IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-82,014-01

EX PARTE CRISTIAN AGUILAR, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 1388321-A IN THE 337TH DISTRICT COURT FROM HARRIS COUNTY

YEARY, J., filed a concurring opinion in which KEEL, J., joined.

CONCURRING OPINION

The Court grants post-conviction habeas corpus relief to Applicant based on the United States Supreme Court's opinion in *Padilla v. Kentucky*, 559 U.S. 356 (2010). I am not convinced that Applicant is entitled to relief on the basis of that opinion.

Applicant was indicted for the third degree felony offense of evading arrest with a motor vehicle. TEX. PENAL CODE §§ 38.04(a) & (b)(2)(A). On advice of counsel, he pled guilty to the lesser offense of attempted evading arrest with a motor vehicle, a state jail felony. TEX. PENAL CODE § 15.01(d). Though convicted of a state jail felony, he was punished under Section 12.44(a) of the Penal Code, which permits the trial court to punish

a state jail felon "by imposing the confinement permissible as punishment for a Class A misdemeanor[.]" TEX. PENAL CODE § 12.44(a). The trial court assessed his punishment at 180 days in the county jail, and Applicant has already served that term of incarceration.

In *Padilla*, the Supreme Court held that, "when the deportation consequence" of a guilty plea "is truly clear," trial counsel's Sixth Amendment "duty to give correct advice is equally clear." 559 U.S. at 369. Applicant does not now allege that his attorney was ineffective for failing to inform him that a conviction for the offense of attempted evading arrest with a motor vehicle would—in itself—render him eligible for deportation under federal law. And with good reason. As far as I can tell, a conviction for this offense does not itself subject Applicant to deportation because it does not amount to a "crime of violence" for which Applicant received at least a one-year sentence, as required by 8 U.S.C. § 1101(a)(43)(F). *See United States v. Segura-Sanchez*, 452 Fed.Appx. 471, 473 (5th Cir. 2011) ("crime of violence" is not an "aggravated felony," for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii), unless it is a crime "for which the term of imprisonment [is] at least one year"). Applicant's term of confinement was only six months. At best, then, it is both "unclear" and "uncertain" that, by pleading guilty to the inchoate offense of attempted evading arrest with a motor vehicle, particularly in exchange for a 180-day sentence, Applicant was subjecting himself to eligibility for deportation. *Padilla*, 559 U.S. at 369.

According to *Padilla*, "[w]hen the law is not succinct and straightforward . . ., a criminal defense attorney need do no more than advise a noncitizen client that pending

criminal charges may carry a risk of adverse immigration consequences." *Id*. Applicant fails to allege or prove that his attorney misadvised him about this generalized "risk of adverse immigration consequences." Indeed, the trial court specifically admonished Applicant that "a plea of guilty . . . may result in your deportation, exclusion from admission to the United States or denial of naturalization under federal law." In short, this case is hardly on all fours with *Padilla*.

What Applicant *has* alleged and proven is as follows: Applicant, a Honduran national, had already retained an immigration lawyer prior to his arrest for this offense, in an effort to become a "Lawful Permanent Resident." Applicant retained a different attorney to represent him in the criminal proceedings, but the two attorneys agreed to confer with respect to any plea negotiations so that Applicant's criminal defense attorney could attempt to arrange a plea bargain that would not endanger Applicant's "Temporary Protected Status," which has allowed him to remain in this country, where he has resided since he was a child. Applicant's immigration lawyer advised his criminal defense attorney that a felony conviction would jeopardize his Temporary Protected Status, make him ineligible for Lawful Permanent Resident status, "and thus subject him to deportation from the United States." Affidavit of Amanda Waterhouse, Immigration Attorney. She further advised Applicant's criminal defense attorney that he should seek a misdemeanor conviction carrying a sentence of no greater than six months' duration, which, she assured him, "would not prevent [Applicant] from becoming a Lawful Permanent Resident." *Id*. On the basis of this advice, Applicant's

criminal defense attorney believed that Applicant could safely plead guilty to the state jail felony offense so long as he was punished under Section 12.44(a) of the Penal Code and received a sentence of six months or less. He therefore advised Applicant to accept the State's plea offer. But he has now signed an affidavit in which he states, "I now recognize that the plea agreement that I negotiated and advised [Applicant] to accept will absolutely have negative immigration consequences up to and including making him 'deportable.'" Affidavit of Alex N. Udorah, Criminal Defense Attorney.

Because it is (at best) unclear and uncertain that Applicant's conviction for attempted evading arrest with a motor vehicle would, in itself, subject Applicant to deportation, it seems to me that his trial counsel had no greater duty under *Padilla* than to advise Applicant generally that his guilty plea could have deportation consequences. We should not unilaterally extend the reach of *Padilla* to require a criminal defense attorney to advise his foreign national client about how a guilty plea will impact such matters as the renewal of his Temporary Protected Status or his application for Lawful Permanent Resident status. As this case aptly illustrates, specific advice relating to those kinds of matters should ordinarily be left to immigration law attorneys.

Even so, having chosen to give Applicant more specific advice with respect to potential deportation consequences than the minimum required of him by *Padilla*, Applicant's trial attorney assumed a Sixth Amendment obligation concerning the more specific immigration advice—to advise his client *correctly*. *See* George E. Dix & John M.

Schmolesky, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 40:74, at 600 (3d ed. 2011) ("If defense counsel gives the client erroneous, material advice about the terms or consequences of entering a negotiated plea of guilty or nolo contendere, that may make the plea involuntary.") (citing, *e.g.*, *Ex parte Griffin*, 679 S.W.2d 15, 17 (Tex. Crim. App. 1984) ("In several recent cases this Court has reversed convictions or granted habeas corpus relief because of a defense attorney's inaccurate advice to a defendant about the consequences of his plea of guilty.")); *Ex parte Moody*, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999) ("Counsel had the obligation to provide Applicant with accurate information[.]"); *Ex parte Moussazadeh*, 361 S.W.3d 684, 691-92 (Tex. Crim. App. 2012) (trial counsel has a duty to give accurate information with respect to parole eligibility). Trial counsel's mistaken understanding of the immigration lawyer's advice in this case misled Applicant into accepting a guilty plea he would not otherwise have accepted, and thereby rendered Applicant's plea involuntary. For this reason, I agree that Applicant is entitled to post-conviction habeas corpus relief on *that* ground.

On this basis, I concur only in the result.

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