

IN THE
MISSOURI SUPREME COURT

ERIC D. WEBB,)
)
 Appellant,)
)
 vs.) No. SC 91012
)
 STATE OF MISSOURI,)
)
 Respondent.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSOURI
TWENTIETH JUDICIAL CIRCUIT, DIVISION ONE
THE HONORABLE GAEL D. WOOD, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the denial without an evidentiary hearing of appellant's motion for postconviction relief pursuant to Rule 24.035. Appellant sought to vacate his convictions of involuntary manslaughter in the first degree, Section 565.024,¹ and armed criminal action, Section 571.015, after a guilty plea in the Circuit Court of Franklin County. The Honorable Gael D. Wood sentenced appellant to twelve years imprisonment. The Eastern District Court of Appeals affirmed the motion court's ruling, and this Court granted transfer after opinion. This Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 9, Mo. Const. (as amended 1976).

¹ Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Appellant, Eric Webb, was indicted for involuntary manslaughter in the first degree, armed criminal action, and failure to drive on the right half of the roadway (L.F. 1-2). He appeared before the Honorable Gael D. Wood on June 10, 2008, and entered a plea of guilty to involuntary manslaughter and armed criminal action, in exchange for the state's dropping count three and recommending concurrent sentences of ten years (L.F. 3-15). Appellant told the court that the allegations in the indictment were true, and that there were no threats or promises inducing his plea of guilty (L.F. 7-9).

Appellant appeared on July 22, 2008, for sentencing (L.F. 16). The court said that based on the SAR, he was going to sentence appellant to twelve years instead of ten (L.F. 18). Appellant was given the opportunity to withdraw his plea, but chose to maintain it and accept the twelve year sentence (L.F. 18-19). The court thereupon sentenced him to two twelve year sentences, to run concurrently to each other and to a prior sentence (L.F. 29, 34-35).

Appellant filed his *pro se* motion for postconviction relief on September 22, 2008 (L.F. 40). Counsel was appointed and filed an amended motion (L.F. 58).² The motion alleged in part that appellant received ineffective assistance of counsel

² The court granted a motion to consider the amended motion timely filed (L.F. 70).

in that counsel told him that he would not be subject to the eighty-five percent rule (L.F. 59).

On August 27, 2009, Judge Wood entered findings of fact and conclusions of law and denied appellant's motion without an evidentiary hearing (L.F. 68). The findings state that the allegation was refuted by the record since appellant said at the plea hearing that no one had promised him anything to get him to plead guilty (L.F. 72). Notice of appeal was filed September 25, 2009 (L.F. 81).

POINT RELIED ON

The motion court clearly erred in denying appellant’s Rule 24.035 motion without an evidentiary hearing, because appellant pleaded factual allegations which, if proved, would warrant relief and which are not refuted by the record, in that appellant claimed that he received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, when counsel misadvised appellant as to the effect of his guilty plea on his parole eligibility, which was deficient performance under prevailing professional norms. The ineffective assistance of counsel appellant received rendered his plea involuntary, because parole eligibility is intimately related to the criminal process, and without this misadvice, appellant would have chosen to go to trial rather than plead guilty.

Padilla v. Kentucky, ___ U.S. ___, 130 S.Ct. 1473 (2010);

Strickland v. Washington, 466 U.S. 668 (1984);

Eakins v. State, 734 S.W.2d 290 (Mo. App., E.D. 1987);

Taylor v. State, ___ S.E.2d ___, 2010 WL 2684051 (Ga. App., filed July 8, 2010);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Sec. 18(a);

Section 565.024;

Rule 24.035;

2 Compendium of Standards for Indigent Defense Systems, Standards for

Attorney Performance, p. D-10; and

ABA Standards for Criminal Justice, Standard 14-3.2.

ARGUMENT

The motion court clearly erred in denying appellant's Rule 24.035 motion without an evidentiary hearing, because appellant pleaded factual allegations which, if proved, would warrant relief and which are not refuted by the record, in that appellant claimed that he received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, when counsel misadvised appellant as to the effect of his guilty plea on his parole eligibility, which was deficient performance under prevailing professional norms. The ineffective assistance of counsel appellant received rendered his plea involuntary, because parole eligibility is intimately related to the criminal process, and without this misadvice, appellant would have chosen to go to trial rather than plead guilty.

Standard of review

The motion court denied appellant's Rule 24.035 motion without an evidentiary hearing. Review of the motion court's decision is limited to a determination of whether the judgment of the court is clearly erroneous. Rule 24.035(j); *Antwine v. State*, 791 S.W.2d 403, 406 (Mo. banc 1990). A judgment will be found clearly erroneous if, upon review of the entire record, this Court is left with the definite and firm belief that a mistake has been made. *Sidebottom v. State*, 781 S.W.2d 791, 795 (Mo. banc 1989).

Appellant was entitled to an evidentiary hearing if he pleaded facts in his motion which, if true, would entitle him to relief, unless the motion and the files and records of the case conclusively show that he is entitled to no relief. Rule 24.035(g); *State v. Rahberger*, 747 S.W.2d 724, 725 (Mo. App., W.D. 1988).

Consequences of a guilty plea

Appellant's motion asserted that he was denied effective assistance of counsel in that counsel told him that he would not be subject to the eighty-five percent rule (L.F. 59). The Court of Appeals held that appellant's claim was refuted by the record, because at the guilty plea hearing appellant testified that no one promised him anything to get him to plead guilty. *Webb v. State*, ___ S.W.3d ___, 2010 WL 1860037, slip op. at 3 (Mo. App., E.D, filed May 11, 2010). But in fact, appellant's allegation raises an issue of fact that must be decided after an evidentiary hearing. Without any testimony by appellant or his trial counsel, it cannot be determined whether appellant's belief after counsel's misadvice was reasonable. *Eakins v. State*, 734 S.W.2d 290, 293 (Mo. App., E.D. 1987).

In any event, the analysis of this issue has changed since the United States Supreme Court case of *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473 (2010).³ Prior to *Padilla*, the law in the State of Missouri was well-settled.

³ *Padilla* was decided before the Court of Appeals opinion in this case, but after this case was briefed.

The law prior to Padilla

A guilty plea must be entered voluntarily and intelligently to be a valid waiver of rights. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Reynolds v. State*, 994 S.W.2d 944 (Mo. banc 1999). This *has* meant that the defendant must enter the plea with knowledge of the direct consequences of the plea. *Brady*, 397 U.S. at 755; *Reynolds*, 994 S.W.2d at 946. This Court held in *Reynolds* that eligibility for parole is a collateral consequence of a guilty plea, not one of the direct consequences about which a defendant must be informed for the plea to be voluntary and intelligent. 994 S.W.2d at 946. Neither the trial court nor defense counsel was under any obligation to inform a defendant about the parole consequences of his guilty plea. *Id.* The *Reynolds* Court cited *Hill v. Lockhart* for the proposition that

[w]e have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary. ...

474 U.S. 52, 56 (1985); *Reynolds*, 994 S.W.2d at 946. This Court recognized that there was authority for the proposition that misinforming as opposed to failing to inform a defendant about parole consequences can undermine the voluntariness of the plea, but found that it did not apply to Reynolds' situation. *Id.* Since *Reynolds*, the Missouri Court of Appeals has drawn this distinction between failure to inform and misinformation. *See, e.g., Hao v. State*, 67 S.W.3d 661, 663 (Mo. App., E.D. 2002).

Direct versus collateral consequences

In *Padilla*, the defendant claimed that he received ineffective assistance of counsel in that counsel misadvised him about the potential for deportation as a consequence of his guilty plea. 130 S.Ct. at 1478. The United States Supreme Court noted that the State of Kentucky had applied an analysis similar to Missouri's and rejected Padilla's ineffectiveness claim on the ground that deportation was a collateral matter. *Id.* at 1481. The Court said, "[w]e, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance required under *Strickland*." 130 S.Ct. at 1481, citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984).⁴ The Court declined to decide whether that distinction was appropriate in the case of deportation. 130 S.Ct. at 1481.

Instead, the Court decided that whether counsel was constitutionally effective turned not on whether counsel was advising the defendant on the direct or collateral consequences of a guilty plea, but rather on whether counsel's

⁴ Under *Strickland*, for a finding of ineffective assistance of counsel it must be shown that the defense attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances, prejudicing the defendant such that there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. 466 U.S. at 689-694.

performance was “reasonable under prevailing professional norms.” *Padilla*, 130 S.Ct. at 1482; quoting *Strickland*, 466 U.S. at 688. The Court looked to various sources for those professional standards, including NLADA’s Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, and to the ABA Standards for Criminal Justice, Pleas of Guilty. *Padilla*, 130 S.Ct. at 1482. The NLADA compendium includes Oregon’s requirement that an attorney advise his or her client about the possible “parole or post-prison supervision eligibility, ... and collateral consequences of conviction, e.g., deportation, civil disabilities, and enhanced sentences for future convictions. ...” and the ABA standards state that “to the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.” 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, p. D-10; ABA Standards for Criminal Justice, Standard 14-3.2.

Under the *Padilla* standard, it is irrelevant whether a consequence of a guilty plea is deemed direct or collateral, so long as it violates prevailing professional norms to fail to advise one’s client of the consequence. In *Taylor v. State*, ___ S.E.2d ___, 2010 WL 2684051 (Ga. App., filed July 8, 2010), the Georgia Court of Appeals, citing *Padilla*, held that defense counsel must advise clients concerning registration as a sex offender prior to entry of a guilty plea. Like deportation, registration as a sex offender is “intimately related to the

criminal process” in that it is an “automatic result” following certain criminal convictions. *Taylor*, at *4, citing *Padilla*, 130 S.Ct. at 1481. In *Padilla* itself, the Court found it “not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” 130 S.Ct. at 1483.

Here, accepting appellant’s allegations as true for the purpose of determining the need for a hearing, the consequences of the plea follow just as inexorably as if they were deportation or registration: Appellant alleged that counsel misadvised him as to whether he was subject to the eighty-five percent rule, and in fact, told him that he would only have to serve forty percent of his sentence before becoming eligible for parole (L.F. 59). Under Section 565.024, appellant was in fact subject to the eighty-five percent rule. The statute clearly states that “for any violation of subdivision (3) of subsection 1 of this section, the minimum prison term which the defendant must serve shall be eighty-five percent of his or her sentence.” Arguably, this is a *direct* consequence of the guilty plea, despite the fact that parole eligibility has so frequently been termed *collateral*. In any event, it makes no difference under the *Padilla* analysis.

Misadvice versus failure to advise

Not only should Missouri courts no longer use a test that distinguishes between direct and collateral consequences of a guilty plea, but also the distinction between misadvice and failure to advise should be rendered meaningless. The Solicitor General urged the United States Supreme Court to apply *Strickland* only to the extent that Padilla alleged affirmative misadvice but *Padilla* Court declined to do so. 130 S.Ct. at 1484. The Court found “no relevant difference between an act of commission and an act of omission in this context.” *Id.* The Court held that this would invite absurd results – including “giving counsel an incentive to remain silent on matters of great importance, even when answers are readily available.” *Id.* The Court noted that *Hill v. Lockhart*, 474 U.S. 52 (1985), applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty. *Padilla*, 130 S.Ct. 1484-1485.⁵

In *Padilla*, both misadvice and failure to advise were at issue, and the Court held that Padilla’s claim was subject to *Strickland* analysis as to both. This is now a distinction without a difference.

Prejudice

In *Eakins*, the Court of Appeals remanded for an evidentiary hearing where the appellant contended that he pled guilty under the belief that he would be released after serving shock time on his eight year sentence. 734 S.W.2d at 293.

⁵ The petitioner in *Hill v. Lockhart* lost on the prejudice prong. 474 U.S. at 59-60.

The Court held that "[f]rom the record before this court, without any testimony by movant or his trial counsel, we cannot determine whether movant's belief was reasonable." *Id.*

In *Stavricos v. State*, 979 S.W.2d 534 (Mo. App., S.D. 1998), the appellant received an evidentiary hearing on his postconviction claim that his plea counsel was ineffective for advising him that he would get a sentence of less than eight years if he entered an open plea to the charge. However, the Court of Appeals concluded that the appellant's testimony at the evidentiary hearing contradicted his assertion as to his understanding regarding counsel's advice. *Id.* at 536.

Here, without an evidentiary hearing, this Court cannot conclude that appellant's plea was not induced by the misadvice he received as to his parole eligibility. As in *Eakins*, without any testimony by appellant or counsel at an evidentiary hearing, this Court cannot determine whether appellant's reliance upon the advice was reasonable. 734 S.W.2d at 293. And under *Padilla*, it is irrelevant whether it is termed collateral or direct; misadvice or failure to advise. The only question remaining is prejudice, and that can only be determined after testimony is adduced. This Court should therefore reverse the motion court's denial of postconviction relief and remand for an evidentiary hearing.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse the motion court's denial of postconviction relief and remand for an evidentiary hearing.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,804 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a Symantec VirusScan program, which was updated in September, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 5th day of October, 2010, to John W. Grantham, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri, 65102.

Ellen H. Flottman

APPENDIX

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