

No. 08-100666-A

**IN THE
SUPREME COURT OF THE STATE
OF KANSAS**

MELVIN HOLMES,

Movant-Appellant,

vs.

STATE OF KANSAS,

Respondent-Appellee.

PETITION FOR REVIEW

Appeal from the District Court of Sedgwick County,

Kansas

Honorable Anthony Powell

District Court Case No. 07 CV 3944

Michael P. Whalen,#16611

Law Office of Michael P. Whalen

6235 W. Kellogg

Wichita, Kansas 67209

(316) 265-2598

ATTORNEY FOR APPELLANT, MELVIN
HOLMES

Prayer for Review

Mr. Holmes, the petitioner, respectfully asks this Court to grant his petition for review and

declare the findings of the Kansas Court of Appeals to be incorrect and to allow Mr. Holmes an evidentiary hearing so the truth of the violations of his rights may be heard.

Date of Court of Appeals Decision

The Court of Appeals decided this case on August 14, 2009.

Issue on Which Review Is Sought

DID THE KANSAS COURT OF APPEALS ERR BY FINDING THAT MR. HOLMES HAD NO RIGHT OF REVIEW OF HIS 60-1507 PETITION?

Facts of the Case

The facts presented in the Court of Appeals' opinion are adequate for the purposes of this review.

Argument: Why This Court Should Review This Case.

A. The district court erred in denying Mr. Holmes's pro se 60-1507 petition, as legitimate factual questions were raised.

1. Standard of review.

“When reviewing the district court's decision on a K.S.A. 60-1507 motion after the district court conducts a preliminary hearing, an appellate court applies a findings of fact and conclusions of law standard of review to determine whether the findings are supported by substantial competent evidence and whether those findings are sufficient to support its conclusions of law. The district court's ultimate legal conclusion regarding whether the petitioner has established that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, or (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack is reviewed as a conclusion of law using a de novo standard.” Bellamy v. State, 285 Kan. 346, Syl. 4 (2007).

2. The district court erred in denying Mr. Holmes's arguments related to the ineffective assistance of appellate counsel.

The district court found that the failure of appellate counsel to brief the violation of his right to assert a non-guilt based defense was not reviewable because there was no evidence that appellate counsel should have known to brief the claim. (R. II, 110).

However, Mr. Holmes told the police officers that the shooting was an accident. (R. XVIII, 50). Mr. Holmes testified that the shooting was accidental. (R. IXX, 36). And yet, trial counsel begins his closing argument by saying: "I would usually start out a closing argument by saying Melvin Holmes is not guilty. I can't do that this time. He is guilty. He's guilty of either involuntary manslaughter or voluntary manslaughter." (R. IXX, 89).

So, yes, appellate counsel should have been able to assess the violation of Mr. Holmes' rights by a reading of the trial transcripts and should have included the issue in the brief. A different outcome would likely occur regarding Mr. Holmes' conviction had appellate counsel raised the issue on appeal.

This violation of Mr. Holmes' right to present a not guilty plea and non-guilt based defense is further substantiated by the fact that both the voluntary intoxication instruction and the self defense instructions were given to the jury and both arguments can act as complete, affirmative defenses. Instead, trial counsel ignored these lines of argument and proceeded with a guilt-based defense of Mr. Holmes.

A factual question existed as to whether or not appellate counsel just missed the argument completely or whether appellate counsel made a strategic choice to ignore this very strong and outcome-changing issue. As such, the district court erred in denying Mr. Holmes an evidentiary hearing as the answer to these questions can not be assessed based upon a reading of the files and records of the case. "When acting on a 60-1507 motion, the court may determine that potential issues of fact are raised in the motion, supported by the files and record, and hold a preliminary hearing to determine if the issues in the motion are substantial. Gaudina v. State, 278 Kan. 103, Syl. ¶ 4, 92 P.3d

574 (2004). It is erroneous to deny a 60-1507 motion without an evidentiary hearing where the motion alleges facts which do not appear in the original record, which if true would entitle the movant to relief, and it identifies readily available witnesses whose testimony would support such facts or other sources of evidence. Floyd v. State, 208 Kan. 874, Syl. ¶ 1, 495 P.2d 92 (1972).” State v. Holmes, 278 Kan. 603, 629 (2004).

The Court of Appeals found that the guilt based defense and trial counsel’s closing arguments were consistent with Holmes’ theory of the defense and that appellate counsel had no duty to challenge trial counsel’s actions on appeal and, if it had been challenged, it would not have been successful. (Slip Op. at 4).

However, there is a difference between an accidental shooting and manslaughter. Voluntary manslaughter requires a finding that the killing was intentional. PIK 56.05. An accidental shooting would not qualify as an intentional act. Thus, the Court of Appeals was wrong. And trial counsel was wrong because the accident did not occur upon a sudden quarrel, but in Mr. Holmes defense of self. Involuntary manslaughter requires a finding of an unintentional killing either recklessly or in the commission of a crime. Also, not nearly the same as an accident. Again, both trial counsel and the Court of Appeals were wrong in their findings and Mr. Holmes had a right of review of this claim. This is an issue of statewide import and this Court should grant review.

This matter should be remanded for a full hearing on appellate counsel’s effectiveness.

3. The district court erred in finding there was no harm in the failure of appellate counsel to include the videotape and transcript of Mr. Holmes’ statement to police.

First, nobody, not the Supreme Court nor the district court ever reviewed the tape or the transcripts to see what errors were made and whether or not they could have changed the outcome of the case. The Supreme Court couldn’t review the matter because the tape and transcript were never

provided to them as part of the record on review. The district court failed to review the tape or the transcripts for no discernible reason. The district court merely found that the Supreme Court thought the unreviewed materials were ok and that was good enough for the district court. (R. II, 111).

“The major problem in reviewing this issue is that Holmes has failed to include the videotape or the transcript in the record on appeal. Without these items, it is virtually impossible to fully assess Holmes' claims. The appellant has the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court.” See State v. Decker, 275 Kan. at 502, 507, 66 P.3d 915 (2003).” State v. Holmes, 278 Kan. 603, 625 (2004).

While it is correct that the Supreme Court found that there were significant efforts made to edit the transcript and that a limiting instruction was given to the jury, the Court’s final determination was that there was no error in allowing the jury to use the transcripts in conjunction with the video. The Court did *not* find that there was no error in trial counsel’s failure to be sure that the video and the transcripts were properly edited. Id.

At trial, following the playing of the video to the jury, defense counsel stated: “Judge, if I may, I'd like to make a record of a conversation that we had back in your waiting area regarding the videotape that was played. Despite our best efforts, there were some parts of the tape that were not edited correctly as [the prosecutor] and I had agreed to. And I do not want to direct attention to it, but that was the reason why I objected to it being admitted without watching it. The Court informed us that [it] would not play the videotape or ... give a copy of the transcript to the jury without playing [the videotape] in the courtroom if [the jury] requested that.... [I]t was my understanding in our conversation that we would have the opportunity to redact or edit any portion that would be presented to [the jury] so that it conformed with the Court's previous order. (R. XVIII, 40-41). Prior to the playing of the video, defense counsel informed the court that he had not viewed the redacted video. Id. at 37. Thus, the erroneous and improper information that was shown to the jury for which a corrective

limiting instruction was needed was because of trial counsel's failure to review the redacted tape prior to its being presented to the jury. Thus, the failure of appellate counsel to address this issue and failure to include the information on appeal denied Mr. Holmes appropriate review of his case and his claims and an evidentiary hearing was needed because the finding of the district court was not based on a review of the tape or the transcript and the district court summarily failed to do its job and examine whether an issue existed.

The Court of Appeals found that this Court held that a "review of the evidence in the record does not support Holmes' position," and that this Court found that a limiting instruction was given to remedy the edited video tape and that Mr. Holmes' due process rights were not violated. (Slip Op. at 4-5).

However, it was not a matter of due process rights at issue, but the fact that improper evidence was allowed before the jury and this Court was deprived of the ability to review the redacted video and transcripts because such was never provided to this Court for review. Thus, a completely different issue is at play in the instant case and the district court and the Court of Appeals erred in their findings.

This Court should grant review of this issue in that it has never been properly presented to this court due to the shortcomings of trial and appellate counsel.

This matter should be remanded to the district court for appropriate review.

Respectfully submitted,

By: _____

Michael P. Whalen
Sup. Ct. No. 16611
Law Office of Michael P. Whalen
229 E. William, Ste. 300
Wichita, Kansas 67214
Telephone: (316) 265-2598
ATTORNEY FOR MOVANT/APPELLANT

CERTIFICATE OF SERVICE

This is to certify that one true and correct copy of the above and foregoing Brief was placed in the U.S. Mails, postage prepaid to the following:

David Lowden
Sedgwick County District Attorney
1900 E. Morris
Wichita, KS 67211
this ____ of September, 2009.

Michael P. Whalen

APPENDIX