No. SC91012

In the
Supreme Court of Missouri

ERIC WEBB,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Franklin County Circuit Court
Twentieth Judicial Circuit
The Honorable Gael D. Wood, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

JOHN W. GRANTHAM
Assistant Attorney General
Missouri Bar No. 60556

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
john.grantham@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

Defendant appeals from a Franklin County Circuit Court judgment overruling his Rule 24.035 motion for post-conviction relief. Defendant sought to vacate his convictions for first-degree involuntary manslaughter[1] and armed criminal action[2] for which he was sentenced to a total of twelve years imprisonment. The Missouri Court of Appeals, Eastern District, affirmed the denial of Defendant's post-conviction motion. On August 31, 2010, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

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[1] § 565.024, RSMo Cum. Supp. 2005.

[2] § 571.015, RSMo 2000.

STATEMENT OF FACTS

Defendant was indicted as a persistent offender in Franklin County Circuit Court with one count of first-degree involuntary manslaughter, (Count 1), one count of armed criminal action, (Count 2), and one count of failure to drive on the right half of the roadway (Count 3). (L.F.1).[3] On June 10, 2008, Defendant appeared with counsel before Judge Gael D. Wood to enter guilty pleas pursuant to a plea agreement. (L.F. 5-8). In exchange for Defendant's guilty pleas to Counts 1 and 2, the prosecutor agreed to dismiss Count 3, and to recommend that Defendant be sentenced to concurrent terms of ten years of imprisonment on Counts 1 and 2. (L.F. 7-8).

Defendant admitted that on April 21, 2007, while he was driving under the influence of alcohol, he drove on the wrong side of the road with criminal negligence and collided with a vehicle in which Terry Parker was an occupant, thus causing Terry Parker's death. (L.F. 7). Defendant also admitted that he committed the crime of involuntary manslaughter through the use of a dangerous instrument, an automobile. (L.F. 8). Defendant pleaded guilty to both charges. (L.F. 7-8).

Defendant denied that anyone had threatened him in order to get him to plead. (L.F. 9). Then the court asked,

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[3] The record on appeal consists of a legal file (L.F.).

Has anyone promised you anything other than the State's recommendation to get you to plead guilty?

(L.F. 9). Defendant responded, "No." (L.F. 9).

The court examined Defendant regarding his understanding of his rights attendant to trial, and Defendant stated that he understood those rights. (L.F. 9-14). The trial court also informed Defendant of the range of punishment for both counts. (L.F. 11-12).

Defendant acknowledged that he was thinking clearly, and that he had heard and understood all of the court's questions. (L.F. 12). Defendant stated that he had no questions about the proceedings. (L.F. 12).

Defendant stated that he had plenty of time to discuss the case with his attorney. (L.F. 12). Defendant stated that his attorney had done everything he asked her to do, and that she had not done anything that he did not want her to do. (L.F. 12-13). Defendant denied that counsel made him plead guilty against his will. (L.F. 13). Defendant stated that he could not think of anything that plea counsel should have done differently, and affirmed that he was completely satisfied with her services. (L.F. 13).

The court found that Defendant's pleas were voluntary, knowing, and intelligent. (L.F. 14). However, the court deferred accepting Defendant's pleas and ordered a sentencing advisory report (SAR). (L.F. 14).

On July 22, 2008, Defendant appeared again before Judge Wood. (L.F. 16). The court noted that the SAR had been completed and filed with the court. (L.F. 17) Plea counsel acknowledged that she had reviewed the SAR and had discussed it with Defendant. (L.F. 18). The court informed Defendant that, because of the sentencing recommendation in the SAR, the court intended to reject the plea agreement. (L.F. 18). The court advised Defendant of his right to withdraw his guilty pleas and proceed to trial. (L.F. 18). The court further informed Defendant that if he persisted in his pleas of guilty, the court would sentence him to twelve years on each count to run concurrent with one another and with a sentence that Defendant was already serving. (L.F. 18).

Defendant chose to persist in his guilty plea. (L.F. 19). The court sentenced Defendant to twelve years of imprisonment on both counts, with each sentence to be served concurrently with each other, and concurrently with another sentence that Defendant was then serving. (L.F. 29, 34-36).

The court then examined Defendant regarding the assistance of counsel he received. (L.F. 30-31). Defendant again affirmed that there was nothing that he wanted his attorney to do that his attorney failed to do, and that his attorney did not do anything against his wishes. (L.F. 31). Defendant denied that there were any witnesses that his attorney failed to interview or motions that counsel failed to file. (L.F. 31). Defendant stated that he had plenty of time to discuss the case and possible

defenses with counsel. (L.F. 31). Defendant denied that counsel made him plead guilty against his will. (L.F. 31). Defendant stated that he was completely satisfied with counsel's services. (L.F. 31).

On September 22, 2008, Defendant filed a *pro se* motion for post-conviction relief. (L.F. 40-57). On January 15, 2009, post-conviction counsel filed an amended Rule 24.035 motion (L.F. 58-67), which alleged that his guilty plea was involuntary and unknowing because he was denied the right to effective assistance of counsel. (L.F. 59-60). Specifically, Defendant alleged that counsel told him that as a result of his guilty plea, he would not be subject to any "85% non-parole eligibility rule," but that he would be required to serve 40% without parole eligibility because of a prior commitment to the Department of Corrections. (L.F. 59-60). Defendant further alleged that he learned, after the plea, that he would have to serve 85% of his sentence before becoming eligible for parole pursuant to § 565.024, RSMo Cum. Supp. 2005, the statute which proscribed involuntary manslaughter and provides for punishment. (L.F. 60). Defendant further alleged that, had he known that he would have to serve 85% of his sentence before becoming eligible for parole, he would not have pleaded guilty but would have insisted on a trial. (L.F. 60-61).

On August 27, 2009, Judge Wood entered written findings of fact, conclusions of law, and an order overruling Defendant's motion without an evidentiary hearing. (L.F. 68-79). This appeal followed.

ARGUMENT

The motion court did not clearly err in overruling without an evidentiary hearing Defendant's claim that his guilty plea was induced by improper advice about his parole eligibility because his allegations were refuted by the record.

A. Standard of Review

In reviewing the denial of a motion for post-conviction relief, an appellate court should uphold the findings and conclusions of the motion court unless they are clearly erroneous. Rule 24.035(k). Such findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made. *Edwards v. State*, 200 S.W.3d 500, 509 (Mo. banc. 2006).

A petition for post-conviction relief must meet three requirements to warrant an evidentiary hearing: (1) it must contain facts, not conclusions, which, if true, would warrant relief; (2) the alleged facts must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice to the movant." *State v. Blankenship*, 830 S.W.2d 1, 16 (Mo. banc 1992). An evidentiary hearing is not required when the court determines and the record conclusively shows that the movant is not entitled to relief. Rule 24.035(h).

B. The motions court's findings of fact and conclusions of law.

The motion court held that Defendant was not entitled to an evidentiary hearing because his allegations were conclusively refuted by the record of the plea hearing, in which Defendant testified that no one had promised him anything other than the State's recommendation in order to get him to plead guilty. (L.F. 72).

C. Defendant's claim was refuted by the record.

The motion court found that Defendant's claim, that he pleaded guilty because he was promised that he would only have to serve 40% of his sentence before being eligible for parole, was conclusively refuted by the record. The motion court's finding was supported by Defendant's testimony at the plea hearing, that he had not been promised anything in addition to the State's recommendation. (L.F. 9). However, Respondent acknowledges that Missouri courts have suggested that a negative response to a routine inquiry whether any promises other than those stated on the record had been made is too general to conclusively refute a claim that counsel misinformed Defendant about parole eligibility. *See Reid v. State,* 192 S.W.3d 727, 733 (Mo. App. E.D. 2006); *State v. Shackleford,* 51 S.W.3d 125, 128 (Mo. App. W.D. 2001).

However, upon information and belief, Respondent submits that the SAR (which Defendant reviewed with counsel before declining the opportunity to withdraw his guilty plea (L.F. 18)) informed Defendant that he would have to serve far in excess

of 40% of his sentence before being eligible for parole. The SAR, which was filed with and considered by the sentencing court (L.F. 17-18), would support the motion court's conclusion that Defendant's claim was refuted by the record. However, Defendant did not include the SAR in the record on appeal. Under Supreme Court Rule 81.12, Defendant had a duty to include all of the record and evidence necessary to the determination of the questions presented. Rule 81.12(a); *In the Matter of the Care and Treatment of Johnson,* 161 S.W.3d 873, 879 (Mo. App. S.D. 2005). When an appellant omits portions of the record, a court may presume that the omitted portion would have been favorable to the circuit court's judgment and unfavorable to the appellant's claim on appeal. *Wykle v. Colombo,* 457 S.W.2d 695, 700 (Mo. 1970); *State v. Ramires,* 152 S.W.3d 385, 406 (Mo. App. W.D. 2004).

In any event, to the extent that the SAR would be dispositive of this case, perhaps the most efficient procedure would be for this Court to request a copy of the SAR from the Circuit Court Clerk pursuant to Supreme Court Rule 30.04(h).[4] Alternatively, it may be necessary to remand the case for an evidentiary hearing.

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[4] Respondent has been unable to obtain a certified copy from the Circuit Court Clerk in order to supplement the record. Upon contacting the Circuit Court Clerk, undersigned counsel was informed that the SAR is not a document that the Clerk releases upon request.

D. The issue of whether counsel is ineffective for failing to advise his client about parole eligibility is not properly before this Court.

Relying on the U.S. Supreme Court's recent pronouncement in *Padilla v. Kentucky,* __ U.S. ___, 130 S.Ct. 1473 (2010), Defendant asks this Court to hold that counsel is ineffective, not only if he misadvises his client about parole eligibility, but also if he fails to adequately advise his client about parole eligibility. See App. Br. 11-15. Defendant's request is either an assertion of a new basis for relief that was not made in the circuit court, or, is a request that this Court rule on an issue that is not presented by the facts of this case. Either way, his request is improper.

If Defendant is now claiming that counsel failed to give him any advice about parole eligibility, this claim is wholly different from, and in fact, contradicted by, the allegations he made in his Amended Motion. There, he claimed that counsel advised him, incorrectly, that he would eligible for parole after serving 40% of his sentence. (L.F. 60). As this Court held in *Coates v. State,* 939 S.W.2d 912, 915 (Mo. banc 1997), a motion court cannot err in failing to grant relief based on allegations that were not presented as a grounds for relief. *Id. See* Rule 24.035(d) ("the movant waives any claim for relief known to the movant that is not listed in the motion."). Defendant cannot raise a new claim on appeal, because to do so is to effectively file a successive post-conviction motion which is prohibited by Rule 24.035(*l*); *Cf. Cloyd v.*

State, 302 S.W.3d 804, 808-809 (Mo. App. W.D. 2010) (declining plain error review for claims not raised in the Rule 29.15 motion).

If Defendant is not now alleging that his attorney failed to advise him about parole eligibility, but rather maintains his position that counsel provided incorrect advice, then his request that this Court rule that a failure to advise a client about parole eligibility constitutes ineffective assistance of counsel is a request that this Court rule on merely hypothetical factual allegations. But this Court should not issue an opinion on whether counsel would have been ineffective had counsel failed to advise Defendant of his parole eligibility because "[t]his Court's role is limited to deciding the issues before it and not making advisory opinions." *Committee for Educational Equality v. State*, 294 S.W.3d 477, 493 (Mo. banc 2009). *See also City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 188 (Mo. banc 2006) (recognizing that this Court has no authority to render an advisory opinion)*; Schottel v. State*, 159 S.W.3d 836, 841 (Mo. banc 2005) ("[t]his Court cannot offer advisory opinions on issues that may arise in the future"). It is well settled that a constitutional question will not be addressed by the court unless its answer is essential to a proper determination of the case presented. *State ex rel. State Bd. of Mediation v. Pigg*, 244 S.W.2d 75, 79 (Mo. banc 1951).

Though the issue that Defendant raises may arise in another case in the future, this Court has no authority to give advisory opinions on constitutional questions which

may affect the rights of persons who are not parties to this action. *Id.* Unless such persons are actually in court and the constitutional issues are directly presented and necessary to the resolution of the case, this Court will not decide such constitutional issues. *Id.* This Court should decline Defendant's invitation to rule on hypothetical facts. But even if Defendant had asserted this claim in his amended motion, he would not have been entitled to relief.

E. A defendant's guilty plea is not rendered involuntary by counsel's failure to inform the defendant about parole eligibility.

Based on the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), Defendant argues that the analysis of claims of ineffective assistance of plea counsel has changed. Defendant asks this Court to reconsider well-settled Missouri law, such as this Court's ruling *Reynolds v. State*, 994 S.W.2d 944, 946 (Mo. banc 1999), holding that parole eligibility is a collateral consequence of pleading guilty of which counsel has no duty in inform the defendant prior to the guilty plea. Specifically, Defendant argues that the *Padilla* opinion changed the analysis in two ways. First, he argues that *Padilla* eliminated the distinction between claims of failure to advise about the direct consequences of a guilty plea versus the collateral consequences thereof. See App. Br. 13. However, the *Padilla* court expressly declined to decide whether that distinction is appropriate. *Id.* at 1481.

Defendant also argues that, under *Padilla*, Missouri courts should no longer distinguish between claims that counsel failed to advise the defendant about a particular consequence of pleading guilty, and a claim that counsel provided affirmative misadvice about that consequence. It is true that the *Padilla* court expressly declined to limit the application of its holding to claims of affirmative misadvice about deportation consequences. *Id.* at 1484. However, the broad application of *Padilla* to claims of failure to advise about deportation should not be expanded to include claims of failure to advise about parole eligibility. As one court has found, "the holding of *Padilla* seems not importable-either entirely or, at the very least, not readily importable-into scenarios involving collateral consequences other than deportation." *Brown v. Goodwin*, Slip Copy, 2010 WL1930574 at *13, D.N.J. (declining to apply *Padilla* to a claim that counsel failed to inform the defendant that his guilty plea would place him at risk of civil commitment as a sexually violent predator).

The *Padilla* court found that advice regarding deportation came within the ambit of the Sixth Amendment right to counsel for four reasons: 1) deportation is a particularly severe "penalty;" 2) deportation is intimately related to the criminal process; 3) deportation is "nearly an automatic" result of conviction for certain offenses, and 4) prevailing professional norms require defense attorneys to advise the defendant about deportation consequences. *Id.* at 1481-1483. Applying these same

factors to parole eligibility demonstrates that parole eligibility differs from deportation consequences in important ways which militate against a finding that the failure to advise about parole eligibility renders a guilty plea involuntary.

First, it cannot be said that the inability to be considered for early release is a "severe penalty" in the same way that deportation is. Deportation is not only a penalty, but a "nearly automatic penalty" which is over and above the criminal penalty and which is not resolved by the entry of the guilty plea. In contrast, the eligibility to be considered for parole is not a consequence which extends beyond the sentence, but one that may merely shorten it.

A criminal defendant might fairly assume that they will have "paid their debt to society" once their judicially pronounced sentence is completed, and that no more severe penalties will be imposed by the government as a consequence of their criminal conviction. Part of what makes deportation such a "severe penalty" is that it is a consequence over and above the sentence imposed by the court. A lack of parole eligibility for a certain amount of the sentence is not a "severe penalty" because it is not a consequence which extends the consequences of the guilty plea beyond the sentence of the court.

The proposition that a guilty plea is involuntary unless the defendant is informed about when the Board of Probation and Parole will begin to consider him for early release depends on an assumption that a defendant will expect early release from

his sentence unless he is corrected by plea counsel. There is no reason why a defendant is entitled to such an assumption because there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *State ex rel. Cavallaro,* 908 S.W.2d 133, 134 (Mo. banc 1995) (citing *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). Furthermore in Missouri, a defendant has no justifiable expectation of release until they have served their entire sentence because the Board of Probation and Parole has "almost unlimited discretion" in determining whether to release someone on parole. *Id*. (citing Section 217.690, RSMo 1990). Early release from prison is not a right, but a matter of legislative grace. *Jones v. State,* 471 S.W.2d 166, 169 (Mo. banc 1971) (citation omitted). Because of the Board's "almost unlimited discretion," the Department of Probation and Parole is never required to release any particular inmate. Therefore, parole is not an "automatic result" for any criminal defendant sentenced to a term of imprisonment.

Thus, even if parole eligibility is "closely related to the criminal process," and even if prevailing profession norms call for counsel to inform the defendant about parole eligibility, it does not follow necessarily from the holding of *Padilla* that an guilty plea is rendered infirm merely by the failure of counsel to inform the defendant about his eligibility for parole. Duties stemming from ethical obligations are not the same as constitutional requirements. See *Montejo v. Louisiana,* ___ U.S. ___, 129

S.Ct. 2079, 2087 (2009) ("the Constitution does not codify the ABA's Model Rules"). *See also Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice … are guides to determining what is reasonable, but they are only guides."); *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel").

The *Padilla* court relied on several factors, including the fact that deportation was a "severe penalty" and that it followed automatically from conviction, to conclude that deportation is "not categorically removed from the ambit of the Sixth Amendement right to counsel. *Padilla*, 130 S.Ct. at 1481-1483. Thus, the *Padilla* court implicitly found that not all consequences of a guilty plea which are closely connected to the criminal process and which are included among the consequences which counsel is expected to inform his or her client by virtue of prevailing professional norms are consequences which counsel must inform his or her client to render the guilty plea knowing and voluntary. Rather, there are other factors in addition to these two factors that should be considered.

In *Brown v. Goodwin*, the court declined to expand the holding of *Padilla* to a claim that counsel had failed to advise the defendant of the risk of civil commitment after the end of his sentence on the basis that the procedural protections and

individualized assessment required to civilly commit the defendant as a sexually violent predator rendered that consequence "qualitatively different" from deportation, which is automatic for certain crimes. *Brown v. Goodwin*, Slip Copy, 2010 WL1930574 at *13. *See also Maxwell v. Larkins*, 2010 WL 2680333 at *8-*10 (E.D. Mo 2010) (declining to expand *Padilla* to find counsel ineffective for failing to advise the Defendant of possible commitment under the SVP act, registration as a sex offender, and completion of the MOSOP program). Similarly, parole eligibility, or the legislative grace that is available to a defendant at the discretion of the Board of Probation and Parole, is qualitatively different from deportation. Unlike deportation, the minimum amount of time that must be served before parole eligibility is not a "severe penalty" over and above the sentence imposed. Therefore, the holding of *Padilla* should not be imported to claims of failure to advise about parole eligibility.

CONCLUSION

The motion court's judgment was not clearly erroneous. Its judgment should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

JOHN W. GRANTHAM
Assistant Attorney General
Missouri Bar No. 60556

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
john.grantham@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,021 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 29th day of November, 2010, to:

Ellen H. Flottman
Woodrail Centre, Bldg. 7, Ste. 100
1000 West Nifong
Columbia, Missouri 65203

_____

JOHN W. GRANTHAM
Assistant Attorney General
Missouri Bar No. 60556
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

APPENDIX