

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

NO. 2010-CA-001872-MR

JASON WOOLEN

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT  
HONORABLE RONNIE C. DORTCH, JUDGE  
ACTION NO. 05-CR-00029

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

DIXON, JUDGE: Jason Woolen appeals from an Ohio Circuit Court order denying his motion for post-conviction relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. Finding no error, we affirm.

In March 2005, an Ohio County grand jury indicted Woolen on one count of first-degree rape. The victim, a relative of Woolen's wife, was thirteen years old at

the time. Woolen retained an attorney, Justin S. Keown, to represent him, and the case was set for a jury trial on February 15, 2006.

On February 9, 2006, Woolen accepted the Commonwealth's offer of a ten-year sentence in exchange for pleading guilty to an amended charge of second-degree rape. The court conducted a guilty plea hearing, wherein Woolen expressed both understanding of the plea agreement and satisfaction with his attorney's representation. Woolen participated in a standard plea colloquy, and the court determined that the plea was entered voluntarily, knowingly, and intelligently.

Prior to final sentencing, Woolen discharged Keown as his attorney, retained new counsel, and moved to withdraw his guilty plea. Woolen alleged that, at the time he pled guilty, he was misinformed regarding his eligibility for shock probation and the requirement to register as a sex offender.

The court denied Woolen's motion to withdraw his guilty plea and held a sentencing hearing on June 22, 2006. Woolen acknowledged receipt of his pre-sentence investigation report and sex offender assessment. Woolen requested that the court consider probation, and he indicated his willingness to attend sex offender treatment classes. The court denied probation and sentenced Woolen to ten years' imprisonment pursuant to the plea agreement. Thereafter, Woolen unsuccessfully filed several motions for shock probation.

In April 2009, Woolen filed an RCr 11.42 motion to vacate his conviction due to alleged ineffective assistance rendered by Attorney Keown. Woolen

contended that Keown failed to investigate the case and failed to inform Woolen of the registration and counseling requirements for sex offenders.

The court held an evidentiary hearing on November 5, 2009. Both Attorney Keown and Woolen testified at the hearing, and they presented conflicting testimony regarding Keown's representation and advice leading up to the guilty plea. The court also heard testimony from members of Woolen's family and testimony from Tim Coleman, the Ohio County Commonwealth's Attorney. On June 30, 2010, the trial court denied Woolen's RCr 11.42 motion, and this appeal followed.

Allegations of ineffective assistance of counsel arising from a guilty plea require a showing, "(1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial." *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky. App. 1986), *citing Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 370, 80 L. Ed. 2d 203 (1985). Where, as here, "the trial court conducts an evidentiary hearing, the reviewing court must defer to the determinations of fact and witness credibility made by the trial judge." *Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998) (overruled on other grounds by *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009)).

Keown informed Woolen that he would be eligible for parole after serving 20% of his ten-year sentence; however, it is undisputed that Keown failed to advise Woolen that he would also be required to complete a sex offender treatment program (SOTP) during his incarceration as a pre-requisite to parole eligibility.<sup>1</sup> Further, in order to complete the SOTP, an offender must admit his guilt. *Razor v. Commonwealth*, 960 S.W.2d 472, 474 (Ky. App. 1997). Woolen asserts he has not completed the SOTP because the counselors concluded he was not “convincing enough”; consequently, he has never been deemed eligible to meet the parole board. Because Keown failed to advise Woolen of the SOTP pre-requisite to parole eligibility, Woolen contends his guilty plea was invalid.

At the outset, we observe that Keown testified he advised Woolen he would have to submit to a pre-sentence sex offender risk assessment evaluation and that he would be required to register as a sex offender after he served his sentence. Furthermore, Woolen clearly admitted his guilt in open court; however, his failure to complete the SOTP, and thus obtain parole eligibility, was plainly a result of his own refusal to accept responsibility for the crime.

In *Carpenter v. Commonwealth*, 231 S.W.3d 134, 137 (Ky. App. 2007), a panel of this Court concluded that an attorney did not render ineffective assistance by failing to advise the defendant of sex offender registration requirements because registration was a collateral consequence of the guilty plea. Similarly, we would

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<sup>1</sup> Pursuant to KRS 197.045(4), a sex offender who fails to complete the SOTP must serve his entire sentence without the benefit of parole.

be inclined to conclude that the SOTP pre-requisite was a collateral aspect of Woolen's plea.

Woolen points to a recent decision of the United States Supreme Court, *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), where the Court found the direct consequence versus collateral consequence analysis inapplicable and concluded that an attorney was deficient for failing to advise her non-citizen client that deportation was clearly a consequence of pleading guilty. *Id.* at 1483. The Court emphasized that deportation was a severe penalty relevant to "a broad class of noncitizen offenders," making it difficult to categorize deportation as either a direct or collateral consequence. *Id.* at 1481-82. Although the Court declined to address whether a collateral-consequences inquiry was relevant to ineffective assistance claims where deportation was not at issue, *id.*, Woolen contends that we should broadly construe the holding of *Padilla* as applicable to the SOTP requirement in this case.

While we find Woolen's broad interpretation of *Padilla* questionable, we need not delve into an analysis of the collateral consequences issue. Even if we assume Keown's omission constituted deficient performance, we are not persuaded that Woolen "would not have pleaded guilty, but would have insisted on going to trial." *Sparks*, 721 S.W.2d at 727-28. As the Court explained in *Padilla*, to prevail on an ineffective assistance claim, the movant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 130 S. Ct. at 1485.

Keown testified that he advised Woolen regarding the strengths and weaknesses of the case. Keown explained that a twenty-year sentence (with 85% to serve before parole eligibility) was the potential result of a jury trial. In discussing the negative aspects of the case, Keown pointed out the medical evidence indicating that the victim sustained a hymeneal tear and fissure. Keown noted the victim was thirteen years old, she repeatedly gave consistent statements regarding the incident, and she had no apparent motive to fabricate the allegation. Keown also testified that Woolen had given incriminating statements to police that he had wrestled with the victim and that he had an erotic dream about the victim. These facts existed at the time Woolen decided to plead guilty; consequently, if he had been advised of the SOTP pre-requisite, it is irrational that Woolen would have rejected the plea agreement and risked the more severe sentence that could have resulted from a trial. After careful review, we agree with the trial court's conclusion that Woolen was not entitled to RCr 11.42 relief.

For the reasons stated herein, we affirm the order of the Ohio Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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