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TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-002190-MR

RUSSELL TIM PRIDHAM, JR

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 06-CR-00503

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING & REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; SHAKE,<sup>1</sup> SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Russell Pridham appeals from a Hardin Circuit Court denial of his Kentucky Rules of Criminal Procedure (RCr) 11.42 motion for post-conviction relief based upon ineffective assistance of counsel. Pridham requests

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<sup>1</sup> Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

relief based upon his counsel's gross misadvice concerning parole eligibility. The trial court denied his motion, without an evidentiary hearing, based upon the Kentucky Supreme Court's holding in *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008) (overturned by *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010)), that incorrect advice concerning collateral issues does not warrant post conviction relief. In light of the U.S. Supreme Court's reversal of *Commonwealth v. Padilla*, 253 S.W.3d 482, we reverse the Hardin Circuit Court's order and remand this case to the circuit court for an evidentiary hearing.

### I. Factual and Procedural Background

On September 24, 2007, Pridham entered an unconditional guilty plea to the charges of manufacturing methamphetamine, second offense, fourth-degree controlled substance, endangerment to a minor, complicity to commit unlawful distribution of a methamphetamine precursor, and being a first-degree persistent felony offender. He received a sentence of 30 years' imprisonment.

Manufacturing methamphetamine, second offense, is a Class A felony which requires that Pridham must serve 85% of his sentence before he is eligible for parole. KRS 439.3401. On appeal, Pridham claims that his defense counsel grossly misadvised him that he would be eligible for parole after serving 20% of his sentence, or 6 years.

On July 11, 2008, Pridham moved the trial court to correct his sentence and claimed that the Department of Corrections categorized him inappropriately as

an inmate who would be eligible for parole after serving 85% of his sentence. The trial court remanded the motion on July 31, 2008.

On September 17, 2008, Pridham filed an RCr 11.42 motion for post conviction relief. Pridham claimed that his guilty plea was a product of ineffective assistance of counsel. On October 24, 2008, the Hardin Circuit Court denied his motion without a hearing. Quoting *Commonwealth v. Padilla*, the trial court's order provided:

As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [his client] of such collateral issue or his act of advising [his client] incorrectly provides no basis for relief.

*Id.* at 484-85. (Internal citations omitted). This appeal follows.

## II. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides the right to competent counsel. U.S. Const. amend. VI. Defense counsel's performance is presumed competent unless the petitioner proves that counsel was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Criminal defendants seeking post conviction relief must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have instead insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Pridham claims that his counsel's gross misadvice concerning parole eligibility fell outside the range of competent representation and

resulted in his decision to accept a plea agreement that he otherwise would not have accepted.

### III. The Effect of *Padilla* on Collateral Issues

The question of whether gross misadvice concerning parole eligibility violates the Sixth Amendment right to counsel is neither new nor unique to Kentucky courts. In *Sparks v. Sowders*, 852 F.2d 882 (6<sup>th</sup> Cir. 1988), the Sixth Circuit U.S. Court of Appeals held that an affirmative act of gross misadvice concerning parole eligibility could be grounds for post conviction relief. *Id.* at 885. Thereafter several unpublished, and thus non-binding, opinions of this Court adopted the *Sparks* reasoning. In *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), the Kentucky Supreme Court held that erroneous advice concerning collateral issues did not provide a basis for post-conviction relief.

Although *Commonwealth v. Padilla* did not involve a question of parole eligibility but rather the risk of deportation faced by a criminal defendant who was not a citizen but lived lawfully in the United States, the Kentucky Supreme Court concluded that collateral consequences of a guilty plea are “outside the scope of the guarantee of the Sixth Amendment right to counsel.” *Id.* at 485.

The U.S. Supreme Court reversed the Kentucky Supreme Court’s decision in *Commonwealth v. Padilla*, and held:

[c]ounsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant

impact of deportation on families living lawfully in this country demand no less.

*Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 1486, 176 L.Ed. 284 (2010).

In reaching this decision, the U.S. Supreme Court noted that it had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance under *Strickland*.” *Id.* at \_\_\_, 130 S.Ct. at 1481. (Internal citation omitted). In *Padilla*, the Court considered that deportation is “intimately related to the criminal process” and “nearly an automatic result” following certain criminal convictions. *Id.* The Court considered that deportation is a “drastic measure” which is the “equivalent of banishment or exile.” *Id.* at \_\_\_, 130 S.Ct. at 1478, 1486. (Internal citation omitted). The Court considered that the immigration statutes were “succinct, clear and explicit” about the consequences of the defendant pleading guilty, so it was “not a hard case in which to find deficiency.” *Id.* at \_\_\_, 130 S.Ct. at 1483.

The Commonwealth argues that the unique nature of deportation limits the *Padilla* decision to only misadvice concerning the risk of deportation. However, the Court in *Padilla* repeatedly cited with approval to its decision in *Hill*, a case dealing with the *Strickland* standards in the context of misadvice regarding parole eligibility. Moreover, the factors relied upon in the deportation context apply with equal vigor to the circumstances of gross misadvice about parole eligibility. Parole eligibility involves a foreseeable, material consequence of the guilty plea that is “intimately related to the criminal process” and is an “automatic

result” following certain criminal convictions. *Id.* at \_\_\_\_, 130 S.Ct. at 1478, 1486. The varying degrees of eligibility enumerated by the General Assembly in KRS 439.3401 are “succinct, clear and explicit.” KRS 439.3401 provides that “**any** person who has been convicted of or pled guilty to the commission of . . . [a] Class A felony” . . . is considered a “violent offender” for the purposes of the parole statute. KRS 439.3401. The statute further states that, “[a] violent offender who has been convicted of . . . a Class A felony with a sentence of a term of years . . . **shall not** be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.” KRS 439.3401(3). Even though Pridham’s Class A felony conviction (Manufacturing methamphetamine, 2nd offense) would not be regarded by most as a violent offense, all Class A felonies are treated equally for the purposes of parole eligibility. The parole classification system is automatic upon conviction or guilty plea and permanently affects a defendant’s minimum term of imprisonment.

While no criminal defendant has a right to parole, *Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999), parole eligibility is an integral part of a criminal defendant’s decision to enter a guilty plea and is an issue that impacts plea negotiations. Pridham alleges that he entered a guilty plea pursuant to counsel’s advice under the belief that he would be eligible for parole after serving 20% of his 30 year sentence. The difference between 20% and 85% is substantial. At 20% parole eligibility Pridham meets the Parole Board after serving 6 years of his 30 year sentence. At 85% parole eligibility Pridham must serve 20 years before

he meets the Parole Board. This gross disparity may have affected Pridham's decision to plea guilty. Further, counsel's erroneous advice or ignorance of this vital statute clearly constitutes deficient representation.

In light of the decision in *Padilla*, we conclude that gross misadvice concerning parole eligibility may amount to ineffective assistance of counsel worthy of post-conviction relief. Because the trial court did not hold an evidentiary hearing and issue findings of fact, we cannot determine whether misadvice actually occurred in the case at hand or whether the requisite prejudice resulted. Therefore, we remand this matter to the trial court with instruction to hold an evidentiary hearing concerning Pridham's allegations.

Accordingly, we reverse the Hardin Circuit Court order and remand this matter to the circuit court for an evidentiary hearing.

ALL CONCUR.

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