RENDERED: July 7, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000433-MR

PRESTON MONHOLLEN — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 97-CR-00056

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, KNOPF,[1] AND MINTON, JUDGES.

KNOPF, JUDGE: Following a two-day jury trial in February 1999, a Whitley County jury found Preston Monhollen guilty of the November 1996 murder of his mentally retarded uncle, Elmer Lynn Croley. By judgment entered March 18, 1999, the Whitley Circuit Court sentenced Monhollen to twenty-five years' imprisonment. Our Supreme Court affirmed Monhollen's conviction in an

[1] This opinion was completed and concurred in prior to Judge William L. Knopf's retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

unpublished opinion rendered February 21, 2002.[2] In about February 2003, Monhollen moved the circuit court for relief from his judgment pursuant to RCr 11.42. By order entered February 5, 2005, the Whitley Circuit Court denied Monhollen's motion. It is from that denial that Monhollen has appealed. He maintains that his 1999 trial was rendered unfair by counsel's failure to present additional defense witnesses. Because we are convinced that the additional evidence is not reasonably likely to have affected the outcome of Monhollen's trial, we affirm.

Monhollen was accused along with two confederates--his wife, Tina, and his friend, Thomas Honeycutt--of having lured Croley to a spot on the bank of the Cumberland River outside Williamsburg known as the Ponderosa and there having robbed him, bound his wrists and ankles with shoe laces, and thrown him into the river. The attack was alleged to have occurred during the evening of November 29, 1996, the day after Thanksgiving. Croley's shoeless body, thus bound, was discovered washed up alongside the river some three months later. Tina testified for the Commonwealth that that evening she had induced Croley to accompany her and Monhollen on a marijuana-purchasing errand, that they had encountered Honeycutt on the way, and that the foursome had proceeded to the Ponderosa to talk and party. Tina, who had been drinking and taking drugs that day, claimed

[2] Monhollen v. Commonwealth, 1999-SC-0469-MR (final as of March 14, 2002).

that she passed out in her car shortly after arriving at the river, but when she awoke she observed Honeycutt nervously wiping his hands on a white rag and heard him ask Monhollen, "What are we going to do about Tina, man? She's going to know; she's going to know." Monhollen replied, "Don't worry about the old lady. She don't know nothing, look at her." Croley was no longer with the men, and other evidence tended to show that no one saw him alive thereafter.

Monhollen had been returned to custody in early 1997 for having violated a prior probation. The Commonwealth presented testimony by one of Croley's sisters-in-law, Maryetta Croley, that the black athletic shoes taken from Monhollen at the time of his 1997 incarceration were the shoes Croley had been wearing during the family's Thanksgiving celebration. Another of Croley's relatives, however, his nephew's spouse, Rosalie McCullah, who often helped Croley pay bills and shop, testified that she had been with Croley during the day that Friday following Thanksgiving, and that he had been wearing not a black pair of athletic shoes, but a white pair with black trim and black laces. The black shoes taken from Monhollen had not been introduced into evidence at the time McCullah testified, so defense counsel was not able to ask her directly whether the shoes she remembered were different. Monhollen contends that

counsel rendered ineffective assistance by failing to recall McCullah during the defense's case for that purpose.

As the parties correctly note, to obtain relief from his judgment on the ground of counsel's ineffective assistance, Monhollen must show

> that [his] lawyer made errors so serious that [s]he was not functioning as the "counsel" guaranteed by the Sixth Amendment. [He] must also show that the deficient performance prejudiced his defense, i.e., that there is a reasonable probability that but for counsel's error the result of the proceeding would have been different.[3]

While it is true that counsel's utter failure to present evidence of a viable defense can amount to ineffective assistance,[4] the failure to present merely corroborative or cumulative evidence of a defense otherwise raised is far less likely to be erroneous.[5] Here, counsel diligently sought to undermine the shoe evidence both by attempting to impeach Maryetta Croley who claimed to remember Croley's wearing the shoes taken from Monhollen, and by emphasizing McCullah's testimony that hours before Croley's disappearance she had seen him in white shoes. The failure to recall McCullah did not deprive Monhollen of a defense. Even if counsel's failure to

[3] Mills v. Commonwealth, 170 S.W.3d 310, 327 (Ky. 2005) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

[4] Norton v. Commonwealth, 63 S.W.3d 175 (Ky. 2001); Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992).

[5] Mills v. Commonwealth, *supra.*

recall her could be deemed erroneous, moreover, the jury had already heard her testify that she remembered white shoes. It would have added little for her to say that the black shoes introduced by the Commonwealth were different. There is no reasonable possibility that this additional testimony would have altered the result of the trial, and thus its omission does not entitle Monhollen to relief.

For similar reasons, Monhollen is not entitled to relief for counsel's alleged failure to impeach Tina with Honeycutt's alibi. Apparently Honeycutt's mother, and possibly other relatives, were prepared to testify that Honeycutt had been with them in Sunbright, Tennessee throughout the 1996 Thanksgiving weekend. Monhollen contends that counsel erred by failing to impeach Tina's testimony with this evidence contradicting an important aspect of her story. Again, even assuming that counsel erred by failing to present this evidence, there is no reasonable possibility that it would have changed the result. Counsel very effectively impeached Tina with her strong motive for cooperating with the Commonwealth and with prior statements about the incident that she admitted had been lies. Additional impeachment, at least by witnesses with as powerful a motive for untruthfulness as hers, is not reasonably likely to have made a difference. We agree with the trial court, furthermore, that although Honeycutt had not pled guilty

at the time of Monhollen's trial, his subsequent plea accepting accessory liability, notwithstanding that it was an Alford plea,[6] tends to refute Monhollen's claim that counsel neglected viable impeachment evidence.

Because the record thus tends to refute Monhollen's allegations and because even if accepted those allegations do not entitle him to relief, the trial court did not err by denying his motion without an evidentiary hearing.[7]

Finally, we agree with the Commonwealth that Monhollen's allegation of prosecutorial misconduct is not properly before us. Apparently after testifying about Croley's white shoes, McCullah remained in the witness room subject to recall throughout the first day of trial, but, although the court had not released her from her subpoena, she failed to return for the trial's second day. She was thus not available to be recalled as a defense witness even if counsel had sought to recall her. Monhollen maintains that McCullah failed to return because the prosecutor, unbeknownst to court or defense, told her that she did not need to. We agree with the Commonwealth that this is an issue that could and should have

[6] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

[7] Fraser v. Commonwealth, 59 S.W.3d 448 (Ky. 2001).

been raised on direct appeal. It is not subject to review, therefore, under RCr 11.42.[8]

In sum, in this case as in most cases, defense counsel did not present every possible witness. The excluded witnesses, however, were only marginally material, and their exclusion did not deprive Monhollen of a defense or deny him a fair trial. Accordingly, we affirm the February 5, 2005, order of the Whitley Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[8] Gross v. Commonwealth, 648 S.W.2d 853 (Ky. 1983).