RENDERED: JULY 22, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001342-MR

LEONDO HARRIS — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2009-SC-000394-DG

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NOS. 05-CR-002347 & 05-CR-002918

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This case comes before this Court on remand from the Supreme Court of Kentucky for further consideration in light of that Court's recent decision in *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011). After careful review, we hold that Harris's appellate counsel was not ineffective under *Hollon*.

On January 23, 2007, Leondo Harris was convicted of first-degree rape, first-degree robbery, and first-degree sexual abuse of T.W. and was sentenced to a term of fifty years' imprisonment. The relevant facts of this case were sufficiently stated in the Supreme Court's opinion affirming Harris' conviction on direct appeal:

> T.W. testified that as she was leaving a pay-phone near her home on Virginia Avenue in Louisville shortly before 9:00 p.m. on November 5, 1996, she was accosted by an African-American man wearing a black sweat-shirt with its hood pulled over his head and around his face. The man showed her a handgun and directed her to an unlighted alley between two buildings where he first robbed her of the small amount of cash in her possession, rummaged in her bra for more cash, ordered her to remove her shirt and lower her pants, and then vaginally raped her. During the assault, the man several times threatened T.W. with the gun and ordered her not to look at him. Once the man had fled, T.W. sought help at a nearby apartment, where the occupants helped her call 911. At trial, T.W., one of the persons who assisted her, and two of the police officers who responded to the 911 call all testified that in the immediate aftermath of the assault T.W. was distraught, that she was crying and sobbing uncontrollably, and that her clothes were disheveled. A short time later, T.W. was interviewed by the detective assigned to the case, but she had not recognized her assailant and was unable to provide more than a very general description. Following the interview, she was taken to the hospital where she was examined and a vaginal smear collected. The detective placed that evidence in storage. When no leads developed, the police eventually declared the case "cold" and placed it in abeyance.
>
> In the meantime, advances in technology led to the Federal Bureau of Investigation's creation of the Combined DNA Index System ("CODIS"), "a massive centrally-managed database linking DNA profiles culled

from federal, state, and territorial DNA collection programs," *United States v. Kincade*, 379 F.3d 813, 819 (9th Cir. 2004). Pursuant to CODIS, local law enforcement agencies collect DNA samples from, among other sources, crime scenes and individuals convicted of qualifying state offenses. *See* KRS 17.170-17.175. The DNA is analyzed, and the resulting profiles are incorporated in the database, making possible nationwide computer searches for matches between the evidence from different crime scenes as well as between the crime scene evidence and the known-offender profiles. In 2000, Congress passed the DNA Analysis Backlog Elimination Act, Pub.L. No. 106-546, 114 Stat. 2726 (2000), which provided grant money to the states to fund lab work in hopes of eliminating some of the enormous backlog of collected but unanalyzed samples. Tracey Maclin, Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? 33 J.L. Med. & Ethics 102 (Spring 2005). Due to one such grant, in 2005 the State Police Crime Lab in Frankfort reworked the evidence gathered in T.W.'s case and from semen present on the vaginal swabs obtained a male DNA profile that proved to be a perfect match with Harris's offender profile. T.W.'s case was reopened, and on August 4, 2005 a Jefferson County Grand Jury indicted Harris. Not long after the indictment, the Commonwealth obtained a new blood sample from Harris and confirmed the match between his DNA and that obtained from T.W.'s rape kit.

Harris's case was first called to trial on January 31, 2006, but at that time the Commonwealth admitted that it had not yet located T .W. and requested a continuance. Harris objected and moved that the case be dismissed without prejudice. The trial court apparently understood his motion as a demand for a speedy trial, but given the obvious importance of the witness, the seriousness of the charges, and the fact that the prosecution was then only about six months old, the trial court denied the motion to dismiss and rescheduled trial for June 27, 2006. On June 23, 2006, the Commonwealth again requested that the trial be continued. Although it had located T.W., another key witness-the detective initially assigned to T.W.'s case

> in 1996-was on vacation. Again Harris objected, but again the trial court rescheduled trial, this time for August 22, 2006. When that date rolled around, Harris requested more time-to file a KRE 412 motion and to interview witnesses-and so once again trial was postponed. Harris was finally tried in October 2006, about fourteen months after his indictment and almost ten years after the alleged offense.

Harris v. Commonwealth, No. 2007-SC-000142-MR, 2008 WL 2484934 (Ky., June 19, 2008).

Harris appealed his conviction to the Kentucky Supreme Court, claiming that he was denied his rights to a timely prosecution and a speedy trial. Harris also claimed that his trial was rendered unfair by: 1) the under-representation of African American males on the venire from which the petit jury was chosen; 2) the exclusion of evidence that the complaining witness, T.W., was a convicted felon; 3) the use of jury instructions which understated the Commonwealth's burden of proof; and 4) the prosecutor's misuse of closing argument to suggest that Harris had to prove his innocence.

While Harris' appeal was still pending, he filed a motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42, alleging various claims of ineffective assistance of counsel. On May 14, 2008, the Jefferson Circuit Court denied Harris' motion because the case was pending on appeal, and the trial court had no record to review. Subsequently, the Kentucky Supreme Court affirmed Harris' conviction and sentence on June 19, 2008. Harris

then appealed the denial of his RCr 11.42 motion to this Court in lieu of refiling his RCr 11.42 motion for review by the trial court.

Initially, we affirmed the trial court's denial of Harris' RCr 11.42 motion, holding that his claims had already been presented in his direct appeal to the Kentucky Supreme Court. Further, we held that the claims the Supreme Court reviewed for palpable error did not amount to ineffective assistance of counsel (IAC). Finally, we declined to review his claims for ineffective assistance of appellate counsel (IAAC) because at the time the opinion was rendered, that was not a cognizable claim in this jurisdiction pursuant to *Hicks v. Commonwealth*, 825 S.W.2d 280 (Ky. 1992). However, on April 21, 2011, the Supreme Court rendered *Hollon v. Commonwealth*, *supra*, overruling *Hicks*. The Court 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* [*v. Robbins,* 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)], "'[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. (Emphasis added). In the instant case, Harris is claiming that he received IAAC because his appellate counsel failed to hold his direct appeal in abeyance while he pursued his claims for IAC. Thus, his claim is that his counsel was ineffective in handling his RCr 11.42 motion and ineffective in handling his direct appeal for not filing a motion to hold it in abeyance. As the court specifically stated in *Hollon*, there is no cognizable claim for ineffective assistance of appellate counsel relating to counsel's handling of RCr 11.42 matters. Thus, we are left to evaluate whether his counsel is ineffective in not placing his direct appeal in abeyance. Because the normal procedure is to hold **the RCr 11.42 motion** in abeyance pending the outcome of the direct appeal, it does not amount to ineffective assistance of appellate counsel to not hold the **direct appeal** in abeyance. The trial court would have to review the record in order to determine whether counsel was ineffective, and because Harris first filed a direct appeal that was still pending, that record would have been at the Supreme Court. Thus, the

trial court was unable to review any record to determine the legitimacy of Harris' claims and denied the motion accordingly. If anything, the trial court could have held the RCr 11.42 motion in abeyance, but it was not ineffective assistance of counsel for appellate counsel to not petition the Supreme Court to hold the direct appeal in abeyance.

Accordingly, we affirm the portion of the trial court's order denying the RCr 11.42 claims for ineffective assistance of trial counsel for the reasons stated in our initial opinion. Further, regarding Harris' claims for ineffective assistance of appellate counsel for not holding his direct appeal in abeyance, we hold that it was not ineffective for appellate counsel to proceed with the direct appeal before handling the RCr 11.42 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leondo Harris, *Pro Se*
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky