



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**

KEASLER, J., delivered the opinion of the Court, in which HERVEY, ALCALA, RICHARDSON, NEWELL, and WALKER, JJ., joined. YEARY, J., filed a concurring opinion in which KEEL, J., joined. KELLER, P.J., filed a dissenting opinion.

O P I N I O N

Cristian Aguilar, a Honduran national with temporary protected status, pleaded guilty to the state-jail felony of attempting to evade arrest in a motor vehicle and was sentenced to six months' imprisonment. In his application for a writ of habeas corpus, Aguilar alleged that his plea counsel, who gave incorrect advice regarding the immigration consequences of the guilty plea, was ineffective and his plea was involuntary. We hold that Aguilar's plea was involuntary, and we vacate his plea.

I.

At the time of his arrest, Aguilar was lawfully present in the United States as a nonimmigrant with temporary protected status and was attempting to adjust his status and gain lawful permanent residency. Because he was concerned that the criminal proceedings would affect his immigration status, Aguilar asked his immigration attorney to advise his plea counsel.

The immigration attorney spoke with plea counsel three times. She told plea counsel that if Aguilar was convicted of a felony he would lose his temporary protected status and have no legal immigration status. She also told plea counsel that Aguilar would be ineligible for lawful permanent residency if he was sentenced to more than six months' imprisonment. Plea counsel indicated to both the immigration attorney and Aguilar that he understood and could negotiate a plea bargain that allowed Aguilar to retain his temporary protected status and remain eligible for legal permanent residency.

Plea counsel negotiated a plea agreement where Aguilar would plead guilty to attempted evading arrest with a motor vehicle, a state-jail felony, and be sentenced to six months in state jail. On plea counsel's advice, Aguilar accepted the plea agreement and pleaded guilty. The plea did not conform with the immigration attorney's advice and rendered Aguilar ineligible to maintain his temporary protected status. In his affidavit, Aguilar alleges that: "[He] would never have agreed and entered a guilty plea if [he] had known or thought that it would cause [him] a problem with immigration or put [him] in danger of deportation."

Aguilar’s habeas corpus application alleged that ineffective assistance of counsel rendered his guilty plea involuntary. Specifically, he argued that plea counsel gave incorrect legal advice on the immigration consequences of the guilty plea. The habeas judge recommended that we grant relief and entered the following findings of fact: (1) Aguilar’s primary concern was to avoid deportation consequences and not lose his right to remain in the United States; (2) plea counsel was informed by an immigration attorney that a felony conviction would cause Aguilar to lose his temporary protected status; (3) Aguilar relied on plea counsel’s incorrect advice that pleading guilty to a state-jail felony would not affect his immigration status; and (4) Aguilar “would not have pled guilty but would have insisted on going to trial but for [plea counsel’s] incorrect counsel.”

We remanded the case to determine whether Aguilar pleaded guilty to a removable offense. After this remand, the habeas judge entered the following additional findings of fact: (1) Aguilar is required to reapply for his temporary protected status; (2) the United States Citizenship and Immigration Services (USCIS) notified Aguilar that it will deny his reapplication if he has been convicted of a felony; (3) the felony conviction Aguilar received as a result of his plea has affected his immigration status and will subject him to removal; (4) because of the plea, USCIS will terminate Aguilar’s temporary protected status; (5) because of the plea, Aguilar “has no legal status[:]” and (6) “[i]n the context of [Aguilar’s] legal status, the conviction in this case is a deportable offense.” The habeas judge again recommended we grant Aguilar relief.

We remanded the case a second time to determine the impact of Aguilar’s juvenile record on his immigration status. The habeas judge entered additional findings of fact and conclusions of law and again recommended we grant relief. We filed and set this case to determine whether *Padilla v. Kentucky*¹ extends to the facts presented here.

II.

As the United States Supreme Court has said, “Immigration law can be complex, and it is a legal specialty of its own.”² Although criminal and immigration law often interact, criminal law attorneys are not necessarily specialists in immigration law. In order to understand Aguilar’s case, it is necessary to define the immigration terminology at play here. This section serves as a brief and by no means complete primer into the immigration law involved in this case.

Aguilar is a Honduran national with temporary protected status, a legal immigration status sometimes provided to nonimmigrants. A nonimmigrant is an alien who lives in the United States temporarily and for a limited purpose.³ In contrast, a legal permanent resident is an alien who lawfully lives in the United States permanently and defines the United States

¹ 559 U.S. 356 (2010).

² *Id.* at 369.

³ *Nonimmigrant*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (last visited June 6, 2017), <https://www.uscis.gov/tools/glossary/nonimmigrant>.

as his permanent residence.⁴

When the conditions in a foreign country prevent nationals from safely returning, that country may be designated for temporary protected status.⁵ Once a country is designated, nationals who are already in the United States may be granted temporary protected status.⁶ Under temporary protected status, an alien is not removable and is authorized to work in the United States.⁷ To gain temporary protected status, an alien must be a national of a designated country, have been continuously present in the United States since the designation, be admissible, not have been convicted of a felony, and register within the registration period.⁸ Once an alien has gained temporary protected status, he is required to re-register every year.⁹ If the Attorney General finds that an alien is no longer eligible for temporary protected status, he will withdraw the status and its accompanying protections.¹⁰

⁴ 8 U.S.C. § 1101(a)(20); *see Permanent Resident Alien*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (last visited June 6, 2017), <https://www.uscis.gov/tools/glossary/permanent-resident-alien>.

⁵ 8 U.S.C. § 1254a(b)(1); *see Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (last visited June 6, 2017), <https://www.uscis.gov/tools/glossary/temporary-protected-status>.

⁶ 8 U.S.C. § 1254a(c)(1)(A).

⁷ *Id.* § 1254a(a)(1).

⁸ *Id.* § 1254a(c).

⁹ *Id.* § 1254a(c)(3)(C).

¹⁰ *Id.* § 1254a(c)(3)(A).

III.

A defendant is entitled to post-conviction relief on an ineffective-assistance-of-counsel claim if he demonstrates that (1) counsel’s performance was deficient and (2) the applicant was prejudiced as a result of that deficient performance.¹¹ Counsel’s performance is deficient if it falls “below an objective standard of reasonableness.”¹²

In *Padilla*, the United States Supreme Court held that when the removal consequences of a guilty plea are clear, counsel has a duty to correctly advise a defendant of those consequences.¹³ *Padilla*, a Honduran national and lawful permanent resident, was charged with the transportation of a large amount of marihuana.¹⁴ The Supreme Court of Kentucky rejected *Padilla*’s claim because it considered removal a collateral matter and outside of the scope of representation required by the Sixth Amendment.¹⁵ The Supreme Court of the United States held that advice on the unique consequence of removal was within the scope of representation required by the Sixth Amendment.¹⁶ Although removal is a civil proceeding, it is intimately related to criminal proceedings and current immigration law

¹¹ *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016).

¹² *Strickland*, 466 U.S. at 688.

¹³ *Padilla*, 559 U.S. at 369.

¹⁴ *Id.* at 359.

¹⁵ *Id.* at 364-65.

¹⁶ *Id.* at 365.

renders removal the presumptive consequence of certain convictions.¹⁷ The court held that “[t]he severity of deportation—‘the equivalent of banishment or exile,’—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”¹⁸

The immediate consequence of Aguilar’s conviction is not removal, but a loss of his legal nonimmigrant status. Aguilar is present in the United States as a nonimmigrant with temporary protected status. Because aliens with temporary protected status are required to reapply for their status annually, they must continue to remain eligible to keep their temporary protected status.¹⁹ An alien is ineligible for temporary protected status if he is convicted of a felony.²⁰ Once an alien becomes ineligible and loses temporary protected status, he loses his legal nonimmigrant status.²¹ While the conviction directly causes a loss of status and not removal, under the removal statute, “any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted . . . is deportable.”²² As such, Aguilar’s conviction places him on the unstoppable

¹⁷ *Id.*

¹⁸ *Id.* at 373-74 (in text citation omitted).

¹⁹ 8 U.S.C. § 1254a(c).

²⁰ *Id.* §§ 1254a(c)(2)(B)(I), (3)(A).

²¹ *Id.*

²² *Id.* § 1227(a)(1)(C)(i).

path toward presumptive removal.

When an alien loses his nonimmigrant status, like when an alien is convicted of a controlled substance offense, “his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal.”²³ Similarly, when a nonimmigrant with temporary protected status is convicted of a felony the loss of his nonimmigrant status is practically inevitable. Under the temporary protected status statute: “The Attorney General shall withdraw temporary protected status granted to an alien under this section if the Attorney General finds that the alien was not in fact eligible for such status under this section.”²⁴ The language in this statute is mandatory. Any discretionary relief would be unlikely and, like his removal after he loses status, Aguilar’s loss of temporary protected status is practically inevitable.

The State argues that *Padilla* should not extend beyond the unique consequences of removal. According to the State, because the immediate consequence of Aguilar’s conviction was a loss of status and not removal, *Padilla* does not apply. But the State fails to appreciate that Aguilar’s loss of temporary protected status and presumptive removal necessarily follow the conviction. A felony conviction renders a nonimmigrant with temporary protected status ineligible to maintain that status and the loss of nonimmigrant

²³ *Padilla*, 559 U.S. at 364.

²⁴ 8 U.S.C. § 1254a(c)(3)(A).

status renders an alien removable.²⁵ While presumptive removal is not the immediate consequence of the conviction, it is an automatic and practically inevitable response to the conviction; a response which Aguilar cannot avoid. Because the loss of status automatically renders Aguilar removable, the conviction has removal consequences and *Padilla* is triggered. We do not decide whether every loss or change in status implicates *Padilla*, but when a conviction automatically triggers a loss of status which, in turn, renders a defendant presumptively removable, *Padilla* applies.

IV.

Although the United States Supreme Court recognized that counsel must inform a client when removal may be a consequence of a conviction, the scope of counsel's duty to advise his client is determined by whether the removal consequence is clear, specific, and explicit.²⁶ Padilla's counsel assured him that a guilty plea and subsequent conviction would not subject him to removal.²⁷ However, the removal statute clearly, succinctly, and explicitly defined removal as a consequence of Padilla's conviction.²⁸ "The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was

²⁵ *Id.* §§ 1227(a)(1)(C)(I), 1254a(c)(3).

²⁶ *Padilla*, 559 U.S. at 369.

²⁷ *Id.* at 368.

²⁸ *Id.*

presumptively mandatory, and his counsel’s advice was incorrect.”²⁹ Because the removal statute was clear, succinct, and explicit, the court held that Padilla’s counsel was constitutionally deficient for providing incorrect advice regarding the immigration consequences of the guilty plea.³⁰

In *Padilla*, the United States Supreme Court focused on the clarity of the removal statute, but when plea counsel has the advantage of an immigration attorney we need not focus on the statute alone. Criminal law attorneys are generally not knowledgeable of specialized immigration law and may not understand the effect of a criminal conviction on a noncitizen. As such, we anticipate and expect, but do not demand, that criminal law attorneys will rely on their immigration-law counterparts when representing noncitizens. When a criminal defense attorney is advised by an immigration attorney and correctly relies on that advice, the advice and immigration-law knowledge is imputed to the criminal defense attorney and his performance is evaluated in light of that expertise. In such a case, if the advice is clear, explicit, and succinct, then plea counsel has a duty to provide correct advice.

We need not reach whether the statutes involved in Aguilar’s case were clear because plea counsel was given clear advice by an immigration attorney, relied on that advice, and told his client and the immigration attorney he understood and would comply with that advice. Plea counsel knew Aguilar was not a United States citizen and was concerned with

²⁹ *Id.* at 369.

³⁰ *Id.*

the immigration consequences of the criminal charges. Plea counsel was told by Aguilar's immigration attorney that a felony conviction would make Aguilar ineligible to retain his temporary protected status, leave him with no legal status, and render him removable. Plea counsel told the immigration attorney that he understood her advice, and in his affidavit stated that he believed he had understood her advice. Plea counsel negotiated a plea agreement that he believed conformed with the immigration attorney's advice, but did not. As a result of the plea agreement, Aguilar pleaded guilty to a state-jail felony, became ineligible to retain temporary protected status, lost his legal status, and became removable. In his affidavit, plea counsel states, "I take full responsibility for my error as I was advised in advance that a felony conviction would result in negative immigration consequences."

Deficiency is easy to find in this case. Plea counsel was advised that a felony conviction would cause Aguilar to lose his temporary protected status and render him removable. This advice was clear. Plea counsel indicated to the immigration attorney and his client that he not only understood the advice but would rely on it. Despite all of this and through his own fault, plea counsel negotiated a plea agreement for a state-jail felony and incorrectly advised Aguilar that the plea would not have negative immigration consequences. We hold that Aguilar's plea counsel was deficient for providing incorrect advice to Aguilar despite clear and correct instructions from an immigration attorney, upon whom plea counsel assured his client he would rely.

IV.

When an ineffective-assistance-of-counsel claim relates to a guilty plea, the prejudice prong of *Strickland* requires the defendant to demonstrate that “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.”³¹ In *Ex parte Torres*, we held that “the *Hill* [*v. Lockhart*] standard appropriately governs the prejudice injury in the context of an ineffective-assistance-of-counsel claim under *Padilla*.”³² In the recently decided *Lee v. United States* opinion, the United States Supreme Court also held that the *Hill* standard is the appropriate test for prejudice under *Padilla*.³³

The habeas judge found that Aguilar had “established that he would not have pled guilty but would have insisted on going to trial but for Udorah’s incorrect counsel.” Aguilar attached several affidavits to his habeas application which support this finding. First, plea counsel’s affidavit stated that Aguilar instructed him to discuss plea negotiations with the immigration attorney “to ensure that [Aguilar] would not suffer negative immigration consequences or be at risk of deportation from the United States.” Further, in plea counsel’s court-ordered affidavit he states that “[Aguilar’s] primary concern was not to lose his right to remain in the United States or not to be deported out of the United States.” Aguilar states

³¹ *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

³² *Ex parte Torres*, 483 S.W.3d 35, 47 (Tex. Crim. App. 2016).

³³ *Lee v. United States*, 137 S.Ct. 1958, 1965 (2017).

in his affidavit that, “ I would never have agreed and entered a guilty plea if I had known or thought that it would cause me a problem with immigration or put me in danger of deportation.” According to the affidavit, he pleaded guilty only because he believed that plea counsel was acting on the immigration attorney’s advice and the plea would have no negative immigration consequences. This evidence supports the habeas judge’s finding and, as such, we give it almost total deference.³⁴ Based on this finding and its support in the record, we hold that Aguilar has demonstrated that, but for counsel’s error, he would not have pleaded guilty and would have insisted on a trial.

The State argues that while Aguilar has shown prejudice he has not shown harm. While habeas has a general harm standard, that standard is only at play when we have not previously set out a definition for prejudice or harm.³⁵ Thus, by satisfying *Strickland*’s prejudice prong, Aguilar has shown harm.

V.

We extend *Padilla* to the circumstances where a defendant’s guilty plea causes him to automatically lose legal immigration status and become removable. Aguilar’s guilty plea,

³⁴ *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013).

³⁵ See *Ex parte Martinez*, 330 S.W.3d 891, 903 (Tex. Crim. App. 2011) (“[T]he *Strickland* prejudice prong . . . presents a more difficult burden than does the harm analysis under Rule 44.2 of the Texas Rules of Appellate Procedure[.]”); *Ex parte Moussazadeh*, 361 S.W.3d 684, 690-91 (Tex. Crim. App. 2012) (“[T]he standard for the analysis of harm under the *Strickland* protocol . . . may be stated generally as ‘but for the erroneous advice of counsel, the applicant would not have plead [sic] guilty.’”) (citing *Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010)).

which was based on his counsel's incorrect advice, will cause him to lose his temporary protected status and render him removable. Because Aguilar has shown he would not have pleaded guilty if he had been correctly advised of the relevant immigration consequences, we hold that ineffective assistance of counsel rendered his plea involuntary and vacate his plea.

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