



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-17-00037-CR

EX PARTE CLAUDIA LETICIA
MARISCAL

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. C-371-010768-1416809-AP

MEMORANDUM OPINION¹

Claudia Leticia Mariscal appeals the denial of her application for writ of habeas corpus, in which she alleged ineffective assistance of counsel. See Tex. Code Crim. Proc. Ann. art. 11.072 (West 2015). Because we must defer to the trial court's role as factfinder where the evidence conflicts, we affirm.

¹See Tex. R. App. P. 47.4.

Background

Mariscal, a Mexican citizen, pleaded guilty to possession of a controlled substance, and on January 22, 2016, the trial court placed her on deferred-adjudication community supervision for three years. Several months later, in May 2016, after being taken into custody by Immigration and Customs Enforcement, Mariscal filed an application for writ of habeas corpus under article 11.072 of the code of criminal procedure in which she alleged ineffective assistance of trial counsel. Mariscal alleged that she spoke Spanish and very little English, that she was a legal resident of the United States, and that her trial counsel failed to warn her about the immigration-related consequences of pleading guilty. In August 2016, Mariscal filed an affidavit that tracked the accusations in her application. The next month, trial counsel filed his own affidavit in which he asserted that Spanish was his first language, that he knew all along that Mariscal was not a U.S. citizen, and that he had in fact warned Mariscal of the immigration consequences of pleading guilty. Mariscal's husband then filed an affidavit in which he asserted that at no time during the pendency of his wife's case had she mentioned to him that her trial counsel had discussed with her the immigration consequences of pleading guilty. In early November 2016, the trial court gave the parties another 20 days to submit any additional evidence, after which it informed them that it would consider the record closed and proceed to a decision. In January 2017, the trial court adopted the State's proposed findings of fact and conclusions of law and denied Mariscal's article 11.072 application.

Mariscal's argument

The elements of ineffective assistance of counsel are that (1) counsel performed deficiently, and (2) counsel's deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). In a single issue, Mariscal correctly notes that an attorney's failure to warn a client of the immigration consequences of a guilty plea constitutes deficient performance—the first prong of an ineffective-assistance-of-counsel claim. See *Padilla v. Kentucky*, 559 U.S. 356, 368–69, 130 S. Ct. 1473, 1483–84 (2010). Mariscal then argues that the trial court was wrong to believe trial counsel, asserting that “the evidence is overwhelming that the actions of trial counsel were wholly deficient.”

Standard of review

When reviewing a trial court's denial of an article 11.072 habeas-corpus application, we review the evidence in the light most favorable to the trial court's ruling. *Ex parte Mello*, 355 S.W.3d 827, 832 (Tex. App.—Fort Worth 2011, pet. ref'd). This deferential review applies even when the ruling is based on affidavits rather than live testimony. See *Ex parte Wheeler*, 203 S.W.3d 317, 325–26 (Tex. Crim. App. 2006). Absent an abuse of discretion, we must affirm a trial court's decision to deny the relief requested in the application. *Mello*, 355 S.W.3d at 832.

Discussion

Faced with conflicting affidavits on whether trial counsel warned Mariscal about the immigration consequences of pleading guilty, the trial court believed

trial counsel and disbelieved Mariscal and her husband. See *id.* As the factfinder, that was the trial court's prerogative if there was evidentiary support. See *Ex parte Garcia*, 353 S.W.3d 785, 787–88 (Tex. Crim. App. 2011) (discussing distinction between article 11.07 applications, where the court of criminal appeals is the ultimate factfinder, and article 11.072 applications, where the trial judge is the sole factfinder and where appellate courts generally afford total deference to a trial court's factual determinations if the record supports them).

Mariscal points out that the plea paperwork shows that she was identified as a U.S. citizen, an error that Mariscal suggests also evidences trial counsel's alleged ineffectiveness by his not bothering to find out her true citizenship status before recommending the plea agreement. Although the paperwork does show a checkmark in the "I am a United States Citizen" box, neither Mariscal's application nor her supporting affidavits addressed this discrepancy. The trial court made two specific findings regarding this misinformation and a third finding that puts to rest Mariscal's argument that trial counsel failed to give the warnings because he was allegedly proceeding under the misconception that she was a U.S. citizen. The trial court found that the "record [was] ambiguous as to whether [Mariscal] was untruthful or simply inaccurate when [she] signed her name under the representation that 'I am a United States Citizen.'" It also found that "[Mariscal] ha[d] offered no specific explanation why she incorrectly maintained she was a United States citizen at the time of her plea, when in fact she was not." Finally, the trial court found that trial counsel "was aware that [Mariscal] was a

lawful permanent resident in the U.S.[] but was not a U.S. citizen and defended her with the immigration consequences in mind.” The trial court thus found that regardless of whether the misinformation regarding Mariscal’s U.S. citizenship was deliberate or inadvertent, trial counsel knew she was not a U.S. citizen and warned her accordingly.

In sum, the trial court found that trial counsel, who was fluent in both Spanish and English, warned Mariscal of the deportation consequences of pleading guilty but that Mariscal pleaded guilty anyway to avoid the possibility of spending two years in a state jail facility.² Because the record contains evidence—trial counsel’s affidavit—supporting the trial court’s ruling, we must hold that the trial court did not abuse its discretion by denying Mariscal’s application. See *Mello*, 355 S.W.3d at 832.

We overrule Mariscal’s issue and affirm the trial court’s order.

²Trial counsel stated in his affidavit that a video clearly captured Mariscal shoplifting with a minor child present and that officers subsequently discovered the controlled substance (methamphetamine) when they searched her incident to the arrest. From his negotiations with the prosecutor, trial counsel was also aware that “the prosecutor was concerned about the child having been present at the time of the offense.” Trial counsel advised Mariscal that a jury would likely convict her of a state jail felony, something that carries with it a maximum two-year term of incarceration. See Tex. Penal Code Ann. § 12.35(a) (West Supp. 2016).

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: MEIER, GABRIEL, and KERR, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 10, 2017