

Commonwealth of Kentucky

Court of Appeals

NOS. 2017-CA-000609-MR
and 2017-CA-001129-MR

CUDDIE HOLBROOK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
ACTION NO. 08-CR-01012-002
HONORABLE THOMAS TRAVIS, JUDGE
ACTION NOS. 11-CR-01184 AND 11-CR-01466

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

LAMBERT, D., JUDGE: In this consolidated appeal,¹ Cuddie Holbrook appeals from the orders of the Fayette Circuit Court entered on March 10 and June 19, 2017, denying his Kentucky Rules of Criminal Procedure (RCr) 11.42 motions

¹ Holbrook filed a motion to consolidate appeals 2017-CA-000609-MR and 2017-CA-001129-MR, and this Court granted such motion on October 18, 2017.

without an evidentiary hearing. These orders stem from cases in separate divisions of the Fayette Circuit Court that resulted in guilty verdicts from two jury trials. Holbrook's motions sought to set aside his convictions due to ineffective assistance of standby and appellate counsel. Finding no error, we affirm.

In the first case, Holbrook was charged with multiple counts of theft by deception after passing cold checks in 2008 (action no. 08-CR-01012-002). While Holbrook was released on bond in that case, he was charged with passing additional cold checks in 2011. Those 2011 charges formed the basis for the other two cases, which were consolidated for trial (action nos. 11-CR-01184 and 11-CR-01466). He was charged with being a first-degree persistent felony offender (PFO) in both cases. These cases went to trial separately in August 2012.

Holbrook represented himself and was also appointed standby counsel at both trials. At the end of the first trial, the jury found Holbrook guilty of six counts of theft by deception over \$300. At the second trial, the jury found Holbrook guilty of two counts of theft by deception over \$10,000; three counts of theft by deception over \$500; and one count of theft by deception under \$500, and of being a first-degree PFO. He was sentenced to twenty years' imprisonment in the first trial and forty years' imprisonment in the second trial.

Holbrook pursued a direct appeal from these judgments. The Supreme Court reviewed these cases as a consolidated appeal and issued an

opinion on August 21, 2014. *Holbrook v. Commonwealth*, Nos. 2012-SC-000703-MR, 2012-SC-000704-MR, 2014 WL 4160137 (Ky. Aug. 21, 2014). That opinion affirmed the judgments of conviction in both cases but remanded for resentencing.² *Id.* at *17. Related to this appeal, the Supreme Court held that there was nothing improper about Holbrook's absence from bench conferences during his trials. Specifically, the Court distinguished the cases *sub judice* from *Allen v. Commonwealth*, 410 S.W.3d 125 (Ky. 2013). Unlike in *Allen*, where the Court found that the *pro se* defendant was erroneously excluded from bench conferences, *id.* at 144, the Court here found the trial court did not explicitly exclude Holbrook and standby counsel did not participate over Holbrook's objection. *Holbrook* at *2. The Court instead noted that the record indicated that standby counsel was extensively involved in Holbrook's defense, suggesting acquiescence by Holbrook. *Id.* at *3.

Thereafter, Holbrook filed his RCr 11.42 motions with the trial court and requested evidentiary hearings on his motions. The Department of Public Advocacy reviewed Holbrook's case and filed a supplement to Holbrook's RCr 11.42 motion in both cases. The trial court in action no. 08-CR-01012-002 denied Holbrook's motion in a written order, finding his allegations of ineffective assistance of counsel had been previously addressed by the Supreme Court or could have been raised in his direct appeal. The trial court in action nos. 11-CR-

² Holbrook was ultimately resentenced for an aggregate of twenty-five years' imprisonment.

01184 and 11-CR-01466 also denied Holbrook's motion on similar grounds. This appeal follows.

On appeal, Holbrook alleges his RCr 11.42 motions based on ineffective assistance of standby and appellate counsel were erroneously denied. His brief to this Court argues that his standby counsel was ineffective by not objecting to the courts' exclusion of Holbrook, as a *pro se* defendant, at bench conferences during trial and that his appellate counsel was ineffective by not citing to references in the record that demonstrated standby counsel's ineffectiveness in his direct appeal. He also contends the trial court erred in denying his RCr 11.42 motion without an evidentiary hearing.

The Commonwealth first argues that the Supreme Court has already dealt with Holbrook's first claim and that standby counsel was not deficient because Holbrook acquiesced or did not object to standby counsel representing him at bench conferences. As to Holbrook's second claim, the Commonwealth argues that there is no caselaw where a court has found counsel was deficient by failing to adequately present an argument on appeal, and regardless, Holbrook's appellate counsel was not deficient because there were no other instances in the record to cite in support of the claim.³

³ The Commonwealth also states that Holbrook failed to include the video record of the trial in case nos. 11-CR-01184 and 11-CR-01466, and therefore, we must assume in the trial court's favor, pursuant to *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). However, there does not appear to be any video record missing in this case.

RCr 11.42 places the burden on the movant to establish that he was deprived of substantial rights that would justify the extraordinary relief afforded by this post-conviction motion. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984),⁴ an appellant must make two showings to prevail on a claim of ineffective assistance of counsel: (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Gall*, 702 S.W.2d at 39. Without both showings, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

However, it is not necessary for us to evaluate Holbrook's first claim under the above test because the Supreme Court has previously addressed this precise issue on direct appeal. The Court stated that Holbrook "failed to cite anything in the record that would tend to indicate that the trial court actively excluded him from approaching the bench" or "that standby counsel participated . . . over his objection or without his consent." *Holbrook*, at *3 n.1, *3. "It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court." *Thacker v.*

⁴ This standard was adopted by this Commonwealth in *Gall v. Commonwealth*, 702 S.W.2d 37, 39 (Ky. 1985).

Commonwealth, 476 S.W.2d 838, 839 (Ky. 1972) (citations omitted). Reasserting the same claim under the guise of an ineffective assistance of counsel claim does not negate the established principle of preventing the relitigation of issues. *See Brown v. Commonwealth*, 788 S.W.2d 500, 501 (Ky. 1990).

We shall review the merits of Holbrook's claim of ineffective assistance of appellate counsel because it could not have been raised on direct appeal. On their first appeal of right, criminal defendants should continue to receive effective assistance of appellate counsel. *Hollon v. Commonwealth*, 334 S.W.3d 431, 434 (Ky. 2010). Though Holbrook also claims that his appellate counsel was ineffective for failing to adequately support the argument that Holbrook was improperly excluded from bench conferences with references to the record, his brief here yet again fails to support that same argument. Holbrook has been given multiple opportunities to point to an instance where he was explicitly excluded from the bench conferences or where he made any objection to his absence therefrom. Our courts have consistently refused to search the record where there are insufficient references to the record in support of a claim, and we are not inclined to do so here. *Ventors v. Watts*, 686 S.W.2d 833, 834-35 (Ky. App. 1985); *Robbins v. Robbins*, 849 S.W.2d 571, 572 (Ky. App. 1993). Thus, we must conclude that such instances do not exist, and Holbrook's appellate counsel could not have been ineffective for failing to cite to events that did not occur. Further, we have not found any caselaw, nor does Holbrook cite to any case, that has found ineffective assistance of appellate counsel for failing to adequately

present an argument on appeal. For these reasons, Holbrook's claim of ineffective assistance of appellate counsel is meritless.

On an RCr 11.42 motion, an evidentiary hearing is necessary when the allegations presented cannot be resolved through an examination of the record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). Here, the trial court was readily able to render a decision by examining the record, and the trial court's conclusion was correct. Holbrook's RCr 11.42 motion is without merit and was properly denied without an evidentiary hearing.

Accordingly, the Fayette Circuit Court's orders denying Holbrook relief under RCr 11.42 are affirmed.

NICKELL, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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