

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001318-MR

KYLE D. THOMPSON

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 10-CR-00433

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

JONES, JUDGE: Kyle D. Thompson appeals from an order of the Hardin Circuit Court denying his motion pursuant to Kentucky Rules of Civil Procedure (RCr) 11.42 based on ineffective assistance of counsel. Thompson alleges his defense counsel provided ineffective assistance by failing to advise him that after entering his guilty plea, he would be required to register as a sex offender pursuant to Kentucky Revised Statutes (KRS) 17.510. Thompson argues the trial court erred

when it denied his motion without an evidentiary hearing. Upon review, we reverse and remand.

Pursuant to a plea agreement, Thompson entered guilty pleas to second-degree terroristic threatening, criminal attempt to commit kidnapping, unlawful possession of a weapon on school property, third-degree terroristic threatening, carrying a concealed deadly weapon, and possession of marijuana. He was sentenced to serve a total of three-years' imprisonment and an additional five years probated from his date of release or parole. Because at the time of the offenses the victim was a minor, KRS 17.500 requires Thompson to register as a sex offender.

After entry of his plea and sentencing, Thompson filed a motion to remove his name from the sex offender registry alleging he had not been informed of the requirement prior to entering his plea and only learned of it when he received a letter from the Kentucky State Police. At a hearing, defense counsel informed the trial court that at the time the plea was entered, neither he nor the prosecutor believed the registration requirement applied and the registration requirement did not enter into the plea negotiations.

Subsequently, Thompson filed a motion pursuant to RCr 11.42 alleging defense counsel was ineffective for failing to inform him that he would be required to register as a sex offender. The trial court denied the motion and this appeal followed.

The seminal case setting forth the appropriate standard of review for an ineffective assistance claim is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Quoting *Strickland*, in *Bowling v. Commonwealth*, 80 S.W.3d 405, 411-12 (Ky. 2002), our Supreme Court set forth the two-pronged standard:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

In the context of a guilty plea, the proper prejudice inquiry is whether "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985).

A movant in an RCr 11.42 proceeding is not necessarily entitled to a hearing. RCr 11.42(5) states in part that if there is a "material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing[.]" A hearing is not required when the trial court determines "that the allegations, even if true, would not be sufficient to invalidate the convictions." *Commonwealth v. Searight*, 423 S.W.3d 226, 228 (Ky. 2014) (quoting *Wilson v. Commonwealth*, 975 S.W.2d 901, 904 (Ky. 1998)).

In *Carpenter v. Commonwealth*, 231 S.W.3d 134, 137 (Ky. App. 2007), this Court concluded counsel did not render ineffective assistance by failing to advise a defendant of Kentucky's sex offender registration requirements. In

doing so, the Court emphasized that sex offender registration statutes are nonpunitive. The nature and purpose of such statutes is remedial enacted to protect the public. *Id.* (quoting *Hyatt v. Commonwealth*, 72 S.W.3d 566, 772-73 (Ky. 2002)). This Court held “it is plain that the registration requirement constitutes a purely collateral consequence which implicates neither the constitutionality of [the defendant’s] plea nor ... counsel’s effectiveness.” *Id.*

When this Court decided *Carpenter*, the rule that counsel’s failure to advise a defendant of sex offender registration requirements was widely accepted. *See Ward v. State*, 315 S.W.3d 461, 470-71 (Tenn. 2010)(noting that all but one of thirty-three states addressing the issue concluded a sexual offender registration requirement is a collateral consequence). Despite the precedent in this Commonwealth and sister states, Thompson argues the same conclusion cannot be reached in light of the United States Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). We agree as related to the present case.

In *Padilla*, the Supreme Court found the distinction between collateral and direct consequences inapplicable in the context of deportation. *Id.* at 366, 130 S.Ct. at 1482. The Court explained that because under current immigration law deportation is nearly an automatic result for a broad class of noncitizen offenders, “accurate legal advice for noncitizens accused of crimes has never been more important.” *Id.* at 364, 130 S.Ct. at 1480. Noting the seriousness of deportation, the Court concluded it is a “severe penalty” inseparable from the conviction. *Id.* at

365, 130 S.Ct. at 1481. The Court likened deportation “to banishment or exile.”

Id. at 373, 130 S.Ct. at 1473. The Supreme Court concluded the Kentucky

Supreme Court improperly classified deportation as a collateral consequence:

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla’s claim.

Id. at 366, 130 S.Ct. at 1482.

The *Padilla* decision markedly deviated from the existing law in Kentucky as well as other jurisdictions regarding ineffective assistance claims in the context of advice regarding deportation. However, a more troublesome question was how far the court’s language reached concerning the direct-collateral consequences rule traditionally applied to ineffective assistance claims in other contexts.

The Supreme Court has further explained its reasoning in *Padilla* and clarified that it was not invalidating the widely recognized rule that advice about collateral consequences is not within the ambit of the Sixth Amendment right to counsel. In *Chaidez v. United States*, U.S. , 133, S.Ct. 1103, 185 L.Ed.2d 149 (2013), the Court explained that in *Padilla*, its “first order of business was ... to consider whether the widely accepted distinction between direct and collateral consequences categorically foreclosed Padilla’s [Sixth Amendment] claim.” *Id.* at 1111. The Court clarified that *Padilla* did not “eschew the direct-collateral divide

across the board,” but simply held the distinction was ill suited to the unique circumstance of deportation. *Id.* at 1112. The pivotal inquiry is whether the sex offender registration requirement is sufficiently akin to deportation that the direct versus collateral consequences analysis is ill suited to resolve Thompson’s ineffective assistance claim.

At least two states have taken the view that the distinction between direct and collateral consequences is ill suited when a defendant pleads guilty without advice regarding sex offender registration requirements. *See Taylor v. State*, 304 Ga.App. 878, 698 S.E.2d 384 (2010); *People v. Fonville*, 291 Mich.App. 363, 804 N.W.2d 878 (2011). The Michigan Court of Appeals drew the following parallel between the two consequences:

Like the consequence of deportation, sex offender registration is not a criminal sanction, but it is a particularly severe penalty. In addition to the typical stigma that convicted criminals are subject to upon release from imprisonment, sexual offenders are subject to unique ramifications, including, for example, residency-reporting requirements and place-of-domicile restrictions. Moreover, sex offender registration is intimately related to the criminal process. The automatic result of sex offender registration for certain defendants makes it difficult to divorce the penalty from the conviction.

Further, when, as here, the sex-offender-registration statute is succinct, clear, and explicit in defining the registration requirement for the defendant's conviction, defense counsel’s duty to give correct advice is likewise clear. Thus, we conclude that applying the *Padilla* rationale to this case supports a holding that defense counsel must advise a defendant that registration as a sexual offender is a consequence of the defendant's guilty plea. The failure to inform a pleading defendant that the plea will necessarily require registration as a sex offender affects whether the plea was knowingly made.

Id. at 391-92, 804 N.W.2d at 894-95 (internal quotations, brackets and footnote omitted).

Expressing a contrary view, the Utah Supreme Court held the direct-collateral dichotomy is appropriately applied to the consequence of sex offender registration. *State v. Trotter*, 330 P.3d 1267 (2014). Finding sex offender registration materially different from deportation, the Court pointed out that although registration is automatically required upon conviction of certain crimes, its severity was far less than deportation. Despite the statutory restrictions imposed on sex offender registrants, it is not banishment or exile from this country. *Id.* at 1273-74. As the Court noted, “[f]or the most part, the registered offender maintains the choice to live and work where he or she chooses.” *Id.* at 1275. Ultimately, the Utah Supreme Court held the sex offender registration requirement “is a civil remedy and is properly categorized as collateral consequence rather than a direct consequence of a defendant’s guilty plea because it is unrelated to the length or nature of the sentence.” *Id.* at 1277.

In *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012), our Supreme Court expressed similar reasoning when it held that the failure to advise a defendant of the sex offender treatment program completion requirements and its effect on parole is a collateral consequence. The Court emphasized the collateral consequences rule is only ill suited “for deportation and for consequences ‘like’ deportation in their punitive effect, their severity, and their intimate relationship to the direct criminal penalties where the consequence is easily determined from a

clear and explicit statute.” *Id.* at 881-82. The Court held that the deferral of a defendant’s parole eligibility until he or she completes the sex offender treatment required by Kentucky law “is not like deportation in any of these respects.” *Id.* at 882. The Court explained its reasoning noting (1) sex offender treatment is not a punishment or a penalty but is a rehabilitative measure, (2) the deferral of parole cannot be characterized as severe, and (3) although mandated by statute, deferral of parole until the sex offender treatment is completed is not automatic depending on various factors affecting the timing of completion of the sex offender treatment program. *Id.*

In *Pridham*, 394 S.W.3d 867 (Ky. 2012), the defendant complained only that his counsel did not explain to him that completion of sex offender treatment while incarcerated was a condition precedent to parole. *Id.* at 882. It was clear, however, that the defendant was aware that his guilty plea made him a sex offender subject to certain requirements and limitations. He only complained about one aspect, the requirement that he complete sex offender treatment and its affect on his parole eligibility.

This case is far different. Thompson alleges, and his counsel appears to have admitted, that he was not advised that the crimes he was pleading guilty to would subject him to classification as a sex offender pursuant to KRS 17.510. The sex offender registry statutes require the defendant to maintain his address with the cabinet, affect where he can live, and could subject him to additional criminal penalties should he fail to comply. *See* KRS 17.510(12) (“Any person

required to register under this section or prior law who knowingly provides false, misleading, or incomplete information is guilty of a Class D felony for the first offense and a Class C felony for each subsequent offense."). While these requirements could be classified as "collateral," we cannot accept that they are so removed and/or inconsequential as to excuse counsel's failure to advise a defendant that his plea would require him to register as a sex offender.

Therefore, in light of *Padilla*, we reverse and remand.

D. LAMBERT AND THOMPSON, JUDGES, CONCUR IN
RESULT ONLY.

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