**Affirmed as Modified; Opinion Filed May 2, 2016.**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-15-01346-CR**

**MELITON GONZALEZ, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

**On Appeal from the 265th Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. F-1251885-R**

## MEMORANDUM OPINION

Before Justices Francis, Fillmore, and Schenck
Opinion by Justice Fillmore

In a single issue, appellant Meliton Gonzalez asserts his trial counsel was ineffective by failing to fully and completely discuss with Gonzalez the deportation consequences of his plea of nolo contendere to the charge of sexual assault of a child. We modify the judgment to reflect Gonzalez's plea of nolo contendere. As modified, we affirm the trial court's judgment.

### Procedural Background

Pursuant to an open plea agreement, Gonzalez, who is not a citizen of the United States, pleaded nolo contendere to the charge of sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.011(a)(2) (West 2011). The trial court assessed punishment of ten years' confinement.

Gonzalez filed a motion for new trial in which he asserted ineffective assistance of counsel. At the completion of the hearing on Gonzalez's motion for new trial, the trial court

announced the motion was denied. The motion for new trial was actually overruled by operation of law because no order denying the motion was signed by the trial court.[1]

**Ineffective Assistance of Counsel**

In his sole issue on appeal, Gonzalez contends he was denied effective assistance of counsel because his trial attorney failed to fully and completely discuss with Gonzalez the deportation consequences of his plea of nolo contendere to the charge of sexual assault of a child.

*Standard of Review*

Gonzalez has the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). To prevail on a claim of ineffective assistance of counsel, Gonzalez must show his trial counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability the results of the proceeding would have been different in the absence of counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffective assistance claim. *See Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005). An ineffective assistance claim must be "firmly founded in the record," and the record must affirmatively demonstrate the claim has merit. *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012).

In determining whether the movant carried his burden with respect to ineffective assistance of counsel, the trial court "has the right to accept or reject any part of a witness's testimony[.]" *Odelugo v. State*, 443 S.W.3d 131, 137 (Tex. Crim. App. 2014) (quoting *Charles*

[1] *See* TEX. R. APP. P. 21.8(a) (court must rule on motion for new trial within seventy-five days after imposing or suspending sentence in open court); *id.* 21.8(c) (motion for new trial not timely ruled on by written order will be deemed denied when the period prescribed by rule of appellate procedure 21.8(a) expires).

*v. State*, 146 S.W.3d 204, 208 & n.7 (Tex. Crim. App. 2004)). As the sole factfinder and judge of the credibility of evidence, whether presented by live testimony or affidavits, *id*. (citing *Riley v. State*, 378 S.W.3d 453, 459 (Tex. Crim. App. 2012)), "the trial court is 'within its right to disbelieve' *any* of the 'assertions upon which [the] appellant's claims of ineffective assistance of counsel are based,' so long as the basis [of the trial court's decision] is supported by at least one 'reasonable view of the record.'" *Id*. (quoting *Charles*, 146 S.W.3d at 208, 212). Claims of ineffective assistance of counsel involve mixed questions of law and fact that often contain subsidiary questions of historical fact, some of which may turn upon the credibility and demeanor of witnesses. *Id*. (citing *Riley*, 378 S.W.3d at 458). We therefore review the trial court's ruling for an abuse of discretion, and reverse the trial court's ruling only if the ruling was clearly erroneous and arbitrary, "such as when 'no reasonable view of the record could support the trial court's ruling.'" *Id*. (quoting *Riley*, 378 S.W.3d at 457).

*Discussion*

Article 26.13 of the code of criminal procedure requires certain admonishments be given to a defendant who is pleading guilty or nolo contendere. TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (West Supp. 2015). Among other things, the trial court must admonish a defendant of "the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law [.]" *Id*. art. 26.13(a)(4); *see also* 8 U.S.C.A. § 1227(a)(2)(A)(iii) (West 2005) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). This admonition may be made orally or in writing. TEX. CODE CRIM. PROC. ANN. art. 26.13(d). In connection with written admonitions, the court "must receive a statement signed by the defendant and the defendant's attorney that he understands the admonitions and is aware of the consequences of his plea." *Id*. A court's

admonition that substantially complies with article 26.13(a) is sufficient. *Id*. art. 26.13(c). The presence of article 26.13 admonitions in the record creates a prima facie showing that substantial compliance occurred and the plea was both knowing and voluntary. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (per curiam). Once a prima facie showing is established, the burden shifts to the defendant to demonstrate he did not fully understand the consequences of his plea such that he suffered harm. *Id*.[2]

The Sixth Amendment to the United States Constitution guarantees a defendant effective assistance of counsel in a plea hearing. *Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010).[3] In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court held that the Sixth Amendment requires that the defense attorney for a criminal defendant provide advice about the risk of deportation that arises from a guilty plea. *Id*. at 374. Recognizing that immigration law is complex, the Supreme Court stated that "[w]hen the law is not succinct and straightforward . . ., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id*. at 369. But when the deportation consequence is clear, defense counsel has a duty to give correct advice regarding the deportation consequences of defendant's plea. *Id*. "[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id*. at 372.

The record shows Gonzalez, who is not a United States citizen and was a legal permanent resident of the United States, and his trial counsel signed written statements that Gonzalez's rights had been explained to him, he had read the admonishments and warnings regarding his

[2] *See Alghaylan v. State*, No. 05-14-00001-CR, 2014 WL 5477944, at *1 (Tex. App.—Dallas Oct. 30, 2014, no pet.) (mem. op., not designated for publication).

[3] The protections of the Sixth Amendment are made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Westbrook v. State*, 29 S.W.3d 103, 117 (Tex. Crim. App. 2000).

rights, and his statements and waivers were knowingly, freely, and voluntarily made with full understanding of the consequences. Those admonishments include the following:

> If you are not a citizen of the United States, a plea of guilty or *nolo contendere* may, and under current Federal Immigration rules *is almost certain to*, result in your deportation, removal, exclusion from admission to the United States, or denial of naturalization.

The following admonishments were separately signed by Gonzalez:

> With the approval of counsel, defendant makes the following statements and waivers. . . . I understand that if I am not a United States citizen, a plea of guilty or *nolo contendere* will probably result in my deportation from the United States, exclusion from admission to the United States, or denial of naturalization under Federal law.

Gonzalez's attorney signed a statement that he had "consulted with [Gonzalez], whom he believe[d] to be competent, concerning the plea" and had advised Gonzalez of his rights. Gonzalez's attorney approved Gonzalez's waivers, statements, and agreements. The trial judge also signed the plea agreement, found the waivers, agreements, and plea to have been knowingly, freely, and voluntarily made, and approved those waivers and agreements.

Further, at the hearing in which Gonzalez entered his plea of nolo contendere, in an exchange with the trial court, Gonzalez confirmed he was not a citizen of the United States and he understood his plea "can and likely will result in [his] deportation, exclusion from this country, and/or denial of naturalization." Despite that understanding, Gonzalez confirmed to the trial court that he wanted to go forward with his plea because he wanted his "case to be resolved." The trial court received confirmation from Gonzalez that his attorney, fluent in Spanish, had gone over the provisions contained in the plea agreement with him and that he had signed the plea agreement acknowledging his understanding of those provisions.

In his motion for new trial, Gonzalez asserted he received ineffective assistance of counsel concerning his plea because he was "only given generalized admonitions concerning the immigration consequences for his plea in this case." More specifically, Gonzalez complained in

his motion for new trial that his trial counsel incorrectly advised that "he might not be deported after a plea of guilty or no contest" and that the "faulty and incomplete advice" actually harmed him. In his affidavit attached to his motion, Gonzalez attested:

> I was informed by my former Attorney, F.B. Larrea, concerning the plea of guilty. In particular, [Larrea] told me that if I plead guilty to the indictment I might not be deported. Based on this advice, I decided to plead guilty and seek probation from the judge. If [Larrea] had informed me that there was no chance I would not be deported after a plea of guilty, I would never had pled guilty and sought probation from the judge. If I had known that a plea of guilty would mean I would be deported, without exception, I would have plead [sic] not guilty instead and had a jury trial.

Gonzalez testified at the hearing of his motion for new trial that he recalled previously pleading nolo contendere before the trial court. He acknowledged his recollection of the trial judge asking at the plea hearing if he was a United States citizen and advising him that his plea of no contest "can and likely will result in [his] deportation, exclusion from this country and/or denial of naturalization," and his telling the trial judge he understood. Gonzalez recollected telling the trial judge that his trial attorney, who is fluent in Spanish, had gone over the plea agreement documents with him. Gonzalez testified Larrea told him before pleading that if he pleaded nolo contendere or "declare[d himself] guilty," he would not be deported.

Board certified immigration attorney Nicholas Chavez testified on behalf of Gonzalez at the motion-for-new-trial hearing. Chavez understood from Gonzalez's affidavit that Larrea told Gonzalez that if he pleaded nolo contendere he would not, or might not, face immigration consequences. Chavez testified that a plea of nolo contendere represents a conviction for purposes of federal immigration law, *see* 8 U.S.C.A. § 1101(a)(48)(A) (West 2005), and a sexual-assault-of-a-child conviction is an aggravated felony conviction for which "deportation is almost a certainty." *See* 8 U.S.C.A. § 1227(a)(2)(A)(iii). According to Chavez, there are circumstances under which a person convicted of an aggravated felony could apply for relief from deportation if deportation would work an unusual hardship on a qualified family member,

*see* 8 U.S.C.A. §§ 1182(h), 1229b, (West 2005);[4] however, if the conviction predated 1996 or if the qualified family member is not a United States citizen, the defendant is not eligible for such

[4] In part, 8 U.S.C.A. § 1882(h), entitled "Inadmissible aliens," provides:

> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(1), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(11) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –
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> * * *
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> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien;
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> * * *
>
> and
> (2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.
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> * * *
>
> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

8 U.S.C.A. § 1882(h).

In part, 8 U.S.C.A. § 1229b provides:

> (a) Cancellation of removal for certain permanent residents
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> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien ─
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
> (3) has not been convicted of any aggravated felony.
>
> (b) Cancellation of removal and adjustment of status for certain nonpermanent residents
>
> (1) In general
>
> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien –
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under section 1182(a), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C.A. § 1229b.

waiver relief. Chavez heard Gonzalez's testimony that neither his wife nor children were United States citizens, and Gonzalez's conviction was after 1996. It was Chavez's opinion that a plea of nolo contendere by Gonzalez made deportation a virtual certainty because Gonzalez did not qualify for readjustment or waiver under the Immigration and Nationality Act (INA), and therefore Gonzalez's trial attorney had a heightened responsibility to provide Gonzalez correct advice regarding the consequences of entering a plea. *See Padilla*, 559 U.S. at 369. Chavez acknowledged he was not present during any conversation between Gonzalez and Larrea.

At the motion-for-new-trial hearing, Larrea testified he specializes in criminal defense and immigration removal proceedings, and he was hired to represent Gonzalez in state court on the charge of sexual assault of a child but was not hired to represent Gonzalez in immigration matters. Larrea went over the plea agreement form with Gonzalez and translated the forms into Spanish for him. Larrea, aware of his obligations in consulting with criminal defense clients regarding immigration issues and the potential impact of guilty or nolo contendere pleas in criminal cases, consulted with Gonzalez regarding immigration consequences of a nolo contendere plea to the charge of sexual assault of a child. Specifically, Larrea testified he told Gonzalez that sexual assault of a child is considered an aggravated felony under the INA. *See Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1020–021 (6th Cir. 2016) ("The [INA] defines 'sexual abuse of a minor' as an aggravated felony.") (citing 8 U.S.C.A. § 1101(a)(43)(A) (West 2005)).[5] Although Gonzalez had been a legal permanent resident for over seven years and in certain circumstances a "cancellation-of-removal defense" may be available in immigration cases, Larrea did not review statutory cancellation of removal with Gonzalez, because if Gonzalez was found guilty of sexual assault of a child, whether following a trial or as a result of

[5] *See also Ex parte Lujan*, No. 08-13-00298-CR, 2015 WL 3646662, at *2 (Tex. App.—El Paso June 12, 2015, pet. ref'd)(term "aggravated felony" is defined term under INA and includes "murder, rape, or sexual abuse of a minor") (citing 8 U.S.C.A. § 1101(a)(43)(A)).

a nolo contendere plea, Gonzalez would not qualify for cancellation of removal. Larrea told Gonzalez that in his opinion, Gonzalez would not be eligible for cancellation of removal in this case because conviction for the offense of sexual assault of child is an aggravated felony under the INA that disqualifies a person from eligibility for cancellation of removal. *See Ex Parte Rodriguez*, 378 S.W.3d 486, 490 (Tex. App.—San Antonio 2012, pet. ref'd) (under INA, Attorney General has discretionary authority to cancel removal in some instances; legal permanent resident who has been admitted for at least five years, who has continuously resided in United States for seven years, and who has not been convicted of aggravated felony as defined by INA may apply for cancellation of removal) (citing 8 U.S.C.A. § 1229b(a)). Larrea explained to Gonzalez that a plea of nolo contendere in this sexual-assault-of-a-child case would result in deportation.

During oral submission before this Court, counsel for Gonzalez conceded that Gonzalez did not qualify for cancellation of removal. *See* 8 U.S.C.A. § 1229b ("The Attorney General may cancel removal in the case of [a permanent resident] alien who is inadmissible or deportable from the United States if the alien . . . has not been convicted of any aggravated felony."). Instead, Gonzalez complains in his appellate brief and at oral submission that he was eligible for a "waiver of inadmissibility" pursuant to 8 U.S.C.A. § 1182(h) and that his trial counsel failed to advise him concerning availability of the waiver. *See* 8 U.S.C.A. § 1182(h). Gonzalez argues the section 1182(h) waiver has been held to be available to a person who is "already legally inside the U.S. and then seek[s] to be adjusted to LPR status." *See Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008). In support of the argument, Gonzalez notes the testimony of Chavez during the hearing on his motion for new trial concerning the opportunity of Gonzalez to seek a "waiver." However, the record in this case does not reveal when or how Gonzalez became a legal permanent resident of the United States, and therefore the applicability of section 1182(h),

as interpreted and applied by the *Martinez* court, cannot be ascertained. Moreover, even if a section 1182(h) waiver was available to Gonzalez, his trial counsel's failure to advise him concerning the opportunity to obtain a waiver, and thereby *avoid* deportation notwithstanding conviction in this case, has no bearing upon Gonzalez's ineffective assistance of counsel claim that his trial counsel was deficient by reason of not informing him that he *would* face deportation as a result of conviction in this case.

The trial counsel deficiency complained about in Gonzalez's motion for new trial was that he incorrectly advised that Gonzalez "might not be deported after a plea of guilty or no contest." Gonzalez and his trial attorney, Larrea, presented conflicting evidence regarding whether Larrea told Gonzalez he would be subject to deportation if he pleaded nolo contendere to the charged offense. The trial court had the right to accept or reject any part of Gonzalez's testimony and affidavit and to disbelieve any assertions upon which Gonzalez's claim of ineffective assistance of counsel is based. *See Odelugo*, 443 S.W.3d at 137. A reasonable view of the record, which includes Larrea's unequivocal statements that he informed Gonzalez that a nolo contendere plea to the charge of sexual assault of a child would result in his deportation, could support the trial court's denial of Gonzalez's motion for new trial based on his claim of ineffective assistance of counsel. *See id*.

We conclude Gonzalez has not met his burden of proving by a preponderance of the evidence that his trial counsel's performance was deficient in failing to provide him correct advice regarding deportation consequences of a plea of nolo contendere. *See Andrews*, 159 S.W.3d at 101. Therefore, we conclude the trial court did not abuse its discretion in denying Gonzalez's motion for new trial based on ineffective assistance of counsel. *See Odelugo*, 443 S.W.3d at 137. We resolve Gonzalez's sole issue against him.

## Modification of Judgment

We may modify a trial court's judgment to correct a clerical error when we have the necessary information before us to do so. TEX. R. APP. P. 43.2(b); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). The record reflects Gonzalez pleaded nolo contendere. The judgment erroneously reflects Gonzalez pleaded guilty. Accordingly, we modify the judgment in Case No. F-1251885-R to reflect that Gonzalez pleaded nolo contendere. The judgment is thus modified to read: "Plea: Nolo Contendere."

## Conclusion

As modified, the judgment is affirmed.

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/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

MELITON GONZALEZ, Appellant

No. 05-15-01346-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial District Court, Dallas County, Texas,
Trial Court Cause No. F-1251885-R.
Opinion delivered by Justice Fillmore,
Justices Francis and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The Plea of "Guilty" is modified to reflect the plea of "Nolo Contendere."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 2nd day of May, 2016.