NUMBER 13-16-00512-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

EX PARTE JESUS HURTADO

On appeal from the 214th District Court
of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Rodriguez

Appellant Jesus Hurtado appeals the denial of his petition for writ of habeas corpus. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072 (West, Westlaw through Ch. 49, 2017 R.S.). Appellant pleaded guilty to three counts of indecency with a child by exposure, each a third-degree felony enhanced to a second-degree felony because of a prior felony offense. *See* TEX. PENAL CODE ANN. § 21.11(a)(2)(A) (West, Westlaw through Ch. 49, 2017 R.S.); *id.* § 12.42(a) (West, Westlaw through Ch. 49, 2017 R.S.) (enhancing a third-degree felony to a second-degree felony when previously convicted of

a felony in the third degree or greater not punishable under Texas Penal Code section 12.35(a)). The guilty plea resulted in six years' deferred adjudication community supervision and registration as a sex offender for a period of ten years. *See* TEX. CODE CRIM. PROC. ANN. art. 62.101(c)(2) (West, Westlaw through Ch. 49, 2017 R.S.) (providing for the process by which the duty to register expires). By one issue, appellant contends that his guilty plea was involuntary as a result of ineffective assistance of counsel because his trial attorney improperly informed him that he may be able to terminate his community supervision early and that his ten-year sex offender registration would run concurrently with his community supervision. *See id.* art. 42.12(5)(c) (West, Westlaw through 2017 R.S.); *id.* art. 62.101(c)(2). We affirm.

I. BACKGROUND

Appellant was charged with three counts of indecency with a child by exposing his genitals and a felony enhancement paragraph of burglary of a habitation. *See* TEX. PENAL CODE ANN. 21.11(a)(2)(A); Acts of 1973, 63rd Leg., p. 883, ch. 399 § 1, eff. Jan. 1, 1974 (amended 1993, 1995, 1999) (current version at TEX. PENAL CODE ANN. § 30.02(d) (West, Westlaw through Ch. 49, 2017 R.S.) (setting out the offense of burglary).[1] At trial, the State entered into evidence pictures of appellant at a school park. The State also proffered three witnesses, two children and one adult, who testified that they saw appellant masturbating in a school park. The State announced to the trial court that on the second day of trial it planned to offer another child witness who intended to testify that

[1] Because the amended versions lack substantive changes from the original, we refer to this section of the code in its current version, Texas Penal Code section 30.02(d). *See* TEX. PENAL CODE ANN. § 30.02(d) (West, Westlaw through Ch. 49, 2017 R.S.)

she saw appellant masturbating in a park. The State had subpoenaed appellant's father who would allegedly testify that appellant admitted to committing the offense alleged in the indictment and planned to leave town.

At the start of the second day of trial, appellant agreed to plead guilty to the three charges of indecency with a child and the felony enhancement of burglary of a habitation. The trial court explained that appellant could face two to ten years for each count of indecency. Additionally, the enhancement charge would increase the maximum penalty to twenty years per count.[2] Appellant testified, and swore in writing, that he was pleading guilty because he was, in fact, guilty. The trial court accepted his plea, deferred adjudication of guilt, and placed appellant on six years' community supervision, which included a $1,000 fine and registration as a sex offender to terminate ten years after he completed his community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 62.101(c)(2).

In appellant's petition for writ of habeas corpus, he submitted affidavits signed by him and his father stating that the trial attorney: (1) pressured appellant into accepting the plea; (2) represented that appellant would be required to register as a sex offender for ten years; (3) stated that appellant "would be eligible" to terminate his community supervision early; and (4) told appellant his sex offender registration requirement would run concurrently with his community supervision.

[2] *See id*. § 12.33 (West, Westlaw through Ch. 49, 2017 R.S.) (providing that conviction of a second-degree felony includes a sentence of two to twenty years' confinement); *see also id.* § 3.03(b)(2)(A) (West, Westlaw through Ch. 49, 2017 R.S.) (providing an exception to the general rule—that sentences must be ordered to run concurrently when imposed for offenses arising out of the same criminal episode, prosecuted in a single criminal action—for charges under Texas Penal Code section 21.11 of indecency committed against a victim younger than seventeenyears old, the sentences may run consecutively).

In response, appellant's trial attorney submitted an affidavit in which he testified that he (1) did not pressure appellant into a deal and had no motivation to do so; (2) informed appellant he would have to register as a sex offender for ten years; and (3) advised appellant he could petition for modification, or for early termination, of his community supervision.

After considering the habeas affidavits, the habeas court made the following relevant findings based on the evidence:

> (2) counsel did not use threats or pressure [appellant] into pleading guilty and [appellant] did so freely and voluntarily;
>
> (3) counsel advised that [appellant] had a 10-year duty to register as a sex offender, that information is correct, and [appellant's] fear that he instead must register for life is unfounded;
>
> (4) [appellant] does have the right to file a motion for early termination of his registration requirements, but he would have pleaded guilty regardless of any sex offender registration requirements;
>
> (5) [appellant] could file for early termination of his community supervision, but the Court could not grant such a motion because he is required to register as a sex offender;
>
> (6) nevertheless, [appellant] would not have insisted upon a trial but for counsel's deficient advice that he could move for early termination of his community supervision;
>
> (7) [appellant] has failed to meet his burden to show by a preponderance of the evidence under *Strickland* that his attorney rendered ineffective assistance, even if he has shown one small deficiency, because he has failed to show that he would have insisted on a trial but for any deficiency and counsel's presentation, taken as a whole, was above an objective standard of reasonableness.

II. DISCUSSION

On appeal, appellant argues that counsel misrepresented the terms of both his community supervision and sex offender registration requirements and, further,

pressured him into accepting the plea agreement. He states that trial counsel said community supervision and sex offender registration would last six years and ten years, respectively, but appellant would be able to successfully terminate both after two years. The State responds that, as the habeas court found, trial counsel only gave incorrect advice in that he misrepresented that appellant may early terminate his community supervision, but that this single misrepresentation was not prejudicial.

A. Standard of Review

During a habeas proceeding, the trial court is the sole factfinder. *See State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013). We conduct our review in the light most favorable to the habeas court's ruling. *Ex parte Peterson,* 117 S.W.3d 804, 819 (Tex. Crim. App. 2003) (per curiam), *overruled in part on other grounds by Ex parte Lewis,* 219 S.W.3d 335 (Tex. Crim. App. 2007). As such, when reviewing questions of fact, we apply the *Guzman* standard of review, which "affords almost total deference to a trial court's factual finding when supported by the record[, including affidavits], especially when those findings are based on credibility and demeanor." *Guerrero*, 400 S.W.3d at 583 (citing *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)).

B. Applicable Law

Claims for ineffective assistance of counsel must be firmly established in the record. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). When a defendant enters a plea of guilty on advice of counsel, then subsequently challenges his plea, this Court determines whether counsel rendered effective assistance by two considerations: (1) "whether counsel's advice was within the range of competence

demanded of attorneys in criminal cases" and, if not, (2) "whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) (en banc) (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)); *see Strickland v. Washington*, 466 U.S. 668, 687 (1984). We give deference to trial counsel's actions and start from a strong presumption that counsel performed within the wide range of reasonable professional assistance. *Ex parte Imoudu,* 284 S.W.3d 866, 869 (Tex. Crim. App. 2009); *see Hernandez v. State*, 726 S.W.2d 53, 78 (Tex. Crim. App. 1986) (en banc).

When determining whether erroneous advice prejudiced the plea, this Court

> consider[s] the circumstances surrounding the plea and the gravity of the misrepresentation material to that determination. Even when a defendant wholly relies upon erroneous advice of counsel, the magnitude of the error as it concerns the consequences of the plea is a relevant factor; not every reliance on erroneous advice is sufficient to justify rendering the plea vulnerable to collateral attack.

Ex parte Moody, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999). This Court will assess whether the erroneous information "is of such importance, and so critical to [appellant's] decision, as to cast doubt on the validity of the plea." *Id.*; *see also Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002) (en banc) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). If it is found by a preponderance of the evidence that counsel provided ineffective assistance, then appellant's plea is considered either unintelligent or involuntary. *See Hill*, 474 U.S. at 56; *Ex parte Torres,* 483 S.W.3d 35, 37 (Tex. Crim. App. 2016).

C. Analysis

The habeas court rejected three of applicant's allegations by finding: (1)

appellant's counsel did not threaten or pressure appellant into accepting the plea; (2) counsel properly informed appellant that his registration would last for ten years rather than life; and (3) appellant would be able to file a motion for early termination of his sex offender registration requirement. (Findings 2–4.) We will defer to the habeas court's findings because they are reasonably supported by the record—in particular, by trial counsel's affidavit and written and oral statements made by appellant during his plea proceedings. *See Guerrero*, 400 S.W.3d at 583; *Guzman*, 955 S.W.2d at 89.

Instead, we will consider appellant's remaining allegations: whether trial counsel prejudiced the outcome when he (1) mistakenly advised appellant that he could file for early termination of his community supervision when he in fact could not—an allegation that the habeas court adopted in its fifth through seventh findings, and (2) allegedly misstated that the registration would end ten years after his plea rather than ten years after his community supervision terminated—a finding or determination that the habeas court did not reach. It is undisputed that counsel made no representation that appellant would successfully early terminate his community supervision; counsel simply represented that appellant "would be eligible" for early termination. Nonetheless, even assuming that these two instances of alleged misadvice could establish a departure from the acceptable range of competence under the first prong of *Strickland*, we still conclude appellant is unable to show that error, if any, prejudiced him under the second prong. *See Strickland* 466 U.S. at 694; *Morrow*, 952 S.W.2d at 536.

Appellant contends that, under the second prong of the ineffective assistance analysis, but for his trial counsel's erroneous advice regarding the sex offender

registration and eligibility for early termination of his community supervision, he would have continued his trial. *See Hill*, 474 U.S. at 52; *Morrow*, 952 S.W.2d at 536; *see also Strickland*, 466 U.S. at 694. Prejudice depends on the likelihood that appellant would have continued his trial if properly advised. *See Moody,* 991 S.W.2d at 858. However, not every reliance on incorrect advice is sufficient to satisfy the but-for prong of a claim of ineffective assistance of counsel. *See id*. Rather, this Court will determine whether such incorrect advice was critical to appellant accepting the plea agreement. *See id.*

Trial counsel's misrepresentation was not "of such importance, and so critical to [appellant's] decision, as to cast doubt on the validity of the plea." *See id*. Appellant was charged with three counts of indecency with a child by exposing his genitals knowing a child was present, a third-degree felony. *See* TEX. PENAL CODE ANN. § 21.11 (a)(2)(A). His offense was enhanced to a second-degree felony because of a prior felony offense: burglary of a habitation. *See id.* § 12.42(a); *see also id.* § 30.02(d). Each second-degree felony offense carries with it a minimum sentence of two years, not to exceed twenty years, with a potential fine not to exceed $10,000. *See id.* § 12.33 (West, Westlaw through Ch. 49, 2017 R.S.). If found guilty of all three counts, appellant faced a maximum punishment of sixty years in jail and a $30,000 fine. *See id.* § 3.03(b)(2)(A) (West, Westlaw through Ch. 49, 2017 R.S.). Consequently, he would have to register as a sex offender for ten years. *See* TEX. CODE CRIM. PROC. ANN. art. 62.101(c)(2). The terms of his community supervision included six years deferred adjudication with a resulting sex offender registration requirement that would not expire until ten years after completing his community supervision. *See id.*

The State presented three eyewitnesses and photos of appellant at a school park. Further, it intended to offer more eyewitnesses, as well as evidence concerning appellant's admission of guilt and desire to flee the state. Following the first day of trial, appellant decided to plead guilty. The trial court admonished appellant concerning community supervision and sex offender registration, accepted the terms of the plea agreement, and added that appellant must also complete his GED and pay a $1,000 fine. Both in his appearance before the court and in writing, appellant specifically agreed to the terms of the plea bargain and stated that he was agreeing because he was, in fact, guilty. Such an admonishment and agreement creates a prima facie showing that appellant knowingly and voluntarily accepted the guilty plea. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (en banc). The "overwhelming" weight of this evidence suggests that no prejudice occurred. *See Strickland*, 466 U.S. at 677.

We are not persuaded that any alleged misinformation provided by appellant's trial counsel was critical enough in appellant's decision to accept the plea agreement. *See Moody*, 991 S.W.2d at 858. When considering appellant's potential sentence, in light of the plea agreement and the available evidence, appellant did not carry his burden to show by a preponderance of the evidence that any allegedly erroneous information was "so critical to [appellant's] decision[] as to cast doubt on the validity of the plea." *See id*. The surrounding circumstance of available evidence, the possibility of a sixty-year prison sentence, and the unpredictability of a jury decision lead us to conclude that, even assuming trial counsel acted deficiently, such alleged misadvice did not prejudice

appellant's plea.[3] *See id*.; TEX. PENAL CODE ANN. § 3.03(b)(2)(A).

We overrule appellant's sole issue.

III. CONCLUSION

We affirm the trial court's order.

NELDA V. RODRIGUEZ
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
20th day of July, 2017.

[3] Finally, appellant asserts that this Court should look suspiciously on the findings of fact and conclusions of law made by the habeas court because they were flawed and made without holding a hearing on the writ. Appellant provides no authority to support his argument, and we find none. Instead, such a hearing is unnecessary. TEX. CODE CRIM. PROC. ANN. art 11.072(6)(b) (West, Westlaw through Ch. 49, 2017 R.S.) ("In making its determination [to grant or deny habeas relief], the court *may* order affidavits, depositions, interrogatories, or a *hearing*, and may rely on the court's personal recollection.") (emphasis added).