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TO BE PUBLISHED

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

NO. 2010-CA-002171-MR

DAVID W. GRIDER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 08-CR-002359

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: MOORE, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: David W. Grider appeals from a Jefferson Circuit Court opinion and order denying his post-conviction motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42. We reverse and remand for further proceedings.

On August 7, 2008, in 08-CR-2359, Grider was indicted by a Jefferson County grand jury for first-degree robbery and possession of a handgun

by a convicted felon. Subsequently, in 08-CR-2820, Grider was indicted for complicity to robbery in the first degree; complicity to burglary in the first degree; three counts of complicity to burglary in the second degree; and one count of complicity to burglary in the third degree. On February 12, 2009, Grider was indicted for being a persistent felony offender in the first degree (PFO-I).

In February 2009, the Commonwealth moved to sever the charges in 08-CR-2820 and proceed to trial only on Grider's first-degree robbery and first-degree burglary charges in addition to the PFO-I charge. At the conclusion of a jury trial, Grider was found guilty of complicity to first-degree burglary and PFO-I. The trial court sentenced Grider to twenty-years' imprisonment.

On September 8, 2009, Grider's trial counsel informed Grider that the Commonwealth offered him a twenty-year sentence in 08-CR-2359 to be served concurrently with his sentence in 08-CR-2820. Grider alleges he informed counsel that he would not accept an offer requiring him to plead guilty to a violent offense and serve a minimum of 85% of his sentence pursuant to the violent offender statute, Kentucky Revised Statutes (KRS) 439.3401. He alleges that he ultimately accepted a guilty plea but was unaware and not informed that his first-degree robbery conviction designated him as a violent offender.

On June 22, 2010, Grider filed a motion to vacate judgment pursuant to RCr 11.42 alleging that his trial counsel was ineffective for failing to advise that his guilty plea to first-degree robbery rendered him ineligible for parole until serving 85% of his sentence. The trial court summarily denied Grider's motion.

On appellate review of a claim of ineffective assistance of counsel, we are governed by the two-step test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When a criminal case ends in a guilty plea and a defendant later alleges it was entered involuntarily, unintelligently, and unknowingly, a defendant must meet a modified two-part test to prove ineffective assistance of counsel. “He must show (1) that counsel made errors so serious that counsel’s performance fell outside the wide range of professionally competent assistance as the counsel was not performing as counsel guaranteed by the Sixth Amendment and (2) that the deficient performance prejudiced the defense by so seriously affecting the process that there is a reasonable probability that the defendant would not have pled guilty, and the outcome would have been different.” *Centers v. Commonwealth*, 799 S.W.2d 51, 55 (Ky.App. 1990).

We placed this case in abeyance pending final decisions by our Supreme Court in three cases related to ineffective assistance of counsel claims in the context of guilty plea proceedings. The Court’s opinion in *Stiger v. Commonwealth*, 381 S.W.3d 230 (Ky. 2012), became final in November 2012. In a consolidated opinion final in April 2013, the Court decided *Commonwealth v. Pridham*, 2011-SC-000126-DG and *Cox v. Commonwealth*, 2010-SC-000733-DG. *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012).

In *Pridham* and *Stiger*, the Court addressed the United State Supreme Court’s decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). In *Padilla*, the Court held that the failure to advise a client of

the deportation consequences of a plea falls below prevailing professional norms, regardless of whether deportation is considered a direct or collateral consequence of the plea. The Court emphasized that deportation is intimately related to the criminal process and nearly automatic following certain criminal convictions. The immigration statutes were “succinct, clear and explicit” regarding the consequences of pleading guilty. *Id.* at \_\_\_\_, 130 S.Ct. at 1482-1483.

In *Pridham*, the Court addressed an ineffective assistance of counsel claim in a factual situation similar to the present. Pridham alleged that counsel’s assurance that Pridham would become eligible for parole upon completing 20% of his thirty-five sentence when, in fact, under the violent offender statute, he was ineligible for twenty years constituted ineffective assistance of counsel. The Court held that Pridham had stated a claim under *Strickland* and, in doing so, found certain language in *Padilla* persuasive. It reasoned that the extended period of parole ineligibility under the violent offender statute is like deportation in that it is punitive in nature and a “serious and certain enough detriment” that a defendant must be informed of it prior to entry of a guilty plea. *Pridham*, 394 S.W.3d at 878.

The Court explained:

In *Padilla*, the Court observed that the relevant immigration statute was succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction. Here, the violent offender statute, KRS 439.3401, is also succinct, clear and explicit in deeming a person convicted of a Class A felony, as Pridham was, a violent offender and then providing he shall not be released until he has served 85% of his sentence. Just as the consequences of Padilla’s plea could easily be

determined from reading the removal statute, the parole eligibility consequences of Pridham's plea could easily be determined by reading the violent offender statute. Finally, like the immigration statutes at issue in *Padilla*, the violent offender statute, KRS 439.3401, has for years now been a prominent fixture of our criminal law. It is expressly referred to in KRS 532.080, the persistent felony offender sentencing statute, under which Pridham was likely to be sentenced had he gone to trial.

*Id.* (internal citations, quotations, footnotes, and brackets omitted).

In contrast to its holding in *Pridham*, in its companion case, the Court held that if counsel's erroneous advice concerning eligibility for parole until completion of a sex offender treatment program did not meet the *Strickland* test. Noting that the parole ramifications of the mandatory sex offender treatment program cannot be equated with the severe consequences of classification as a violent offender, the Court held that even if counsel did not inform his client that the treatment program could extend his parole eligibility, it was not an error so gross nor were the consequences so egregious to warrant post-conviction relief. *Id.* at 884.

In *Stiger*, the Court again addressed an RCr 11.42 motion where counsel had not properly advised a defendant that he would be subject to the violent offender statute. However, the Court affirmed the summary denial of the motion. Although the Court held that the allegation was sufficient to meet *Strickland's* deficiency prong, because of the strength of the Commonwealth's evidence and because Stiger received the minimum sentence, it would not have been rational for him to insist on going to trial. *Stiger*, 381 S.W.3d at 238.

Consequently, the Court held that there could be no prejudice and a hearing was not required. *Id.*

After our Supreme Court rendered its opinions in *Pridham* and *Stiger*, the United States Supreme Court rendered its opinion in *Chaidez v. United States*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013), where the Court addressed whether its holding in *Padilla* could be applied retroactively. It pointed out that prior to *Padilla*, the dominant view was that advice regarding immigration consequences was not within the ambit of the Sixth Amendment right to effective assistance of counsel. Announcing that *Padilla* had broken new ground in the law regarding ineffective assistance of counsel claims and imposed a new obligation on counsel, the Court held that *Padilla* does not have retroactive application. *Id.* at 1113.

The Commonwealth argues that because *Padilla* has no retroactive effect, Grider cannot benefit from our Supreme Court's decisions in *Pridham* and *Stiger*. We disagree.

Our Supreme Court analogized the adverse parole consequences under the violent offender statute to the immigration consequences at issue in *Padilla* and borrowed much of the reasoning in *Padilla*. However, its decision did not turn on *Padilla's* holding regarding immigration consequences. Consequently, our Supreme Court stated that whether *Padilla* applied retroactively was not an issue in *Pridham*.

We note that whether *Padilla* applies retroactively to cases already final before it was decided is a viable question, but a question not presently before us and one not herein addressed. See *United States v. Orocio*, 645 F.3d 630 (3rd Cir. 2011) (applies retroactively); *United States v. Hong*, 671 F.3d 1147 (10th Cir. 2011) (does not apply retroactively); *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009) (adopting federal courts' retroactivity analysis). The United States Supreme Court has granted certiorari in *Chaidez v. United States*, 655 F.3d 684 (7th Cir. 2011), cert. granted, — U.S. —, 132 S.Ct. 2101, 182 L.Ed.2d 867 (2012) and presumably will decide this issue this term.

*Pridham*, 394 S.W.3d at 878 n. 6.

Likewise, we conclude that *Padilla*'s holding regarding immigration consequences and ineffective assistance of counsel is not an issue before this Court in this case involving the violent offender statute and the application of the *Strickland* test to Grider's allegation of ineffective assistance of counsel. The rule stated in *Pridham* and *Stiger* that gross misadvice regarding parole eligibility may constitute ineffective assistance of counsel is not new. See *Turner v.*

*Commonwealth*, 2006-CA-001185-MR, 2010 WL 2132676 (Ky.App. 2010);

*Nation v. Commonwealth*, 2007-CA-001376-MR, 2008 WL 2152325 (Ky. App.

2008); *Stewart v. Commonwealth*, 2006-CA-000370-MR, 2007 WL 1193966

(Ky.App. 2007); *Wyatt v. Commonwealth*, 2002-CA-001639-MR, 2004 WL

596169 (Ky.App. 2004).<sup>1</sup>

The trial court summarily denied Grider's motion. Consistent with *Pridham*,

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<sup>1</sup> Pursuant to Kentucky Civil Rules of Procedure 76.28(4)(c), unpublished opinions rendered after January 1, 2003, may be cited if there is no published opinion that adequately addresses the issue before the court.

Grider's allegations are sufficient to support *Strickland's* deficiency prong. If that were the only *Strickland* prong, we would remand for an evidentiary hearing regarding the truth of his allegations. However, the trial court must also consider *Strickland's* prejudice prong. Consequently, we conclude that the proper result is to remand this case to the Jefferson Circuit Court to consider whether Grider has adequately alleged prejudice to be entitled to a hearing.

For the foregoing reasons, we reverse the opinion and order of the Jefferson Circuit Court denying Grider's post-conviction motion and remand for proceedings consistent with this opinion.

ALL CONCUR.

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