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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 29, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000423-MR
AND
2013-SC-000483-MR

GREGORY WILSON — APPELLANT

V.

ON APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
NO. 87-CR-00166

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Sentenced to death in 1988 for crimes committed during a harrowing kidnapping, Gregory Wilson now challenges that conviction and sentence via two appellate routes. According to Wilson, each of these routes presents an error that mandates correction: the trial court, on remand from this Court, erroneously denied Wilson's request to have DNA testing performed on semen, blood, saliva, and fingernails recovered from the crime scene, and the trial court erroneously dismissed his ineffective-assistance-of-appellate-counsel (IAAC) claim. After careful review, we reject Wilson's arguments and affirm his conviction and sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND.

The tragic details of Wilson's crimes have been recited by this Court multiple times. Because this appeal deals primarily with the various procedural twists and turns undertaken by Wilson rather than the underlying facts, we will not repeat those previous recitations. It suffices to say that Wilson was convicted in 1988 on charges of murder, kidnapping, first-degree rape, first-degree robbery, and criminal conspiracy to commit robbery.[1] For these crimes, Wilson received the death sentence.

Wilson appealed directly to this Court as a matter of right in 1992. In that opinion, Wilson's convictions and sentences for murder, rape, robbery, and conspiracy were affirmed; but Wilson's death sentence for kidnapping was set aside and the action remanded for resentencing on that charge alone.[2] Germane to his instant appeal, Wilson alleged ineffective assistance of trial counsel on his direct appeal. The Court found, however, that Wilson had foregone counsel and elected to represent himself at trial so his ineffective-assistance claim was without merit. To the point, the Court noted that Wilson's counsel was effective to the extent that he was permitted by Wilson to participate.

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[1] For more detailed facts, see *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992) (*Wilson* I), *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998) (*Wilson* II), and *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012) (*Wilson* III).

[2] On remand, the trial court sentenced Wilson to life imprisonment for the kidnapping conviction. Wilson again appealed the sentence. And this Court again reversed because Wilson was required to be sentenced by a jury, not a judge. After that reversal, a jury sentenced Wilson to a term of twenty years' imprisonment. *See Gregory Wilson v. Commonwealth*, 1995-SC-000061-MR (Ky. Nov. 22, 1995).

A few years later, Wilson filed a motion to vacate his convictions under Kentucky Rules of Criminal Procedure (RCr) 11.42. With this motion, Wilson alleged, among other things, that he did not voluntarily waive his right to counsel and he received ineffective assistance of both trial and appellate counsel. Following a nine-day evidentiary hearing, the trial court denied Wilson's motion. On appeal, this Court affirmed that decision.

Following that decision, Wilson filed a petition for a writ of habeas corpus in federal court. In that petition, Wilson alleged twenty-four issues of error, including ineffective assistance of trial counsel, ineffective assistance of counsel on his direct appeals to this Court, and a violation of his rights because he was denied a state-court forum in which to raise a claim that his appellate counsel was ineffective. The district court denied Wilson's petition.

Wilson appealed that decision to the Sixth Circuit.[3] The host of allegations Wilson presented to the district court was trimmed to nine. The ineffectiveness of Wilson's trial and appellate counsel remained, as did Wilson's allegation of error regarding the absence of a state-court forum for his IAAC claim. Like the district court, the Sixth Circuit extensively reviewed Wilson's arguments and the record; and, like the district court, the Sixth Circuit ruled against Wilson. Specifically, the Sixth Circuit held that Wilson's ineffectiveness claims were largely meritless because he waived his right to counsel at trial and he could not adequately show prejudice resulted from the conduct of Wilson's various counsels. As for Wilson's claim that his rights were violated

[3] *Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008).

because at the time of his appeals no state forum existed to resolve his IAAC claim, the Sixth Circuit noted that the Supreme Court had made clear states were under no obligation—constitutional or otherwise—to offer such a forum.

Finally, Wilson filed a motion with the trial court to prohibit the imposition of his death sentence because he had a serious intellectual disability[4] and, further, to compel DNA testing of hairs and semen found within the victim's car. The trial court denied both motions without holding an evidentiary hearing and Wilson appealed that ruling to this Court. We remanded the matter to the trial court to hold an evidentiary hearing on Wilson's mental status. And we directed the trial court to rule on Wilson's request for DNA testing of the semen. The trial court, in our view, correctly denied Wilson's motion to subject the hairs found in the victim's car to DNA testing because the evidence did not provide a reasonable probability "Wilson would not have been prosecuted or convicted" or "a more favorable verdict or sentence" would have been reached.[5]

On remand, the trial court denied Wilson's motion to perform DNA testing on the semen, saliva, blood, and fingernail samples. Wilson now appeals from the trial court's refusal to test the semen and other pieces of evidence.

In addition, Wilson filed another motion with the trial court to vacate his conviction—this time based on alleged ineffective assistance of appellate

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[4] Kentucky Revised Statutes (KRS) 532.135 and 532.140.

[5] *Wilson* III, 381 S.W.3d at 190-91.

counsel. This motion was prompted by our decision in *Hollon v. Commonwealth*,[6] recognizing for the first time an IAAC claim in Kentucky. The trial court dismissed Wilson's motion without an evidentiary hearing.

We detail Wilson's lengthy procedural route to highlight at what point various arguments have been appropriately resolved.

II. ANALYSIS.

A. The Trial Court's Refusal to Perform DNA Testing on Samples of Semen, Blood, Saliva, and Fingernails was not Erroneous.

KRS 422.285 allows persons convicted of capital crimes to request DNA testing and analysis of evidence under certain circumstances. Specifically, under subsection 2, the trial court *shall* order testing if:

> (a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis;
>
> (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and
>
> (c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis.[7]

On the other hand, under subsection 3, a trial court *may* order DNA testing if:

> (a) A reasonable probability exists that either:

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[6] 334 S.W.3d 431 (Ky. 2011).

[7] KRS 522.286 was amended in 2013. Other requirements not challenged in this appeal were added to subsections 5 and 6, which prior to 2013 were subsections 2 and 3. Because this case has been tried and appealed under the 2013 version, we reference subsections 2 and 3. The 2013 amendments do not, however, impact our analysis.

1. The petitioner's verdict or sentence would have been more favorable if the results of the DNA testing and analysis had been available at the trial leading to the judgment of conviction; or

2. DNA testing and analysis will produce exculpatory evidence;

(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and

(c) The evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may resolve an issue not previously resolved by the previous testing and analysis.[8]

Wilson alleges that the trial court erroneously denied his motion to compel DNA testing of various pieces of evidence recovered from the victim's automobile—semen, fingernails, blood, saliva, and hairs. As we said in Wilson's last appearance before this Court, to succeed under KRS 422.285(2) and (3), a defendant must show that "the evidence sought would either exonerate [him], lead to a more favorable verdict or sentence, or otherwise be exculpatory. To do this, the [defendant] must describe the role the evidence would have had if available in the original prosecution."[9] When engaging in this analysis, we operate "under the assumption that the evidence will be favorable to the [defendant]."[10]

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[8] The 2013 amendments to KRS 422.285 added elements to this subsection not challenged in the instant appeal.

[9] *Wilson* III, 381 S.W.3d at 190 (quoting *Bowling v. Commonwealth*, 357 S.W.3d 462, 468 (Ky. 2010)).

[10] *Bowling*, 357 S.W.3d at 468.

The trial court, in so many words, denied Wilson's motion because Wilson was unable to show any reasonable probability that he would have received a lesser verdict or sentence if the specimens would have been subject to DNA testing before trial[11] because the evidence against him was so compelling and overwhelming. More specifically, after engaging in a thorough review of the trial transcript, the trial court rejected Wilson's request to test the semen for DNA because it would not prove that Wilson did not commit the rape—it would only prove that someone else's semen was left in the vehicle at some time.[12] Likewise, the trial court refused to order testing of blood, saliva, and fingernail samples collected from the vehicle. In the trial court's opinion, Wilson did not indicate how those samples would provide exculpatory evidence—even assuming the samples did not point to Wilson, other evidence still placed him in the vehicle.

It is worthwhile to remember the vehicle's condition when police discovered it. Following the crime, the vehicle was abandoned and eventually placed in a scrap yard. The evidence is undisputed that the car was readily accessible to and used by various unknown transients. By the time the vehicle

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[11] Any argument under KRS 422.285(2) is meritless in the instant circumstances. Assuming the potential DNA evidence is entirely in Wilson's favor, it does not present a reasonable possibility that he would not have been prosecuted or convicted if the evidence would have been available at trial. As a result, we focus our review on subsection (3) of KRS 422.285—a less favorable verdict or sentence.

[12] This is perhaps more true in this case than others. Forensic investigators were unable to retrieve any semen evidence from the body itself because by the time the victim was discovered, her body was too decomposed. So there was no semen evidence tying Wilson to the rape at trial. If the semen was tested and found not to match Wilson's DNA, nearly the same amount of proof would exist that Wilson committed the rape.

was retrieved by police, it was in a ramshackle condition. A number of items including the "turn signals, ashtrays, radio controls, heater controls, [and] a mirror" had been removed; and the glove box[13] had been emptied, perhaps at the hands of the various transient occupants. In addition, oil had been poured in the floorboard and in the rear of the vehicle.

Wilson is correct in his assessment that the power of DNA evidence can be found in its ability to eliminate a suspect. This understanding of DNA evidence is straightforward but largely inapplicable to Wilson's action. To this point, Wilson argues that performing DNA testing on the biological specimens may eliminate him as a suspect for the rape. But the problem is even after putting aside Wilson's rape conviction—and associated statutory aggravator[14]—the evidence is overwhelming that Wilson kidnapped, robbed, and murdered the victim. In his brief, Wilson essentially admits this by acknowledging that all the evidence sought to be tested would relate only to his rape conviction and statutory aggravator. So assuming DNA testing would indicate the biological specimens at issue here do not match Wilson, clear evidence of Wilson's guilt on all other charges remains: Wilson's confession, Brenda Humphrey's[15] confession and implication of Wilson, and the use of the victim's credit card to purchase items from a department store, including a man's watch—a watch he

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[13] *Wilson* III, 381 S.W.3d at 197 (Cunningham, J., dissenting).

[14] *See* KRS 532.025(2) ("(a) Aggravating circumstances: . . . 2. The offense of murder or kidnapping was committed while the offender was engaged in the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, rape in the first degree, or sodomy in the first degree.").

[15] Wilson's co-defendant and partner in crime.

was seen wearing shortly after the crime. And even if the DNA evidence was exculpatory to its maximum,[16] the jury's finding of guilt on the robbery statutory aggravator would be undisturbed, erasing any reasonable possibility Wilson would receive a more favorable sentence. In the end, Wilson simply cannot carry his burden.

A note about the hairs is necessary before we conclude. We affirmatively resolved in *Wilson* III that the testing of the hairs was unnecessary—that was one of the central holdings in the case. Even assuming testing would have revealed the hairs did not belong to Wilson, we held there was no reasonable probability he would have received a more favorable verdict or sentence or that he would not have been prosecuted or convicted. We issued that holding despite the Commonwealth's repeated claim that it had lost the hairs. In fact, for around twenty years, the Commonwealth has claimed the hairs Wilson wishes to have DNA tested were lost. In *Wilson* III, we chided—perhaps somewhat lightly—the Commonwealth for its cursory search for the hairs.[17] As

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[16] Our view here holds even if we go beyond our previous characterization of the semen evidence as quasi-exculpatory ("because it neither exculpates nor inculpates [Wilson]," *Wilson* III, 381 S.W.3d at 192) and assume the evidence is fully exculpatory. In truth, though, the quasi-exculpatory characterization of the evidence at issue is more accurate given the circumstances of Wilson's case. To be sure, these biological specimens could point away from Wilson, but only to a degree; there is no argument regarding an alternate perpetrator for the evidence to point toward. And, as we point out above, there is no credible argument that Wilson was not in the car. So the instant biological evidence, at best, could only indicate Wilson did not leave semen in the car; it would still be permissible for the jury to infer Wilson committed the rape based on his presence in the car and Humphrey's account of the crime. This same analysis applies to the blood, saliva, and fingernails.

[17] "We disapprove of the Commonwealth's apparent lack of diligent efforts to locate the hairs, but we will not remand for an evidentiary hearing." *Wilson* III, 381 S.W.3d at 192.

it happens, after our opinion in *Wilson* III, the Commonwealth located the hairs. Now that the hairs have been located, Wilson repeats his request for DNA testing. We reject that request because we have already resolved the issue, the location of the hairs aside.[18] That said, the Commonwealth's "search" for the hairs has always been a disappointing aspect of this case.[19] As the custodian of criminal evidence, we expect the Commonwealth to conduct itself in a diligent manner to prevent such mishaps as the instant case displays. This particular piece of evidence does not warrant a new trial. But evidence in another case may, and we trust that the Commonwealth will be able to locate it expeditiously rather than after a twenty-year "cursory search."[20] Our justice system demands better.

> "In 2001, in Wilson's habeas proceedings, a federal district court ordered DNA testing of the hairs. The Attorney General testified that the hairs could not be found but that they were continuing to search for them. There is nothing in the record indicating that the Commonwealth continued its search. Present counsel for the Commonwealth has confirmed the lab that conducted the original testing on the hairs cannot locate the hairs but has looked no further. So the Commonwealth only claims that the hairs 'may not be in existence.' In different circumstances, an apparently cursory search would not be adequate." *Id.* at 192 n.51.

[18] We were clear that the location of the hairs was not material to whether DNA testing of them would present a reasonable probability of a more favorable sentence or verdict. *See Wilson* III, 381 S.W.3d at 191 ("Because we hold that the reasonable probability standard is not met under KRS 422.285(2)(a) or 3(a), there is no reason to hold an evidentiary hearing to determine whether the hairs are in existence for purposes of KRS 422.285(2)(b) or (3)(b).").

[19] The Commonwealth either did not perform a search at all or performed a rather incompetent one—in the end, the hairs were found at the lab they were suspected of being at all along.

[20] *Wilson* III, 381 S.W.3d at 192 n.51.

B. Wilson's IAAC Claim was Properly Dismissed Because *Hollon* Does not Apply Retroactively Under These Circumstances.

For his final allegation of error, Wilson challenges the trial court's summary dismissal of his attempt to vacate his conviction because his appellate counsel was ineffective. More to the point, Wilson argues our recent decision in *Hollon* should apply retroactively. We reject Wilson's approach.

Our jurisprudence for the decades leading up to *Hollon* was clear: we "refus[ed] to recognize ineffective assistance of appellate counsel . . . claims in cases that have been decided upon a merits review."[21] In other words, we routinely rejected defendants' attempted RCr 11.42 challenges to the quality of appellate counsel because we refused to "examine anew an appeal reviewed, considered and decided by this Court."[22] In *Hollon*, we finally responded to the repeated calls for our reconsideration of this policy and chart a new course on which we will recognize "IAAC claims premised upon appellate counsel's alleged failure to raise a particular issue on direct appeal."[23]

We were clear that we would not entertain IAAC claims premised upon "inartful arguments or missed case citations"[24]—only when appellate counsel omitted entirely an issue that should have been presented on direct appeal will IAAC claims be cognizable under RCr 11.42. Likewise, we were clear that our

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[21] *Hollon*, 334 S.W.3d at 433.

[22] *Hicks v. Commonwealth*, 825 S.W.2d 280, 281 (Ky. 1992).

[23] *Hollon*, 334 S.W.3d at 436.

[24] *Id.* at 437.

new approach to IAAC claims was to have prospective effect only.[25] In our view, prospective application was appropriate because "although our courts have not until now provided a forum for IAAC claims based on an allegedly inadequate appellate brief, the federal courts have provided a forum through habeas relief."[26]

In fact, this is exactly what transpired with Wilson's IAAC claim and why applying *Hollon* retroactively here is unwarranted. The federal district court engaged in an extensive evidentiary hearing, during which Wilson presented essentially the same arguments he presents now. Perhaps a defendant will present circumstances meriting *Hollon* reaching backward, but Wilson is not such a defendant. In light of the procedural background of Wilson's action, applying *Hollon* retroactively would provide an impermissible second bite of the apple.

Wilson also argues that *Hollon* left unanswered the ineffectiveness he alleges in his instant appeal. *Hollon* clearly focused on appellate counsel's failure to raise a claim that should have been raised on direct appeal—put another way, a claim "based on counsel's alleged failure to include in an appeal, the merits of which have already been decided, a glaringly important issue."[27] But Wilson's appellate counsel was not ineffective so much in failing to raise important issues. She essentially raised one *too many* issues. Trial

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[25] *Id.* at 439.

[26] *Id.*

[27] *Id.*

counsel's ineffectiveness, generally speaking, is not an appropriate issue for review on direct appeal. Unfortunately, Wilson's counsel raised the issue at that juncture, effectively precluding Wilson from attempting to attack his conviction collaterally under RCr 11.42 at a later date. This was erroneous, to be sure. And perhaps raising an issue at the wrong time procedurally is effectively the same as not raising the issue at all. But we do not need to decide that question today because as we said, Wilson's IAAC claim was thoroughly reviewed by the federal district court, mitigating the need to apply *Hollon* retroactively.

Hollon simply stands for the proposition that Kentucky's courtroom doors are now open to certain IAAC claimants. As the Sixth Circuit correctly pointed out in Wilson's habeas appeal, there is no requirement that we offer a forum for the vindication of Wilson's IAAC claim. Without such a mandate, it is difficult to comprehend how our previous failure to offer such a forum or current refusal to apply *Hollon* retroactively violates Wilson's rights—he has no right to a state forum for his IAAC claim of which we could violate.[28]

[28] Of course, "the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and through it the Sixth Amendment, entitle criminal defendants to the effective assistance of counsel not only at trial, but during a first appeal as of right." *Id.* at 434 (citing *Evitts v. Lucey*, 469 U.S. 387 (1985)). The Supreme Court has not, however, interpreted this to mean a state must offer a forum for the IAAC claim. *See Wilson*, 515 F.3d at 708 ("[W]hile such ineffective assistance of appellate counsel is a constitutional violation, the Supreme Court has not required states to provide a forum to litigate such a claim.").

III. CONCLUSION.

For the foregoing reasons, we affirm the trial court's order denying Wilson's request to have DNA testing performed on semen discovered at the crime scene. In addition, we choose not to apply retroactively our decision in *Hollon* because Wilson has received adequate review of his IAAC claims in federal court.

All sitting. All concur.

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