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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001022-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE THOMAS M. SMITH, JUDGE
ACTION NO. 11-CR-00075

MACK TACKETT — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, COMBS AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: The Commonwealth of Kentucky appeals from an order of the Pike Circuit Court granting Mack Tackett relief under Kentucky Rules of Criminal Procedure (RCr) 11.42. Tackett was convicted of murder, but claimed ineffective assistance of counsel. According to Tackett, both his trial attorney and his appellate attorney were ineffective because he did not receive a jury instruction on the lesser-included offense of second-degree manslaughter, even though he

should have. Relying on *Fields v. Commonwealth*, 12 S.W.3d 275, 282–83 (Ky. 2000), Tackett maintains a criminal defendant who raises voluntary intoxication as a defense to intentional murder—and receives a jury instruction for that defense—is also entitled to an instruction on second-degree manslaughter. After review, we affirm.

I. BACKGROUND

Tackett shot his wife and then himself in 2009. Tackett survived and was sentenced to serve twenty-two years and six months in prison for his wife's murder. He appealed the murder conviction directly to the Kentucky Supreme Court.

Before the Supreme Court, one of Tackett's arguments was that the jury instructions were deficient. Besides arguing for an instruction on self-defense, Tackett also claimed that he was entitled to instructions for the lesser-included offenses of manslaughter in the second degree and reckless homicide. Tackett explained that "[a]n instruction on the lesser included offenses and self defense was required based on the totality of the circumstances." 2011-SC-000703-MR (2012) at 7.

In addressing the jury instructions, the Supreme Court conducted its "own review of the record," which resulted in the following determination: the "[e]vidence adduced at trial that might justify Appellant's requested instructions was not cited to this Court, and without further explanation showing why the requested instructions should have been given, we are simply not persuaded that

the trial court erred." *Id.* The Supreme Court ultimately upheld the conviction, and the appeal concluded.

Roughly nine months later, Tackett filed a motion to vacate his conviction and sentence. In this motion, Tackett essentially claimed his appellate counsel was ineffective because the Supreme Court did not have a chance to consider the argument for additional jury instructions in light of *Fields v. Commonwealth*, 12 S.W.3d 275, 282–83 (Ky. 2000). Tackett argued that *Fields* established a mandatory rule when criminal defendants are on trial for intentional murder. From Tackett's reading of *Fields*, any criminal defendant in that situation who receives an instruction for voluntary intoxication must also receive an instruction as to second-degree manslaughter.

In response, the Commonwealth relied on the Supreme Court's opinion from Tackett's direct appeal. The Commonwealth pointed out that the Supreme Court evaluated the jury instructions, including whether a manslaughter second instruction was appropriate, and found no error. The circuit court agreed and denied Tackett's motion without deciding whether Tackett's counsel was ineffective.

On appeal, another panel of this Court vacated the circuit court's decision in part and remanded the case for the circuit court to rule on the RCr 11.42 issue. When given a second opportunity on remand, Tackett renewed his argument that his appellate counsel should have cited *Fields* and applied the reasoning of that case during his direct appeal. Tackett also asserted that without

this argument, the Supreme Court was unable to fully review the issue. Over the Commonwealth's objection, the circuit court eventually accepted Tackett's position and granted the RCr 11.42 motion. The circuit court also overruled the Commonwealth's subsequent motion to reconsider. This appeal followed.

II. STANDARD OF REVIEW

In order to succeed on a claim for ineffective assistance of counsel, "premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal, 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.'" *Commonwealth v. Pollini*, 437 S.W.3d 144, 148-49 (Ky. 2014) (quoting *Hollon v. Commonwealth*, 334 S.W.3d 431, 436 (Ky. 2010)). The particular issue appellate counsel failed to raise must clearly be stronger than the arguments presented on direct appeal, and the defendant must show by a reasonable probability that the appeal would have succeeded had the issue been presented. *Id.* at 149. The components of a claim for ineffective assistance of counsel are reviewed *de novo*. *Id.*

III. DISCUSSION

On appeal, the Commonwealth primarily leans on the Supreme Court's prior explanation for affirming the conviction. The Commonwealth argues the Supreme Court conducted its own review of the record and found no additional instruction on manslaughter in the second degree was warranted. The record

before the Supreme Court, the Commonwealth emphasizes, clearly stated that the jury was given an instruction on voluntary intoxication. And because this fact was in the record, the Commonwealth characterizes Tackett's appeal for a second-degree manslaughter instruction as precisely the kind of "inartful argument" a defendant is precluded from raising under *Hollon*, 334 S.W.3d at 437. For the following reasons, we disagree with the Commonwealth's characterization.

Under *Fields*, the rule is straightforward: it is prejudicial error for the court to give the jury a voluntary intoxication instruction as a defense to intentional murder and not give an instruction on the lesser-included offense of second-degree manslaughter. *Id.* at 282-83. And at Tackett's trial for intentional murder, the jury was given an instruction on voluntary intoxication but not on second-degree manslaughter. This prejudicial error was not presented to the Supreme Court. Had it been, however, Tackett's direct appeal would have likely succeeded. Accordingly, we affirm the Pike Circuit Court's judgment.

COMBS, JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: With all due respect, I must dissent. I would reverse because the assistance Tackett received from his appellate counsel was not ineffective as measured by the standard in *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011). The circuit court should have denied Tackett's RCr 11.42 motion.

I begin, however, with a point of agreement. Like the majority, I am not persuaded by the Commonwealth's argument that, in Tackett's direct appeal, "the [Supreme C]ourt was of the opinion that the trial court *unnecessarily gave the voluntary intoxication instruction*."[1] If that had been the Supreme Court's opinion, it would have said so; instead, the Court said, "we find *no* instructional error."[2]

The Commonwealth's handicap while arguing to this Court is its reluctance, expressed at oral argument, to consider the possibility that Tackett's direct appeal was wrongly decided – a point made by the majority. But the possibility of the Supreme Court's imperfection will not come as a surprise to, nor daresay offend, the Justices. The Court has said of itself, "we would not be understood as contending that the members of this court, or any other appellate court, are infallible[.]" *Blessing v. Johnston*, 249 Ky. 777, 61 S.W.2d 635, 636 (1933); *see also Stephenson v. Woodward*, 182 S.W.3d 162, 175 (Ky. 2006) (Lambert, C.J., concurring) (referring to "the seven fallible human beings who sit on the Supreme Court of Kentucky"). Candidly put, "there is no constitutional guaranty that [a defendant] shall be furnished an infallible court[.]" *Lake v. Commonwealth*, 209 Ky. 832, 273 S.W. 511, 513 (1925). Unfortunately, fallibility can be found in the opinion deciding Tackett's direct appeal. However, no degree

[1] *Brief of Appellant Commonwealth* at 8 (emphasis added) (citing *Foster v. Commonwealth*, 827 S.W.2d 670, 677 (Ky. 1991)).

[2] *Tackett v. Commonwealth*, No. 2011-SC-000703-MR, 2012 WL 4328055, at *3 (Ky. Sept. 20, 2012) (emphasis added) (unanimous, memorandum opinion) (hereafter "*Tackett Direct Appeal*").

of flaw in a court's analysis provides a reason either to grant RCr 11.42 relief or to affirm such a grant.

As I outline in this dissenting opinion, when measured by the standard of *Hollon*, Tackett's appellate counsel did not fail him. Tackett's counsel made his pitch to the Supreme Court that the jury should have been instructed on second-degree manslaughter. The Supreme Court's finding of an absence of instructional error was a swing and a miss. Applying *Hollon* demonstrates as much.

It is difficult to conceive of clearer guidance for resolving the case before us than we have in *Hollon*.

> [O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance [of appellate counsel] be overcome. . . . 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.

Hollon, 334 S.W.3d at 436-37 (citations and internal quotation marks omitted). Our take away from this quote, relative to Tackett's RCr 11.42 motion, should be that his IAAC claim required a finding that his appellate counsel "omitted completely an issue that should have been presented on direct appeal." Tackett's appellate counsel did not completely omit the issue his client claims should have been presented, namely, the trial court's failure to instruct on the lesser-included offense of second-degree manslaughter. Was that not, and is that not now, the

issue? The key question, therefore, is: for *Hollon*'s purposes, what constitutes "an issue"? It is not a difficult question to answer.

We are told by scholars that, "[i]n an appeal, an issue may take the form of a *separate and discrete question of law* or fact, or a combination of both." ISSUE, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Specific to this case, the Commonwealth correctly noted that, in his direct appeal, Tackett's counsel squarely put "the issue" before the Supreme Court. His brief identified as his second "*issue* of law[,]" CR 76.12(4)(c)(v) (emphasis added), that "the trial court erred . . . when it failed to instruct [the] jury on second degree manslaughter . . . ."[3] He then described in his brief how "[*t*]*his issue* [wa]s preserved for review . . . ."[4] We can drill down further on this question, but still we will reach the same conclusion.

As the Commonwealth notes, *Hollon* also says, "IAAC claims will not be premised on inartful arguments or missed case citations[.]" It is beyond dispute that on this issue of the court's failure to instruct, the IAAC claim in the circuit court was a more artful argument than the Supreme Court heard on Tackett's direct appeal, but both arguments addressed the same issue. And, the more artful argument in the circuit court included citation to a case that Tackett's appellate counsel did not cite in the direct appeal – *Fields v. Commonwealth*, 12 S.W.3d 275

[3] *Brief of Appellant* at 10, *Tackett Direct Appeal* (quoted and converted to lower case from the upper-case argument heading).

[4] *Id.* (emphasis added).

(Ky. 2000). Ironically, although Tackett's counsel did not cite *Fields*, the Commonwealth's direct appeal brief did.[5]

So, what of *Fields*? *Fields* held that "if a jury is instructed on voluntary intoxication as a defense to intentional murder or first-degree manslaughter [as it was in Tackett's prosecution], it must also be instructed on second-degree manslaughter as a lesser included offense; and the failure to do so is prejudicial error." *Id.* at 282-83 (citing *Springer v. Commonwealth*, 998 S.W.2d 439, 454-55 (Ky. 1999)). Clearly, *Fields* was neither the first nor the only case to say this. The Supreme Court in deciding *Fields* cited *Springer*, *supra*, and *Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky. 1997), for the same rule of law. In fairness to Tackett's appellate counsel, his brief before the Supreme Court may have missed citation to *Fields*, but it did include citation to *Springer*.[6] *Springer* said:

> A jury's belief that a defendant was so voluntarily intoxicated that he did not form the requisite intent to commit murder does not require an acquittal, but could reduce the offense from intentional homicide to wanton homicide, *i.e.,* second-degree manslaughter. . . . The failure to instruct on second-degree manslaughter as a lesser included offense of murder was prejudicial error.

Springer, 998 S.W.2d at 454 (quoting *Slaven*, 962 S.W.2d at 857; internal quotation marks omitted).

[5] *Brief of Appellee Commonwealth* at 6, *Tackett Direct Appeal*.
[6] *Brief of Appellant Tackett* at 11, *Tackett Direct Appeal*.

Again, in fairness to Tackett's counsel, he said in his brief in the direct appeal that Tackett "testified that on the evening [of the murder], he and Victim did various drugs."[7] He included in the appendix to that brief both his proposed jury instructions and the instructions actually used by the circuit court. It is clear to anyone who looks at them that the jury was instructed on voluntary intoxication but, contrary to *Slaven* and *Springer* and *Fields*, and as clearly argued by Tackett's counsel, there was no instruction on the lesser-included offense of second-degree manslaughter. With both *Springer* (cited by Tackett) and *Fields* (cited by the Commonwealth) bringing a 15-year-old (now 20-year-old) rule of law to the Supreme Court's attention, and with reference in the brief to Tackett's drug use on the night of the murder, and with a set of jury instructions in the certified record and appended to Tackett's brief, it is difficult to avoid the conclusion that the Supreme Court decided Tackett's direct appeal wrongly when it said: "Upon our own review of the record, we find no instructional error."[8]

Furthermore, the Supreme Court should have understood the issue in Tackett's direct appeal as he now more clearly presents it. In that Court's own words, "When the facts reveal a *fundamental basis for decision* not presented by the parties, *it is our duty to address the issue to avoid a misleading application of the law*." *Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991) (emphasis added); *see also Commonwealth v. Pollini*, 437 S.W.3d 144, 148 (Ky. 2014) ("court may decide an issue not briefed on appeal when that issue flows naturally under our

[7] *Id.* at 6.
[8] *Tackett*, 2012 WL 4328055, at *3.

appellate review of the issue raised") (internal quotation marks omitted). What Tackett now asserts as a new issue was, in fact, a fundamental basis for decision in his direct appeal that flowed naturally from the argument his appellate counsel made, and it was the Court's duty to address it to avoid a misleading application of the law. The Supreme Court's conclusion of "no instructional error" did not do honor to this principle.

Still, Tackett succeeded in convincing the circuit court and the majority that this instructional error issue was not presented to the Supreme Court. His persuasive argument is expressed in his brief to this Court as follows:

> [T]here are two ways to support a manslaughter second instruction, as set forth in KRS 501.020(3). . . . [(1) where] a person . . . consciously disregards substantial and unjustifiable risk [that] the result will occur or that the circumstance exist[s and (2)] where the alleged perpetrator is unaware of the risk solely by reason of voluntary intoxication. Id. This is a separate issue.[9]

In essence, Tackett argues that, under KRS 502.030(3), there is a sober kind of wantonness and a drunken kind of wantonness. Each, he claims, constitutes a separate and distinct "issue." In his direct appeal, he says, his appellate counsel argued only the sober wantonness issue, and completely omitted the drunken wantonness issue.

I simply am not persuaded that *Hollon* allows for such nuancing of the concept of "issue." Logically, *Hollon* most certainly contemplates precisely the kind of inartful advocacy and flawed decision represented by Tackett's direct

[9] *Brief of Appellee Tackett* at 3.

appeal. That is to say, *Hollon* contemplates a case in which the reviewing court affirms a conviction after an advocate's inartful argument or failure to cite persuasive authority, but in which an artful, properly cited, argument would have yielded the correct result of a reversal. *Hollon* says that kind of inartful advocacy does not constitute IAAC.

I commend my colleagues for seeking to do justice in this case, but granting the relief Tackett requests simply illustrates the old saying that two wrongs do not make a right. For these reasons, I respectfully dissent.

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