warranted.

For the foregoing reasons, we affirm in part and remand this matter to the Jefferson Circuit Court for an evidentiary hearing on the limited issue of whether trial counsel investigated the potential alibi witnesses.

ALL CONCUR.

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