

RENDERED: AUGUST 8, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001053-MR

ROBERT HOLLON

APPELLANT

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

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Robert Hollon brings this appeal from an April 18, 2007, order of the Franklin Circuit Court denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for postconviction relief. We affirm.

Hollon was found guilty of intentional murder by a jury and was sentenced to life imprisonment without the possibility of parole or probation for twenty-five years. The Kentucky Supreme Court affirmed Hollon's conviction in

Appeal No. 96-SC-382-MR by a memorandum opinion rendered December 17, 1998. Subsequently, Hollon filed a *pro se* RCr 11.42 motion to vacate sentence in the Franklin Circuit Court. Hollon was appointed counsel, who filed a supplemental RCr 11.42 motion. On April 18, 2007, the circuit court denied Hollon's RCr 11.42 motion without an evidentiary hearing. This appeal follows.

Hollon contends that the circuit court committed error by denying his RCr 11.42 motion without an evidentiary hearing. Specifically, Hollon maintains that he was denied effective assistance of appellate counsel on direct appeal. Hollon argues that appellate counsel was ineffective for failing to raise sundry issues in his direct appeal. Hollon acknowledges that the Kentucky Supreme Court has held that “[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction.” *Lewis v. Com.*, 42 S.W.3d 605, 614 (Ky. 2001)(citing *Hicks v. Com.*, 825 S.W.2d 280 (Ky. 1992)). Hollon, however, urges this Court to now recognize the claim for ineffective assistance of appellate counsel and argues:

The [United States] Supreme Court further declared that states are free to adopt different procedures for treating appeals, so long as the procedures adequately safeguard a defendant's constitutional right to effective appellate counsel. The state's system will satisfy the Fourteenth Amendment only so long as it provides “a criminal defendant pursuing a first appeal as of right [the] minimum safeguards necessary to make that appeal adequate and effective.” *Id.*, at 276, *citing Evitts v. Lucey, supra*, at 392.^[1] Implicit in the Supreme Court's holdings in both *Evitts v. Lucey, supra*, and *Smith v. Robbins, supra*,^[2] is that the states must have in place a

¹ *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1984).

² *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

constitutionally adequate procedure through which criminal defendants can present claims of ineffective assistance of appellate counsel in state court. A right without a remedy is not a right at all. Thus, it is critical that this mechanism exist in state courts, including those in Kentucky, so as to give actual effect to a criminal defendant's Fourteenth Amendment right to effective assistance of counsel on appeal. Kentucky's long-standing approach of refusing to consider a defendant's right to effective assistance of appellate counsel in state court clearly violates the Fourteenth Amendment.

Hollon's Brief at 9.

Although Hollon advances an eloquent and persuasive argument, presumably in reliance on *Smith v. Robbins*, 528 U.S. 259, the Court of Appeals, as an intermediate appellate court, is bound by Supreme Court precedent. Rules of the Supreme Court 1:030(8)(a). As such, we are compelled to follow Supreme Court precedent that a claim for ineffective assistance of appellate counsel is not recognized in this Commonwealth. *See Lewis*, 42 S.W.3d 605. However, we are free to question the soundness and continued validity of such precedent. *See*

Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).³ Accordingly, we

³ We point out that Supreme Court precedent upon the issue of ineffective assistance of appellate counsel has previously been called into question. In *Lofton v. Commonwealth*, Appeal No. 2005-CA-001550-MR, Judge Minton elaborated upon what he termed as a "seemingly contrary position" held by the Supreme Court upon this issue:

As discussed in our original opinion, the United States Supreme Court held in *Smith v. Robbins* that a claim of ineffective assistance of appellate counsel would be reviewed under the familiar standards used for claims involving ineffective assistance of trial counsel. Although we interpreted that holding logically to infer that the Fourteenth Amendment requires that counsel involved in a convicted defendant's direct, matter of right appeal perform effectively, the Supreme Court did not expressly so hold. But in *Evitts v. Lucey*, issued before *Smith v. Robbins*, the Supreme Court did definitively hold that "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the

encourage the Supreme Court to revisit this issue given that *Lewis* did not address the application of *Smith v. Robbins*, 528 U.S. 259. *Lewis*, 42 S.W.3d 605.

In sum, we are of the opinion that the circuit court correctly denied Holland's RCr 11.42 motion to vacate sentence.

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

appellant does not have the effective assistance of an attorney.” Regardless, the Kentucky Supreme Court recently reaffirmed its longstanding, seemingly contrary position when it held that “[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction.”

In his supplemental brief, Lofton contends that we interpreted *Smith v. Robbins* and its predecessors correctly, meaning that his claims of ineffective assistance of appellate counsel must be cognizable. Despite our concerns about the continued viability of our state rule that ineffective assistance of counsel is not cognizable, as an intermediate appellate court, we are bound by the precedents established by the Kentucky Supreme Court. So under the clearly articulated precedent of the Kentucky Supreme Court, Lofton's claims of ineffective assistance of counsel are not cognizable. (Footnotes omitted.)

ORAL ARGUMENT FOR
APPELLEE:

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky