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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000964-MR

JASPER POLLINI

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2010-SC-000504-D

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 02-CR-001146

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This case comes to us on remand from the Kentucky Supreme Court for consideration of Jasper Pollini's ineffective assistance of appellate counsel claim under *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky.

2010). After careful review, we vacate and remand to the trial court for proceedings consistent with this opinion.

The pertinent facts of this case, as set forth by the Kentucky Supreme Court, are as follows:

In the early morning hours of May 7, 2002, Appellant, who was seventeen years old at the time these crimes were committed, broke into Brian Murphy's garage and stole some tools and a generator. Apparently unable to transport the generator, Appellant returned to his nearby home and sought the assistance of Jason Edwards, the boyfriend of Appellant's sister, Crystal Plank. Edwards drove Appellant back to the area and the pair loaded the generator from Murphy's garage into the trunk of Edward's car. Appellant told Edwards to stay in the car and then proceeded to use a screwdriver to break into the nearby garage of Dan Ziegler.

Ziegler awoke shortly after 5:00 a.m. to the sound of his alarm system beeping. While investigating the source for the alarm, Ziegler went into his garage and saw Appellant. Ziegler testified that he perceived Appellant to have a weapon in his hand, but was not sure what it was. Ziegler told Appellant to stop what he was doing or he would "blow his head off." Appellant fled from the scene and was chased into some nearby woods by Ziegler. Ziegler testified that he soon heard a car drive away after losing sight of Appellant in the woods. After returning to his home, Ziegler called 911 and his neighbor, Byron Pruitt, to report the incident and to advise Pruitt to check his property. After talking with Ziegler, Pruitt armed himself with an automatic pistol and a flashlight and began investigating the area.

Meanwhile, Appellant and Edwards drove back to Appellant's house. Edwards removed the generator from his car, covered the car, and then went into the house. Shortly after retreating into the house, Appellant asked Edwards to take him back to Ziegler's residence to retrieve a toolbox he had left at the scene. When

Edwards refused to return to Ziegler's residence, Appellant persuaded his sister, Crystal Plank, to drive him back to the scene to retrieve his toolbox.

Between sixteen and thirty minutes after first being confronted by Zeigler, Appellant and Plank returned to the scene of the burglaries. Appellant stated that he armed himself with a semi-automatic pistol immediately before his return to the scene of the crimes because he had been threatened by Ziegler. Upon their return to the scene, Appellant instructed Plank to turn off the lights on the car because he was about to get out to retrieve the toolbox. As Plank stopped the car, she observed a flashlight coming toward the car. Appellant hurriedly instructed Plank to back up; however, Plank had difficulty doing so due to poor visibility. Appellant then fired his gun out the window of Plank's vehicle and the bullet pierced Pruitt in the throat. Pruitt died shortly thereafter from his injury. Immediately after the shooting, Appellant and Plank fled the scene, but were apprehended, along with Edwards, later that day.

Pollini v. Commonwealth, 172 S.W.3d 418, 421-22 (Ky. 2005).

Pollini and his sister, Plank, were tried together. Pollini was ultimately convicted of capital murder (complicity), first-degree burglary (complicity), second-degree burglary (complicity), and receiving stolen property over \$300.00 (complicity). *Id.* at 421. On September 22, 2005, the Kentucky Supreme Court vacated Pollini's capital murder conviction and remanded his case for resentencing on noncapital murder. Pollini was resentenced, and the sentence was affirmed on direct appeal. *Pollini v. Commonwealth*, 2008 WL 203035 (Ky. 2008) (2006-SC-000835-MR).

Thereafter, Pollini filed a post-conviction motion for a new trial under Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging ineffective assistance

of counsel (IAC) and ineffective assistance of appellate counsel (IAAC). Upon review, the trial court denied Pollini's motion without a hearing. Pollini then appealed to this Court, and we rendered an opinion on July 16, 2010, affirming the trial court's denial of Pollini's IAC claims and holding that Pollini's IAAC claims were not cognizant under *Hicks v. Commonwealth*, 825 S.W.2d 280 (Ky. 1992).

However, on April 21, 2011, the Kentucky Supreme Court rendered *Hollon* and ruled that the time had come for recognition of IAAC claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal.

Specifically, the *Hollon* Court stated:

We are thus persuaded that it is time, indeed past time, to overrule *Hicks* and the cases relying upon it and to recognize IAAC claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal. To succeed on such a claim, the defendant must establish that counsel's performance was deficient, overcoming a strong presumption that appellate counsel's choice of issues to present to the appellate court was a reasonable exercise of appellate strategy. As the Supreme Court noted in *Smith*, “[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance be overcome.” 528 U.S. at 288, 120 S.Ct. 746 (*quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). We further emphasize “ignored issues” to underscore that IAAC claims will not be premised on inartful arguments or missed case citations; rather counsel must have omitted completely an issue that should have been presented on direct appeal. For further clarity, we additionally emphasize that IAAC claims are limited to counsel's performance on direct appeal; there is no counterpart for counsel's performance on RCr 11.42 motions or other requests for post-conviction relief. Finally, the defendant must also establish that he or she was prejudiced by the deficient performance, which, as

noted, requires a showing that absent counsel's deficient performance there is a reasonable probability that the appeal would have succeeded. *Smith, supra*.

Hollon, supra, at 436-37.

Upon remand, this Court permitted the parties to file supplemental briefs addressing the merits of Pollini's IAAC claim. Just as he did before the trial court, Pollini argues that he received IAAC when his counsel on direct appeal failed to present the issue of *ex parte* contact between the judge and the jury to the Kentucky Supreme Court. Specifically, Pollini noted that during deliberations, the jury asked the following question: "Does there exist a transcript of the Plank conversation with police? Difficult to locate on tape. If so, can we please request?" Without notifying either counsel, the trial judge responded to their note by writing "There's none available." At some point after the verdict, Plank's counsel discovered this *ex parte* contact and notified Pollini's counsel.

Plank raised this issue on appeal, and a panel of this Court found that the trial court's failure to notify counsel of this *ex parte* contact was a violation of RCr 9.74 (no information may be given to a jury except in open court and in presence of defendant and counsel). *Plank v. Commonwealth*, 2005 WL 1313838 (Ky. App. 2005) (2003-CA-001861-MR). However, this Court did not determine whether the error was reversible error because it was already reversing Plank's conviction on other grounds. *Id.* at 9.

In its supplemental brief, the Commonwealth argues that while Pollini raised his IAAC claim to the trial court in his RCr 11.42 motion, he abandoned the

claim in the RCr 11.42 appeal to this Court. Instead, the Commonwealth argues, a panel of this Court read one of Pollini's appellate claims as including both an IAC and an IAAC component. The Commonwealth urges this court to deny review of Pollini's IAAC claim on remand because Pollini did not flesh out how his appellate counsel was ineffective in his appeal of the denial of his RCr 11.42 motion.

We disagree with the Commonwealth's argument in this regard. A careful review of the record reflects that in his original RCr 11.42 motion to the trial court, Pollini argued that he received IAAC in his direct appeal when appellate counsel failed to raise the alleged *ex parte* contact between the judge and the jury. In its April 21, 2009, order denying Pollini relief on his RCr 11.42 claims, the trial court summarily denied Pollini's claim for IAAC regarding the *ex parte* contact. The trial court found that because a panel of this Court reversed Plank's conviction on other grounds, her claim concerning the *ex parte* contact was rendered moot. Based on this, the trial court determined that Pollini's claim was also moot and must be dismissed.

In his original RCr 11.42 brief to this Court, Pollini again raised the issue of the improper *ex parte* contact, pointing out that it prejudiced him by preventing him from litigating an issue that had been deemed reversible by Kentucky Courts. Presumably, because Pollini, via counsel, phrased the argument in terms of his trial counsel being ineffective, the Commonwealth urges this Court to hold that Pollini abandoned his IAAC claim on appeal. We simply disagree that Pollini abandoned or waived his IAAC claim on appeal to this Court. His brief

clearly presents the issue of the *ex parte* contact and argues that had original counsel been aware of the contact, he would have notified the trial court of the error. Furthermore, despite knowing of the *ex parte* contact, counsel on direct appeal failed to present the error to the Supreme Court for review.

We find it troubling that the trial court recognized that this Court found the *ex parte* contact between the judge and jury to be erroneous under RCr 9.74, but then went on to summarily deny Pollini relief based on the same erroneous *ex parte* contact. We also find error with the trial court's statement that because Plank's conviction was reversed on other grounds, Pollini's claims were rendered moot. Because Plank's conviction was reversed on other grounds, this Court was not forced to determine whether the *ex parte* contact was a reversible error, but it does not follow that Pollini's arguments were rendered moot.

Turning to whether the omission of *ex parte* contact on direct appeal amounted to IAAC, we look to *Hollon, supra*, for guidance. In *Hollon*, the Kentucky Supreme Court described how the trial court and the appellate courts would work together to address IAAC claims. The court noted:

For clarity, we note some general principles regarding the courts' roles in review of IAAC claims. The trial court will address the IAAC issue under the aforementioned standards entering findings and an appropriate order pursuant to RCr 11.42(6). Once the trial court rules on a defendant's IAAC claim, that court's order will be reviewable in the same manner as orders addressing RCr 11.42 motions are currently reviewed. *See* RCr 11.42(7) (either movant or Commonwealth may appeal from court's final order on RCr 11.42 motion).

If the trial court finds that the defendant received ineffective appellate assistance and is entitled to relief under the *Strickland v. Washington* standard, as noted above, the trial court should enter appropriate findings and an order vacating the original judgment. We depart from the approach, adopted by some courts, which also requires the trial court to reenter the original judgment so that an appeal of the omitted issue may proceed. Kentucky trial courts should not reenter the original judgment. The matter-of-right appeal guaranteed by § 115 of the Kentucky Constitution has concluded and it is not necessary to reenter the judgment in order for the omitted issue(s) to receive appellate review; any omitted issue or issues will be reviewed as part-and-parcel of the appeal of the trial court's order on the RCr 11.42 motion.

On the appeal of the trial court's order on the RCr 11.42 motion, it is incumbent on the Court of Appeals to review in the first instance the trial court's ruling regarding IAAC. If the Court of Appeals concludes that there was ineffective appellate assistance, then it should proceed to address the omitted issue or issues on which the IAAC claim is based. Should the Court of Appeals conclude that there was no IAAC meriting relief then, of course, it would be unnecessary for that Court to address the issue or issues omitted from the matter-of-right appeal. Any final opinion of the Court of Appeals would, as always, be subject to discretionary review by the Supreme Court pursuant to CR 76.20.

Hollon, 334 S.W.3d at 439-40. Thus, in the instant case, we must first address whether Pollini received IAAC when his appellate counsel failed to raise the *ex parte* contact as error to the Supreme Court. Per *Hollon*, counsel's failure to raise such contact must have been a stronger issue than the issues appellate counsel did present on appeal in order to overcome the presumption of effective assistance of counsel. A review of the record indicates that the existence of *ex parte* contact between the judge and the jury is indeed as strong as the claims Pollini's appellate

counsel did raise. Thus, we conclude that appellate counsel's failure to raise the issue on direct appeal amounts to ineffective assistance of counsel.

Turning to the merits of the omitted issue, we conclude that the omitted *ex parte* contact between the judge and jury in this case amounts to reversible error. A review of the record indicates that while the judge instructed the jury that the transcript of Plank's conversation with police did not exist, in fact the transcript did exist, but had not been entered into the record in its entirety. In this court's opinion in *Plank, supra*, this issue was discussed at length. This Court stated:

It must be noted that during the trial, [Plank's] defense counsel had a transcript of [Plank's] statement to police prepared and sought to have it admitted as evidence along with the tape of [Plank's] statement which was admitted. The court denied admission of the transcript on grounds that defense counsel did not cite adequate legal authority for its admission and/or because the Commonwealth had not had the opportunity to certify the transcript. (The prosecution admitted that they had received the transcript prior to trial, but claimed they had failed to certify it because they were aware that [Pollini's] counsel opposed the admission of the transcript of [Plank's] statement.) The trial court stated that the jury would have the tape of [Plank's] statement for its deliberations and they could play it as many times as they wished. It must also be noted that the Commonwealth blew up a portion of this very transcript of [Plank's] statement and used it during its closing argument devoted to the case against [Plank].

The Commonwealth's position on this issue is that the trial court correctly answered the jury's question (since the transcript of [Plank's] statement was not admitted into evidence, it was not available) and thus no information was given to the jury such that the notice requirements of RCr 9.74 would have been invoked. We disagree that the notice requirements of RCr 9.74 were

not applicable in this case. In our view, the court's answer, "There's None Available", was itself information given to the jury that required notice to the parties and to counsel. The trial court was most assuredly aware of the desire of [Plank's] counsel to have this transcript before the jury and it is very bothersome to this Court that counsel was never even given notice that they had requested the transcript. This is especially true in light of the following: the Commonwealth used a selected portion of this very transcript in its closing argument; there were questions regarding the audibility of the audiotape of [Plank's] statement; and dicta in *Perdue v. Commonwealth*, 916 S.W.2d 148, 155 (Ky. 1996), regarding the jury's access to transcripts of tape recordings. Given our rulings above, however, we need not proceed to an analysis of whether this error warranted reversal in this case.

Plank, supra, at 8-9. The jury's note regarding Plank's statement to police clearly indicates that they were unable to understand or find portions of Plank's statements in the videotape of her testimony. The transcript did in fact exist, and thus the judge's response to the jury was erroneous and misleading, at best. While the record indicates that Pollini had at some point objected to the introduction of Plank's statement to police, at the very least, the judge was required to present the jury's request to counsel in Pollini's presence. Accordingly, the trial court committed reversible error when it provided false information outside of Pollini and counsel's presence to the jury. This is exactly the behavior that RCr 9.74 is intended to prevent.

Based on this egregious error, we vacate Pollini's convictions and remand this matter to the trial court for proceedings consistent with this opinion.

ALL CONCUR.

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