

RENDERED: JANUARY 27, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001053-MR

ROBERT HOLLON

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY  
NO. 2008-SC-000618-DG

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 94-CR-00086

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\* \*\* \*\* \*\*

BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; CLAYTON AND MOORE,  
JUDGES.

TAYLOR, CHIEF JUDGE: This case is before us upon remand from the  
Kentucky Supreme Court in *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky.  
2010). The Supreme Court reversed our Opinion dated August 8, 2008, and  
established new precedent by recognizing as cognizable a claim for ineffective

assistance of appellate counsel in this Commonwealth. As we summarily affirmed the circuit court's denial of Hollon's Kentucky Rules of Criminal Procedure (RCr) 11.42 motion based upon ineffective assistance of appellate counsel, we shall now address the merits of such claim in accordance with the directive from the Supreme Court. For the following reasons, we affirm.

Hollon was convicted by a jury of murder and sentenced to life imprisonment without the possibility of parole for twenty-five years. The murder was particularly violent and gruesome. The victim, a mother of two children, was found beaten and stabbed to death in her home. Her injuries were extensive; her body was badly bruised, she had several missing teeth, and she had suffered multiple stab wounds, which included a large knife implanted in her back. On her head, a patch of scalp some six inches by three inches had been completely cut off. Hollon immediately became a suspect as he had worked at Hollon's home and was seen with her the night of the murder.

Eventually, Hollon was indicted upon murder and first-degree robbery. The Commonwealth gave notice of intent to seek a sentence of life imprisonment without the possibility of parole for twenty-five years based upon the aggravating circumstance that the murder was committed during commission of a robbery, burglary, or rape.

A jury found Hollon guilty of murder but acquitted him upon the offense of first-degree robbery. During the penalty phase, the jury recommended a sentence of life imprisonment for twenty-five years without the possibility of

parole based upon the aggravating circumstance that the murder was committed following a burglary. The court sentenced Hollon in accordance with the jury's recommendation.

Hollon directly appealed his conviction, and the Supreme Court affirmed same in Appeal No. 1996-SC-000382-MR. An issue presented was "whether the use of burglary as an aggravating circumstance was proper?" In concluding in the affirmative, the Supreme Court stated that "the Commonwealth offered evidence that Hollon either re-entered the dwelling after his license ended or remained in the dwelling after it was terminated. There was sufficient evidence that the murder occurred in the course of burglary. The use of burglary as an aggravator here does not impermissibly broaden the class of persons eligible for this penalty."

Hollon then filed an RCr 11.42 motion arguing, *inter alia*, that appellate counsel was ineffective for failing to challenge the constitutionality of using first-degree burglary as an aggravating factor. The circuit court determined that appellate counsel was not ineffective and denied Hollon's RCr 11.42 motion. Hollon appeals this decision.

To prevail on his RCr 11.42 motion, Hollon must demonstrate that appellate counsel's performance was deficient and that such deficiency was prejudicial – that is, absent counsel's deficient performance there exists a reasonable probability of success on appeal. *Hollon*, 334 S.W.3d 431.

Hollon argues that appellate counsel was ineffective for failing to challenge the constitutionality of using first-degree burglary as an aggravating circumstance based upon the particular facts of his case. Specifically, Hollon maintains that utilizing first-degree burglary as an aggravating circumstance is violative of the Eighth Amendment's prohibition against arbitrary imposition of the death penalty and the Fourteenth Amendment's due process guarantee. Hollon believes that the burglary aggravator was unconstitutionally ambiguous and overbroad as it essentially allowed imposition of the death penalty for any murder occurring inside a dwelling other than the accused's. If appellate counsel had raised this issue on appeal, Hollon asserts he would have been successful in the direct appeal to the Supreme Court.

To pass constitutional scrutiny, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988)(quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)).

In utilizing first-degree burglary as an aggravating circumstance, the Commonwealth was required to demonstrate that Hollon either entered or remained unlawfully in the victim's home.<sup>1</sup> To support same, the two theories

---

<sup>1</sup> First-degree burglary is codified in Kentucky Revised Statutes (KRS) 511.020 and provides:

(1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains

submitted to the jury were that Hollon left the victim's home and then re-entered the home without the victim's knowledge or that he remained in the home until his permission to remain was withdrawn when he began attacking the victim.

In this specific case and in others generally, the burglar aggravator serves to differentiate between the murderer who enters or remains unlawfully in a building from a murderer who may kill someone in a park, street, or other open area. And, it is reasonable for the legislature to punish a burglar-murderer more severely in an effort to protect the sanctity of the home and other buildings commonly used by the public.<sup>2</sup> Contrary to Hollon's position, we conclude that the use of burglary as an aggravating circumstance serves a legitimate narrowing

---

unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:

- (a) Is armed with explosives or a deadly weapon; or
- (b) Causes physical injury to any person who is not a participant in the crime; or
- (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.

<sup>2</sup> KRS 511.010(1) defines "building" as:

- (1) "Building," in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft:
  - (a) Where any person lives; or
  - (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation.

function that justifies the imposition of a harsher sentence – i.e., life without the possibility of parole for twenty-five years.

Hence, we conclude that appellate counsel was not ineffective for failing to challenge the constitutionality of using burglary as an aggravating circumstance.

We view any remaining contentions as moot or without merit.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT  
FOR APPELLANT:

Amy Robinson Staples  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELEE:

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky