

RENDERED: AUGUST 13, 2004; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000383-MR

DAVID HOLBROOK

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE JOHN ROBERT MORGAN, JUDGE  
ACTION NO. 88-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING

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BEFORE: GUIDUGLI AND KNOPF, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: In December 1988, David Crate Holbrook was indicted for murder as a result of the death of Lee Watson. He was also charged as a persistent felony offender. His first trial resulted in a conviction for murder and he was sentenced

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to forty-five years' imprisonment. The Kentucky Supreme Court reversed, and remanded the case for a new trial.<sup>2</sup> He was again tried in August 1992, and convicted of manslaughter, second degree, and persistent felony offender, second degree. His motion for a new trial on the basis that the jury had not been sworn was sustained. Holbrook's third trial commenced on June 7, 1994, and resulted in a conviction for murder and a ninety-nine year sentence. After the Kentucky Supreme Court affirmed the conviction, Holbrook filed an RCr<sup>3</sup> 11.42 motion alleging ineffective assistance of counsel. Following a hearing, the trial court denied the motion and this appeal followed.

Holbrook raises four instances of counsel's ineffectiveness during his third trial. The first allegation of counsel's incompetence is that his trial counsel, Kim Wright, now deceased, failed to call as a witness, Dr. Willard Arnold. Dr. Arnold was called as a witness in Holbrook's first two trials to establish Holbrook's defense that he killed Watson as an act of self protection. Dr. Arnold, who treated Holbrook for a knife wound immediately following the shooting, testified at the two prior trials that although the wound was not serious, it was in close proximity to Holbrook's vital organs. Based on the location of the wound, Dr. Arnold testified that within his

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<sup>2</sup> See Holbrook v. Commonwealth, Ky., 813 S.W.2d 811 (1991).

<sup>3</sup> Kentucky Rules of Criminal Procedure.

medical opinion, someone other than Holbrook could have inflicted the wound. At the prior trials he also testified extensively about the flee or fight syndrome. He explained that when a person is threatened by danger, non-vital body functions cease and the survival instinct takes over a person's thought process. Despite having been called as a witness in Holbrook's prior two trials, Dr. Arnold was not called to testify at the third trial.

Eight days prior to trial, counsel made a motion for funds to employ a psychiatrist to aid in Holbrook's defense. Although Holbrook's mental state had not been raised in his two prior trials, his mental records entered into the record at the RCr 11.42 hearing reveal that Holbrook is borderline mentally retarded and has been treated for various mental disorders. Because counsel's motion was not filed at least twenty days prior to trial as required by KRS<sup>4</sup> 504.070(1), the trial court denied the motion for funds to employ a psychiatrist and struck the notice of a temporary insanity defense.

Holbrook's third allegation of counsel's ineffectiveness concerns the admission of testimony by Phil McFadden, a Kentucky State Trooper, regarding the position of a knife in the victim's hand and his testimony that it would be customary to hold a knife in the opposite position if a person

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<sup>4</sup> Kentucky Revised Statutes.

were trying to cut somebody. Holbrook contends that counsel failed to object to the officer's opinion testimony on the basis that he was not qualified to render such an opinion and on relevancy. He further argues that even if the witness was qualified to render such an opinion and the testimony had relevance, counsel was required to object on the basis that its prejudicial effect outweighed its probative value.

Holbrook also argues that trial counsel should have impeached the testimony of his mother, June Holbrook, with a prior inconsistent statement given at the first trial. Specifically, at the initial trial, she was called as a defense witness and when asked if she heard Holbrook and the victim talking prior to the shooting replied that she heard them discussing whether the victim's wife was in the house. At the third trial, Ms. Holbrook was called as a prosecution witness, and testified that prior to the shooting, Holbrook and the victim were arguing over an alleged theft of money.

Finally, Holbrook argues that the combined effect of these alleged errors rendered his counsel's assistance ineffective. We must agree.

The standard for proving ineffective assistance of counsel has been set forth in our case law and is well known to

the bar. In Foley v. Commonwealth,<sup>5</sup> it was again reiterated as follows:

The general standards which measure questions relative to the ineffective assistance of counsel are set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985); Sanborn v. Commonwealth, Ky., 975 S.W.2d 905 (1998). In order to be ineffective, performance of counsel must be deficient and below the objective standard of reasonableness and prejudicial so as to deprive a defendant of a fair trial and a reasonable result. Strickland, supra. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." United States v. Morrow, 977 F.2d 222, 229 (6<sup>th</sup> Cir. 1992). The critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands or probable victory. Morrow, supra. The purpose of RCr 11.42 is to provide a forum for known grievances, not to provide an opportunity to research for grievances. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983).

A reviewing court must consider the totality of the circumstances and "access the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance."<sup>6</sup> A defendant is not

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<sup>5</sup> Ky., 17 S.W.3d 878 (2000).

<sup>6</sup> Foley, supra, at 884.

guaranteed errorless counsel, but only counsel likely to render reasonably effective assistance.<sup>7</sup> Our highest court has rejected the argument that counsel's failure to present the same evidence at the second trial constitutes proof of ineffectiveness. "RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accord short shrift in this court."<sup>8</sup> The courts will always defer to counsel's judgment in matters concerning trial strategy.<sup>9</sup> With these principles in mind, we review Holbrook's allegations of error.

The Commonwealth sought to prove that Holbrook shot the victim because of a dispute over money and that the knife wound suffered by Holbrook was self-inflicted. Holbrook admitted that he shot the victim, but argued that he did so in self-defense. A decision regarding witness selection is normally left to counsel's discretion.<sup>10</sup> Holbrook's trial counsel is deceased so we are left with no explanation as to the reason for counsel's actions; we cannot, however, envision any trial strategy in not calling Dr. Arnold in the third trial. His testimony was highly probative as to whether the knife wound

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<sup>7</sup> McQueen v. Commonwealth, Ky., 949 S.W.2d 70 (1997).

<sup>8</sup> Penn v. Commonwealth, Ky., 427 S.W.2d 808, 809 (1968).

<sup>9</sup> Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998).

<sup>10</sup> Foley, supra.

was inflicted by the victim and in explaining why, as a result of being attacked, Holbrook shot the victim. The lack of an expert to support Holbrook's version of the facts was, we believe, highly prejudicial and meets both Strickland standards.

We also differ with the Commonwealth that the late filing of the notice to use an insanity defense was trial strategy. No reasonable counsel would consciously decide to file an untimely motion. It is apparent that counsel was at least alerted to the prospect that his client may have been legally insane at the time of the offense, but failed to pursue the claim in a timely manner. There was, as the evidence at the RCr 11.42 hearing demonstrates, accessible information concerning Holbrook's mental health history and turbulent background. Despite that Holbrook's defense rested on his emotional response to the alleged aggression of his victim and the availability of the information as to his mental health, his counsel did not raise the issue of temporary insanity until the time had passed. While alone it may not constitute prejudicial ineffectiveness of counsel, when combined with the failure to call Dr. Arnold, it is sufficient to warrant reversal.

Holbrook also raises two evidentiary matters which alone would not be so prejudicial to require reversal. Since this case will presumably be retried, however, we briefly discuss the issues raised. State Trooper Phil McFadden, who

investigated the crime scene properly testified as to his observations at the scene and what he observed. However, with the only qualification being that he had been a Trooper for ten years and had in the past investigated homicides, he gave his opinion on how a person would customarily hold a knife if he intended to stab someone. The knife in the victim's hand he pointed out was inconsistent with someone intending to cut another person. Such opinion testimony went beyond mere observation of the crime scene, and without evidence that McFadden had some personal knowledge about the customary use of knives in stabbings, was inadmissible.<sup>11</sup> Trial counsel rendering competent assistance would have objected to its admission.

Finally, counsel did not impeach Holbrook's mother with a statement regarding the nature of the conversation between Holbrook and the victim prior to the shooting by using her prior inconsistent sworn testimony. A review of the first trial in which she was called as a defense witness, would have put any reasonably prepared counsel on notice that her testimony as a prosecution witness was inconsistent with her prior testimony.

We realize that this case has been tried three times. However, we believe that counsel's performance was so deficient that Holbrook has been denied due process. Therefore, the trial

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<sup>11</sup> Kentucky Rules of Evidence (KRE) 602; 701; 703.

court erred in denying his motion to set aside his conviction  
and grant a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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