In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00224-CR

EFRAIN MARTINEZ, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 69th District Court
Moore County, Texas
Trial Court No. 3065W2, Honorable Ron Enns, Presiding

February 4, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

Appellant Efrain Martinez appeals from the trial court's denial of his petition for writ of habeas corpus. Through two issues, appellant contends his guilty plea was involuntary and invalid because neither his counsel nor the trial court properly admonished him of the deportation consequences of such a plea. We will affirm the trial court's order.

Background

In 2001, appellant was charged via indictment with possession of cocaine in an amount of more than one gram but less than four grams. Appellant entered a plea of guilty and, pursuant to his agreement with the State, was placed on deferred adjudication community supervision for a period of seven years.

In June 2001, the State filed a motion to adjudicate appellant's guilt. The motion was never heard by the trial court. After a number of intervening events, the court held a hearing in July 2011 concerning the discharge of appellant from community supervision. After the hearing, the trial court signed an order discharging appellant from community supervision deferred adjudication. The order, however, specifically stated it "does not release the Defendant from the penalties and disabilities resulting from the judgment entered in this cause." According to appellant, when he attempted to renew his visa, he discovered he was subject to deportation as the result of the entry of his guilty plea in 2001, a consequence he claims was not explained to him by his attorney or the trial court.[1] It is undisputed appellant is not a citizen of the United States.

Appellant timely filed a petition for writ of habeas corpus.[2] Appellant claimed he pleaded guilty on the advice of his counsel but that his attorney never explained

[1] It also appears from the record appellant is incarcerated in the State of Oklahoma on an "immigration hold."

[2] Appellant filed his petition pursuant to article 11.072 of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 11.072 (West 2015); *see Ex parte Enriquez,* 227 S.W.3d 779, 783 (Tex. App.—El Paso 2005, pet. ref'd) (discussing jurisdiction of courts in the context of habeas corpus brought pursuant to article 11.072).

immigration consequences of a plea of guilty nor were any consequences explained to appellant by the trial court. He further claimed that if he had known his plea of guilty "would have rendered him removable from the United States, he would not have entered his plea of guilt and would have sought trial before either judge or jury."

The trial court heard appellant's petition for writ of habeas corpus in March 2015, after which it denied the petition. This appeal followed.

Analysis

In his first issue, appellant contends his plea was involuntary because his counsel failed to advise him of the immigration consequences of his plea. His argument is predicated solely on the applicability of the rule announced in *Padilla v. Kentucky,* 599 U.S. 356, 374-75, 130 S. Ct. 173, 176 L. Ed. 2d 284 (2010), stating the Sixth Amendment requires a defense attorney to advise a noncitizen client of the risk of deportation arising from a guilty plea.

We generally review a trial court's decision on an application for a writ of habeas under an abuse of discretion standard. *Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). An applicant seeking habeas corpus relief bears the burden of proving, by a preponderance of the evidence, that the facts entitle him to relief. *Ex parte Richardson,* 70 S.W.3d 865, 870 (Tex. Crim. App. 2002). In reviewing the trial court's decision, we view the evidence in the light most favorable to the ruling and afford great deference to the trial court. *Ex parte Lafon,* 977 S.W.2d 865, 867 (Tex. App.—Dallas 1998, no pet.). The trial judge is the original fact finder in habeas corpus proceedings, and we therefore afford the utmost deference to the trial judge's determination of the

facts that are supported by the record, especially when they are based on an evaluation of credibility and demeanor. *Ex parte Martinez,* No. 13-10-00390-CR, 2013 Tex. App. LEXIS 7276, at *6-7 (Tex. App.—Corpus Christi June 13, 2013, no pet.) (citations omitted). We apply a *de novo* standard of review to "mixed questions of law and fact" that do not fall within this category. *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Whether *Padilla* applies to appellant's case requires us to apply the law to the facts, and we therefore will review the trial court's decision *de novo.* *Ex parte Martinez,* No. 13-10-00390-CR, 2013 Tex. App. LEXIS 7276, at *6-7.

Counsel's advice can provide assistance so ineffective that it renders a guilty plea involuntary. *Hill v. Lockhart,* 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (*quoting McMann v. Richardson,* 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). A guilty plea is not knowing or voluntary if made as a result of ineffective assistance of counsel. *Ex parte Burns,* 601 S.W.2d 370, 372 (Tex. Crim. App. 1980). A defendant's decision to plead guilty when based on erroneous advice of counsel is not done voluntarily and knowingly. *Ex parte Battle,* 817 S.W.2d 81, 83 (Tex. Crim. App. 1991); *see also Ex parte Harrington,* 310 S.W.3d 452, 459 (Tex. Crim. App. 2010) ("When counsel's representation falls below this [*Strickland*] standard, it renders any resulting guilty plea involuntary.").

To obtain habeas corpus relief on a claim of an involuntary plea, an applicant must meet both prongs of the *Strickland* standard: (1) counsel's performance "was deficient; and (2) that a probability exists, sufficient to undermine our confidence in the result, that the outcome would have been different but for counsel['s] deficient performance." *Ex parte White,* 160 S.W.3d 46, 49 (Tex. Crim. App. 2004). In the

context of an involuntary plea, the “different outcome” is choosing not to plead and instead choosing to go to trial. Counsel's performance is deficient if it is shown to have fallen below an objective standard of reasonableness*. Id.* at 51; *Strickland v. Washington,* 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The constitutionally appropriate level of reasonableness is defined by the practices and expectations of the legal community and prevailing professional norms therein. *Strickland*, 466 U.S. at 688.

The law is clear that even a deferred adjudication order subjects an undocumented defendant to deportation. *See* 8 U.S.C. § 1101(a)(48) (2012); *State v. Guerrero,* 400 S.W.3d 576, 587-88 (Tex. Crim. App. 2013) (recognizing that a guilty plea resulting in deferred adjudication is final for purposes of federal immigration law and *Padilla v. Kentucky* applies even when adjudication is deferred and the charges are later dismissed). Therefore, appellant asserts, his trial counsel's duty was to warn him about the deportation consequences of pleading guilty and accepting deferred adjudication community supervision. In his petition, appellant argues *Padilla* should apply to his case because his conviction was not yet final.

The United States Supreme Court has determined its *Padilla* opinion does not have retroactive application. *Chaidez v. United States,* __ U.S. __, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). And the Court of Criminal Appeals has determined *Padilla* does not apply retroactively under Texas law. *Ex parte De Los Reyes,* 392 S.W.3d 675, 678-79 (Tex. Crim. App. 2013) (*citing Chaidez,* 133 S. Ct. 1103, 185 L. Ed. 2d 149); see *Ex parte Juan Gonzalez,* 402 S.W.3d 843, 845 (Tex. App.—Corpus Christi 2013, no pet.) (applying *De Los Reyes*). *See also Ex parte Juan Gonzalez,* 402 S.W.3d 843, 845 (Tex.

App.—Corpus Christi May 9, 2013, no pet.) (*Padilla* does not apply retroactively to a defendant who was subject to deportation consequences as a result of entering into a plea agreement prior to issuance of *Padilla* opinion).

For purposes of application of *Padilla,* appellant's conviction became final when the trial court accepted his guilty plea and entered an order of deferred adjudication in 2001. *Guerrero,* 400 S.W.3d at 587-88. Accordingly, under *Chaidez, Ex parte De Los Reyes,* and *Ex parte Juan Gonzalez, Padilla* does not apply retroactively to his case. *See Ex parte Martinez*, No. 13-10-00390-CR, 2013 Tex. App. LEXIS 7276, at *6-7 (under pre-*Padilla* law, a defendant's Sixth Amendment right to effective assistance of counsel was not violated by a trial counsel's failure to provide advice on collateral aspects of the prosecution, including deportation).

Moreover, even if the rule in *Padilla* were applied retroactively to appellant's case, he failed to satisfy his burden to show his counsel was ineffective. In his petition, which was supported by his affidavit, appellant contended that counsel failed to inform him of the deportation consequences of a deferred adjudication order. He averred he spoke primarily Spanish, "spoke, read, and wrote virtually no English whatsoever" and was forced to rely on interpreters to inform him of the contents of the documents presented to him. He stated counsel spoke with him but he "did not understand [counsel's] explanation very well, at all."

A defendant "making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland,* 466 U.S. at 690. The record must affirmatively

demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Where the record does not do so, counsel is presumed effective. *Id.* A defendant's uncorroborated testimony as to such deficiencies is not sufficient to establish ineffective assistance of counsel. *Arreola v. State,* 207 S.W.3d 387, 391 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Appellant's uncorroborated assertion that trial counsel failed to correctly advise him was insufficient to show deficient performance. *Arreola*, 207 S.W.3d at 391. Moreover, the trial court also had the benefit of defense counsel's affidavit, which directly contradicted appellant's account. *See Ex parte Skelton*, 434 S.W.3d 709, 717 (Tex. App.—San Antonio 2014, pet. ref'd) ("The habeas court is the sole finder of fact in an article 11.072 habeas proceeding, and we afford almost total deference to its determinations of historical fact that are supported by the record . . . .") (*citing Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); *Ex parte Urquhart*, 170 S.W.3d 280, 283 (Tex. App.—El Paso 2005, no pet.)); *see also Ex parte Thompson,* 153 S.W.3d at 425 ("[A] reviewing court will defer to the factual findings of the trial judge even when the evidence is submitted by affidavit.").

In counsel's affidavit, which was also attached to appellant's petition, trial counsel stated appellant's claims that he failed to advise appellant of the immigration consequences of his guilty plea are "patently false." Counsel notes the transcript of the plea hearing shows a translator was present at the hearing and translated all of the documents appellant signed, including one with the admonishment, "I understand that if I am not a citizen of the United States that my plea may result in deportation, the exclusion of admission to this country, or denial of naturalization under federal law."

Counsel averred the trial court asked appellant if he fully understood everything in the document, whether the entire document had been translated for him, and whether he was aware of the consequences of his plea. Appellant answered affirmatively to each inquiry. Counsel described how appellant "had multiple opportunities to express that he did not understand the immigration consequences of his plea, and was specifically questioned as to whether he understood those consequences. At no point did he even remotely indicate that he did not."[3]

Because the trial court was entitled to believe trial counsel's version of events, we find it was reasonable for the court to conclude counsel advised appellant that if he pleaded guilty, he would be subject to deportation no matter the sentence imposed. Trial counsel's performance was not deficient in this regard; he gave the correct advice under the law. *See Ex parte Moussazadeh,* 361 S.W.3d 684, 691 (Tex. Crim. App. 2012); *see also Guerrero*, 400 S.W.3d at 587-88. We note also appellant was charged with a third degree felony, punishable by a term of up to ten years in prison and assessment of a fine up to $10,000. *See* TEX. PENAL CODE ANN. § 12.34 (West 2014). But with counsel's assistance he secured deferred adjudication community supervision, a much more favorable outcome for appellant.

We overrule appellant's first issue.

In his second issue, appellant argues his plea was not valid because the trial court failed to advise him of those same immigration consequences. Appellant asserts

[3] Counsel also refutes appellant's claims that he failed to advise appellant of defenses, including a search and seizure issue, he might have raised.

the trial court's admonishment was "nebulous" and he did not understand the consequences of his plea from the trial court's statements.

The record of the plea hearing is appended to appellant's March 2015 habeas corpus petition. That record shows the trial court did not enumerate the required admonitions. On appeal, the State concedes the "trial court did not orally admonish Appellant of the immigration consequences of his plea." Rather, the court inquired as to appellant's understanding of the terms and admonitions contained in the plea papers, inquired whether appellant's counsel had explained each of the consequences of his plea, and inquired into appellant's awareness of its consequences. On the court's inquiry, appellant told the court the plea papers had been translated for him and he understood them. Counsel assured the court appellant did understand the admonitions and consequences. With his client on the stand, counsel also asked appellant if he understood that by pleading guilty, he was subjecting himself to potential deportation or exclusion from the United States. Appellant agreed he did so understand. Also, as noted, in the plea papers signed by appellant, the following admonishment appears, "I understand that if I am not a citizen of the United States that my plea may result in deportation, the exclusion of admission to this country, or denial of naturalization under federal law." Despite the court's failure specifically to orally admonish appellant of those consequences, the State argues the record establishes appellant was sufficiently informed of the immigration consequences of his plea. We agree with the State's contention.

Prior to accepting a guilty plea, the trial court is required to admonish a defendant that if he is not a United States citizen, a guilty plea may result in his deportation, the

exclusion from admission to this country, or the denial of naturalization. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West 2013). The failure to do so is non-constitutional error. *VanNortrick v. State,* 227 S.W.3d 706, 708 (Tex. Crim. App. 2007). Thus, we consider the record as a whole to determine if we have a fair assurance that the decision to plead guilty would not have changed if he had been admonished. *Id*. at 709. Three issues are relevant to the fair assurance determination. They include (1) whether the defendant knew the consequences of his plea, (2) the strength of the evidence of his guilt, and (3) his citizenship and immigration status. *Id.* at 712.

We first examine the record for any indication that appellant already knew the deportation and immigration consequences of his plea. A trial court's failure to admonish a non-citizen defendant concerning the consequences of his plea would have far less impact on his decision to plead guilty if he were already aware of the particular consequences. *Gutierrez-Gomez v. State*, 321 S.W.3d 679, 681-82 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (*citing Anderson v. State,* 182 S.W.3d 914, 920 (Tex. Crim. App. 2006)). As noted, the record supports a conclusion appellant knew and understood the consequences of his guilty plea. Here also, the trial court was free to accept as true trial counsel's affidavit testimony that he discussed the immigration consequences with appellant before the hearing. As noted, counsel also questioned appellant regarding his understanding during the hearing. Appellant answered affirmatively to each and every inquiry by his counsel and signed a document containing the same admonition.

Secondly, we look to the strength of the evidence of appellant's guilt. There is little in the record indicating the strength of the case against appellant. In short, the

state of the evidence supporting appellant's guilt does not weigh in favor or against a determination of a fair assurance that appellant's decision to plead guilty would not have changed if the trial court had specifically admonished him. Third, we consider appellant's citizenship and immigration status. As noted, it is undisputed appellant is not a citizen of the United States, a fact indicating appellant's decision to plead guilty might have been changed had he been properly admonished. However, given the strength of the evidence in the record appellant was made fully aware of the consequences of pleading guilty, the record gives assurance appellant's decision to plead guilty would not have changed if the trial court had specifically admonished him of the deportation consequences of his guilty plea.

We resolve appellant's second issue against him.

Conclusion

Having overruled each of appellant's issues, we will affirm the order of the trial court denying appellant's petition for writ of habeas corpus.

James T. Campbell
Justice

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