IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1566-15

EX PARTE ANNA KNELSEN, Appellee

ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW FROM THE EIGHT COURT OF APPEALS EL PASO COUNTY

***Per curiam*. KEEL, J., filed a dissenting opinion, in which WALKER, J., joined. ALCALA, J., dissented.**

O P I N I O N

In an application for a writ of habeas corpus, Anna Knelsen sought relief from her probated sentence for possessing marihuana because her counsel had a conflict of interest and her plea was involuntary as a result of counsel's ineffective assistance. The habeas judge vacated Knelsen's conviction, but the court of appeals found the record insufficient to grant her relief. We agree and affirm the court of appeals' judgment.

Background

Anna Knelsen and her co-defendant husband were charged with possessing more than

five but less than fifty pounds of marihuana. At a border crossing, agents found marihuana in the spare tire under the truck Knelsen's husband was driving and in which Knelsen was a passenger. In June 2006, Knelsen and her co-defendant husband entered pleas to the charges pursuant to plea bargains they negotiated with the State. Both Knelsen and her husband were represented by the same attorney.

Knelsen's plea colloquy began with Knelsen waiving arraignment and the judge stating the charged offense and the range of punishment it commanded. The judge continued that, while there was a plea agreement with the State, if he chose not to follow it, Knelsen would be allowed to withdraw her plea. The judge further admonished the Knelsens: "Now, it's very, very important that you fully understand that nobody wants you to plead guilty unless you're guilty. You have an absolute right to plead not guilty and be tried by a jury . . . ." Anna Knelsen indicated that she received a copy of the indictment charging her with the intentional and knowing possession of marihuana, reviewed it with her attorney, and understood the allegations against her. "To that offense, ma'am," the judge asked, "how do you plead ma'am—guilty or not guilty?"

> [Knelsen]: Not guilty.
>
> THE COURT: Huh?
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> [Knelsen]: Not guilty.
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> THE COURT: Not guilty?
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> [Defense counsel]: Your Honor, we've made an agreement. We amended that plea with [the State] to allow for time served, and basically she's—was that—

[State]: No. No. She's still pleading guilty—that was the plea agreement. She's still pleading guilty to six foreign national, but I took off the days as a condition of her probation. But she's entered a "not guilty" plea, so—

[Defense counsel]: Your honor, actually, that's correct. She's entered a "no con"—

THE COURT: You have to talk to her. She's entering the plea.

[Defense counsel]: Correct, Your Honor. She's—it's been explained to her, Your Honor. Can she enter a "no contest" plea, Your Honor, in this court? This is my first time in Impact Court, Your Honor; but, if that's okay with Mr. Duke.

THE COURT: Well, I would normally say "yes," except she's already said "not guilty;" so, I have to have her say that she's guilty, you know. And I won't accept a no—

[Defense counsel]: She understands, Your Honor. She's going to.

* * *

THE COURT: And to this indictment, ma'am, it says that on that 30th day of April, 2006, here in El Paso County, Texas, you had possession of [marihuana] over five pounds, but less than 50 pounds.

How do you plead—guilty or not guilty?

[Knelsen]: Guilty.

* * *

THE COURT: And on that day did you have some [marihuana]?

[Knelsen]: Well, I didn't know about it, but yeah. Yes, yes.

THE COURT: You had [marihuana]? Okay.

Now, ma'am, I don't want to accept the plea if you're not guilty. Do you understand that? You have a right to go to trial; okay?

When asked again whether she possessed marihuana, Knelsen answered affirmatively.

She also affirmed that all the allegations set forth in the indictment were true and correct. She expressly did not contest that the amount of marihuana she possessed was more than five pounds. Finding Knelsen guilty and pursuant to the plea agreement, the judge assessed her punishment at imprisonment for six years, probated for a six-year term of community supervision on the "foreign national program." The judge explained the foreign national program thus: "Now, what this means is that once they deport you, you can come back into this country at any time, but it has to be legally. So, if you come back illegally, you violate a term of probation; okay?" "Okay," Knelsen replied.

Nearly six years later, Knelsen filed an application for a writ of habeas corpus seeking relief under Texas Code of Criminal Procedure Article 11.072.[1] Knelsen alleged her guilty plea should be vacated for two main reasons: (1) her counsel provided ineffective assistance rendering her plea involuntary; and (2) counsel labored under a conflict of interest. Knelsen's application swore that counsel failed to explain the law applicable to the charge she faced—specifically, that the State would have to show she intentionally or knowingly possessed the marihuana—and incorrectly suggested that a "no-contest" plea, as opposed to a guilty plea, may benefit her as it related to future immigration consequences. Knelsen further alleged that, by representing both her and her husband, counsel was prevented from

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[1] *See Ex parte Villanueva*, 252 S.W.3d 391, 397 (Tex. Crim. App. 2008) ("[T]he Legislature intended Article 11.072 to provide the exclusive means by which the district courts may exercise their original habeas jurisdiction under Article V, Section 8 of the Texas Constitution in cases involving an individual who is either serving a term of community supervision or who has completed a term of community supervision.").

asserting a defensive theory that she did not know about her husband's marihuana.

The habeas judge held a hearing in which Knelsen's plea counsel was the only witness who testified. His testimony was the only evidence that supplemented Knelsen's application. Counsel testified that, after reviewing the State's file, he discussed the contents of the State's file with Knelsen. He stated that he discussed the strength and weaknesses in her case. According to counsel, Knelsen admitted to him that she knew about the marihuana in the truck and "that they brought [marihuana] over before and that they didn't see anything wrong with it." He maintained that, in light of the State's offer, he believed it was in Knelsen's best interest to enter a no-contest plea. Counsel further testified that, when he learned in the middle of the plea that the judge did not accept no-contest pleas, he explained the situation to Knelsen and "she persisted in wanting to go forward and plead guilty and get the case put behind her instead of going to trial."

The habeas judge (who did not preside over Knelsen's plea) entered findings of fact, concluded that Knelsen's counsel had a conflict of interest and her plea was involuntary due to counsel's ineffective assistance, and vacated Knelsen's sentence. To say the judge found counsel's testimony not credible is charitable. Just a few of the findings illustrate the tenor of the judge's fact findings: "The Court finds that all of the testimony of Defense Counsel with respect to alleged criminal conduct on the part of Applicant, which he supposedly learned from her, to be false. The Court finds this testimony to be a fabrication intended to create a bias against the Applicant in the eyes of the Court, and a feeble attempt to deflect

attention away from unprofessional conduct in this case." The judge found counsel's testimony about his experience as a practicing lawyer particularly probative of his lack of credibility: "Not believing Defense Counsel's testimony that he has handled over 50,000 cases requires a further finding that he is an attorney who is loose with the truth and has a propensity toward fabrication and exaggeration when testifying under oath." Contrary to counsel's testimony, the judge found, among other things, that (1) Knelsen told counsel that she did not know about the marihuana,(2) counsel did not explain to her that a reasonable jury could possibly find her guilty of possession, and (3) Knelsen did not understand that the State would have to prove she intentionally or knowingly possessed the marihuana. The judge further found as false counsel's testimony that Knelsen admitted she and her husband previously transported marihuana across the border and that she grew marihuana on her property. Regarding Knelsen's conflict-of-interest claim, the judge found that she and her husband had conflicting defenses and that Knelsen's case was compromised by the dual representation because her case would usually be dismissed based on her husband's potential cooperation.

In the Court of Appeals

In an unpublished opinion, the court of appeals reversed the habeas court's order granting relief and vacating Knelsen's sentence.[2] The court acknowledged that it could not

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[2] *Ex parte Knelsen*, No. 08-13-00013-CR, 2015 WL 5047524, *6 (Tex. App.—El Paso Aug. 26, 2015) (not designated for publication).

consider counsel's testimony because the habeas judge found that counsel lacked credibility.[3] And because Knelsen did not introduce her own testimony or affidavit, the court of appeals held that Knelsen could not establish that, even if Knelsen had a viable defensive theory, it was not pursued because of counsel's alleged conflict of interest. Similarly, the court held that the habeas judge erred in granting relief on Knelsen's ineffective-assistance-of-counsel claim because Knelsen relied exclusively on her sworn pleadings and the plea hearing record failed to prove that she would not have pleaded guilty.[4] The court faulted Knelsen for not presenting her own testimony or affidavit detailing counsel's advice and facts related to her guilty plea. Citing our opinion in *State v. Guerrero*,[5] the court of appeals held that "sworn pleadings are an inadequate basis upon which to grant relief in any habeas case."[6] Moreover, even accepting Knelsen's assertions in her sworn application as evidence, the court concluded that she insufficiently stated that she would not have pleaded guilty, instead insisting on a trial.[7]

We granted Knelsen's petition for discretionary review to address the court of appeals' analysis and judgment.

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[3] *Id.* at *5.

[4] *Id.* at *6.

[5] 400 S.W.3d 576, 583 (Tex. Crim. App. 2013).

[6] *Ex parte Knelsen*, 2015 WL 5047524, at *4; *accord id.* at 583; *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016).

[7] *Ex parte Knelsen*, 2015 WL 5047524, at *6.

On Discretionary Review

The applicant bears the burden of proving her claims by a preponderance of the evidence.[8] On appeal from a judge's granting or denying an Article 11.072 application, an appellate court reviewing a habeas judge's order must view the record evidence in the light most favorable to the judge's ruling and must uphold that ruling absent an abuse of discretion.[9] In so doing, we afford almost total deference to the trial judge's determination of historical facts that the record supports when the judge's fact findings are based on credibility and demeanor.[10] We afford this level of deference even when no witnesses testify and all of the evidence is submitted through affidavits, depositions, or interrogatories.[11]

Involuntary-Plea Claims

Part of Knelsen's involuntary-plea claim alleges that her guilty plea was not knowingly and intelligently made because counsel misrepresented or suggested to her that "an immigration benefit might result" by entering a no-contest plea. Knelsen's application cites to the Texas Code of Criminal Procedure provision that states that a no-contest plea shall have the same legal effect as a guilty plea, except that a no-contest plea may not be used as an admission in a civil suit. Knelsen claims that, had she known the pleas were equivalent

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[8] *Ex parte Torres*, 483 S.W.3d at 43; *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002).

[9] *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006).

[10] *Ex parte Garcia*, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011).

[11] *Guerrero*, 400 S.W.3d at 583.

for immigration purposes, she would have refused to enter a plea. We understand Knelsen's claim to be that she received ineffective assistance of counsel in the plea process because counsel did not correctly advise her about the immigration consequences of entering either a no-contest or guilty plea.[12] However, both the United States Supreme Court and this Court have held that "defendants whose convictions became final prior to the Supreme Court's decision in *Padilla* [*v. Kentucky*] . . . cannot benefit from its holding."[13] Although the court of appeals decided this basis of Knelsen's ineffective-assistance-claim on Knelsen's failure to prove prejudice, we affirm its resolution of this claim's basis, albeit on an alternate ground.

Knelsen further complains that counsel did not discuss with her any defenses to the possession charge, nor did he explain to her that the State would have to prove beyond a reasonable doubt that she intentionally or knowing exercised care, custody, or control over the marihuana found in the truck's spare tire. She further states that counsel led her to believe that her "mere presence" in the truck was sufficient to prove her guilty of the possession offense. Although citing and explaining the applicable prejudice standard for the

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[12] *See generally Padilla v. Kentucky*, 559 U.S. 356, 368–69 (2010) (finding counsel's performance deficient in misadvising client of the clearly negative immigration consequences to entering a plea).

[13] *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013); *Ex parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013) (adopting *Chaidez*'s retroactivity analysis as state law).

particular claim asserted,[14] Knelsen failed to allege that, had counsel explained the applicable law to her, she would not have entered a plea, but instead insisted on a trial. "In a postconviction collateral attack, the burden is on the applicant to allege and prove facts which, if true, entitle him to relief."[15]

Knelsen claims in her application that "she would not have entered a plea of guilty . . . had she realized the State had to prove 'knowing' or "intentional' possession." Knelsen's application, drafted by counsel, does not claim that she would have pleaded not guilty and insisted on a trial. The point is not merely semantical or formulaic; the absence speaks to a lack of substantive prejudice an applicant must experience to entitle her to relief under this particular claim. We have recently reaffirmed that an applicant must expressly allege, either in his pleadings or through additional evidence, that had counsel performed adequately "he would have instead decided to plead not guilty and avail himself of a trial."[16] When this Court adopted the *Hill v. Lockhart* analysis for involuntary-plea claims as a result of ineffective assistance of counsel, it adopted the exacting pleading burden *Hill* itself embraced.[17]

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[14] *See Hill v. Lockhart*, 474 U.S. 52 (1985).

[15] *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

[16] *Ex parte Torres*, 483 S.W.3d at 49; *see Hill*, 474 U.S. at 59–60 (denying relief because "Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial").

[17] *Ex parte Torres*, 483 S.W.3d at 49; *Hill*, 474 U.S. at 59–60.

Further, the record of the plea colloquy alone cannot overcome Knelsen's pleading deficiency—and with good reason. Knelsen indeed said during the colloquy that she "didn't know about [the marihuana]." But without any further record evidence, the habeas judge was unable to weigh her allegations against the other interests that may animate a defendant's desire to plead to an offense she may believe she did not commit. As we noted in *Ex parte Tuley*, the decision to plead to an offense may be influenced by factors unrelated to a defendant's guilt, including the inability to afford bail, family obligations, the need to return to work, and the attractive benefits of a plea bargain promising a reduced sentence.[18] Even if we ignored Knelsen's pleading deficiencies and accepted as competent evidence Knelsen's bare allegation that counsel failed to explain the charge she faced, the record presented does not establish that Knelsen would have insisted on a trial had counsel explained the applicable culpability element the charge required.

Conflict of Interest Claim

Lastly, Knelsen maintains that her Sixth Amendment rights were violated because counsel labored under a conflict of interest in representing both her and her husband. Knelsen argues that her and her husband's interests competed and diverged because she did not knowingly possess the marihuana. In support, Knelsen refers to facts derived from investigative reports: the marihuana was concealed in a spare tire and not in plain view; the marihuana's odor was not detectable inside the truck; agents saw her husband's hands shake

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[18] *Ex parte Tuley*, 109 S.W.3d 388, 393 & n.2 (Tex. Crim. App. 2002).

uncontrollably when handing them a business card; her husband appeared nervous to the agents during questioning; the Knelsens told the agents that the truck "was not left alone by them so as to enable a third party to 'plant' the [marihuana] in the spare tire"; and Knelsen was only the passenger and her husband was the driver. Knelsen argues that these facts together establish a plausible defensive strategy that could have been pursued at trial but for counsel's dual representation. However, Knelsen's application does not contain any investigative reports—the source of many of her factual allegations—nor are they found elsewhere in the record.

To establish ineffective assistance of counsel due to counsel's conflict of interest, Knelsen must show that counsel had an actual conflict of interest, and the conflict actually colored counsel's actions during trial.[19] [A]n 'actual conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest."[20] A defendant who did not object at trial must demonstrate by a preponderance of the evidence that an actual conflict of interest adversely affected counsel's performance.[21] "A mere

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[19] *Acosta v. State*, 233 S.W.3d 349, 356 (Tex. Crim. App. 2007) (adopting the rule set out in *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980)).

[20] *Id.* at 355 (quoting *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997)).

[21] *Cuyler*, 446 U.S. at 348; *Odelugo v. State*, 443 S.W.3d 131, 136–37 (Tex. Crim. App. 2014).

possibility of a conflict of interest is insufficient to overturn a criminal conviction."[22] And a single attorney's representation co-defendants is not a *per se* violation of the constitutional guarantee of effective assistance of counsel.[23]

The habeas judge found that Knelsen and her husband had conflicting defenses and that Knelsen's case was compromised by counsel's dual representation. The habeas judge further found that in many co-defendant possession cases, the attorney representing the "allegedly ignorant co-defendant" will normally ask the attorney representing the culpable defendant for the co-defendant's assistance in exculpating the other. If the culpable co-defendant agrees, the case against the co-defendant is usually dismissed. Granting relief under Knelsen's conflict-of-interest claim, the judge concluded that the Knelsens had conflicting defenses and counsel never informed Knelsen of any possible conflicts. "Had [Knelsen] been represented by competent counsel," the judge concluded, "her case would probably have been dismissed following her husband's plea had he been willing to exonerate her."

The court of appeals noted that Knelsen relied exclusively on her sworn pleadings and the reporter's record of the guilty plea.[24] The court further observed that many of the habeas judge's findings of fact are "drawn directly from the sworn pleadings and its recitation of

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[22] *See Cuyler*, 446 U.S. at 349–50.

[23] *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978); *Almanzar v. State*, 702 S.W.2d 653, 655 (Tex. Crim. App. 1986).

[24] *Ex parte Knelsen*, 2015 WL 5047524, at *4.

what was purportedly stated in the police reports."[25] We agree. In this case, it would be illogical to hold that the judge's disbelief of counsel's testimony—which contradicted Knelsen's assertions found only in her application for a writ of habeas corpus—created affirmative record evidence of Knelsen's pleaded allegations. Even assuming Knelsen's bare allegations in her application are competent evidence of her conflict-of-interest claim, her application does not establish that her viable defensive strategy was not pursued as a result of the alleged conflict of interest. The court of appeals correctly concluded that Knelsen failed to establish by a preponderance of the evidence that she was adversely impacted by an actual conflict of interest.

We affirm the court of appeals' judgment.

Delivered: June 7, 2017

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[25] *Id.*