

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000068-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  
AFFIRMING

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BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: John J. Hughes appeals from the trial court's denial of his motion for an evidentiary hearing per Kentucky Revised Statutes (KRS) 439.3401.<sup>1</sup>

Finding no error, we affirm.

In February 2003, Hughes bludgeoned his father to death with a baseball bat. After four or five days, Hughes wrapped the body in plastic and

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<sup>1</sup> We note that Hughes directs this Court's attention to KRS 439.3402. Based on the facts *sub judice* the proper statute for consideration is KRS 439.3401(5).

dropped it into a well on his property. He later confessed to these actions. On November 24, 2003, Hughes pled guilty to Murder, Tampering with Physical Evidence, and Forgery in the Second Degree (two counts). He was sentenced to twenty years.

On December 10, 2004, Hughes filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging ineffective assistance of counsel and seeking to have his guilty plea vacated. As the basis for this motion, he alleged that his counsel failed to investigate his case and to prepare a defense and coerced him into pleading guilty. The trial court overruled the motion without an evidentiary hearing. This Court affirmed the denial of the motion on January 6, 2005. One of the issues considered by this Court was Hughes's allegation that his attorney was ineffective for failing to file a KRS 439.3401(5)<sup>2</sup> motion.

Almost two years later, on January 3, 2008, Hughes, with assistance of counsel, filed a motion styled, "Verified motion for relief pursuant to RCr 11.42." The sole argument in that motion was that Hughes was entitled to a hearing per KRS 439.3401 to determine if he should receive the domestic violence exception to the violent offender statute. The trial court entered an order on

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<sup>2</sup> KRS 439.3401(5) states:

(5) This section 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.

This provides an exception to the violent offender provisions contained in KRS 439.3401.

February 14, 2008, denying that motion without a hearing. Hughes did not prosecute an appeal.

Thereafter, on November 26, 2012, Hughes filed the current *pro se* motion seeking an evidentiary hearing and application of KRS 439.3401(5). The trial court denied said motion without a hearing on December 5, 2012. The court, in denying Hughes's motion, concluded that the issue raised was previously decided by this Court in Hughes's RCr 11.42 appeal.<sup>3</sup> It is from this that Hughes now appeals.

On appeal, Hughes argues that the court erred in denying an evidentiary hearing and failed to make findings to determine if Hughes was a victim of sexual abuse exempting him from the violent offender status of KRS 439.3401. In addition Hughes argues that the court failed to consider the Commonwealth Attorney's obligation and duty to serve the interest of justice for all people/citizens (including Hughes) and duty to take the initiative to investigate the suspected criminal sexual abuse acts and witnesses.

In response, the Commonwealth argues that consideration on the merits of this appeal is prohibited by the doctrines of res judicata and the law of the case. In support thereof, the Commonwealth argues that when Hughes's second

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<sup>3</sup> The court also concluded that the motion failed to satisfy the requirements of KRS 439.3402, as Hughes had directed the court to that statute, and was barred due to his moving court for an evidentiary hearing per KRS 439.3405 previously. Hughes takes issue with the trial court's order wherein it states that he had previously moved for an evidentiary hearing per KRS 439.3405 and contends that he had never filed such a motion. We believe that the trial court mistakenly referred to KRS 439.3405 rather than the statute at issue, KRS 439.3401(5); this mistake does not materially impact the court's order. Accordingly, we decline to reverse on this basis.

RCr 11.42 motion, wherein he claimed to be entitled to a hearing per KRS 439.3401, was denied, and no appeal was taken, no further motions for application of KRS 439.3401(5) could be entertained. The Commonwealth claims that while styled as an RCr 11.42 motion, in reality the motion was one for a hearing per KRS 439.3401, which was denied and, thus, he cannot now make the same motion again. Second, the Commonwealth argues that Hughes presents no authority that the Commonwealth Attorney was under a duty to investigate the allegations of abuse Hughes made against his father. The Commonwealth argues it is unclear what prejudice Hughes has suffered or what relief he requests.

At issue, this Court in affirming the denial of Hughes's RCr 11.42 motion stated:

Hughes's first argument is that his attorney failed to conduct an independent investigation into the facts and evidence of the case. More specifically, his argument relates to the fact that he will be required to serve a minimum of 85% of his 20-year sentence before being eligible for parole because he has been classified as a violent offender. See KRS 439.3401. He further notes that he would have been exempt from the violent offender statute if the court had determined in accordance with KRS 439.3401(5) that he was a domestic violence victim. That portion of the statute exempts a person from the violent offender statute if the court determines the person "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 the serious physical injury of the victim."

Hughes argues that his counsel was deficient in that he failed to inform him that he would be required to serve at least 85% of his 20-year sentence because he was subject to the violent offender statute set forth in KRS 439.3401.

Hughes further states that he was physically and sexually abused by his father from the time of his birth and that he killed his father when his father made yet another sexual advance toward him. In this regard, Hughes asserts that he was entitled to an evidentiary hearing under KRS 439.3401(5) to determine whether he was exempt from the statute because he was a victim of domestic violence and abuse.

Hughes argues that his attorney should have asked for an evidentiary hearing under the statute so that the court could have determined that he was a victim of domestic violence or abuse and thus exempt from the requirement that he serve at least 85% of his sentence before being eligible for parole. He alleges there was an abundance of evidence available to substantiate his claim that he had been sexually and physically abused by his father for all or most of his life. He also claims that his attorney failed to read KRS 439.3401 as well as failed to inform him that he would have to serve at least 85% of his sentence.

In *Turner v. Commonwealth*, 647 S.W.2d 500 (Ky.App.1982), the appellant filed an RCr5 11.42 motion alleging that his guilty plea was involuntary because he was not informed that he would be ineligible for parole for ten years. The court held that “[a] guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action.” *Id.* at 501. Therefore, as to Hughes's claim that his attorney failed to advise him of the 85% requirement of the violent offender statute, we find no constitutional violation even if his attorney failed to so inform him.

The issue of whether his attorney rendered ineffective assistance by not moving the court for an evidentiary hearing concerning whether Hughes was exempt from the violent offender statute is a separate matter. The percentage of time that must be served before Hughes is eligible for parole consideration is an issue that does not involve the validity of either the guilty plea or the sentence. Therefore, should it be determined that Hughes received ineffective assistance of counsel in this regard, his conviction itself would not be disturbed. Rather, the result would involve the possibility of an

evidentiary hearing to determine whether he should be exempt from the 85% requirement of the violent offender statute.

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 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 v. Commonwealth*, 2005-CA-000416-MR, 2006 WL 73738 (Ky. App. Jan. 13, 2006), \*1-\*2.

We agree with the trial court that this matter has previously been decided on appeal in *Hughes v. Commonwealth*. See *Brown v. Commonwealth*, 313 S.W.3d 577 (Ky.2010)(abrogating *Commonwealth v. Schaefer*, 639 S.W.2d

776 (Ky.1982) (The law-of-the-case doctrine generally applies only to matters which an appellate court has addressed on the merits.) *See also Barnett v. Commonwealth*, 348 S.W.2d 834 (Ky. 1961). (In addition, res judicata and collateral estoppel prevent relitigation of issues raised in direct appeal and prior post-conviction relief motions.) Accordingly, the trial court did not err in denying Hughes's motion.

Last, Hughes argues that the court failed to consider the Commonwealth Attorney's obligation and duty to serve the interest of justice for all people/citizens (including Hughes) and duty to take the initiative to investigate the suspected criminal sexual abuse acts and witnesses. We agree with the Commonwealth that Hughes's argument does not necessitate reversal, as we are unclear what relief he is seeking nor does he provide this Court with authority to grant a reversal on this ground. Accordingly, we decline to reverse.

Finding no error, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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