Affirmed and Memorandum Opinion filed June 9, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00831-CR

EX PARTE ANTHONY GILLAN GASTON

On Appeal from the County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Cause No. 1983767

M E M O R A N D U M   O P I N I O N

Applicant Anthony Gillan Gaston pleaded guilty to the misdemeanor offense of possession of marijuana in a useable quantity of under two ounces, after reaching a plea bargain with the State. The trial court accepted the plea and sentenced Applicant to three days' confinement in the Harris County Jail and a $100 fine. In this accelerated appeal, Applicant contends that the trial court erred in denying his application for writ of habeas corpus, in which he argued that he was denied effective assistance of counsel because his counsel failed to inform Applicant of the immigration consequences of his guilty plea. We affirm.

FACTUAL BACKGROUND

Applicant is a citizen of St. Lucia. He immigrated to the United States under a student visa that has since expired. On February 1, 2010, a Harris County Sheriff's Office deputy arrested Applicant for the Class B misdemeanor offense of possession of marijuana in an amount of two ounces or less, and the next day the State filed an information charging Applicant with that offense. *See* Tex. Health & Safety Code §§ 481.121(a), 481.121(b)(1).

Applicant retained criminal defense attorney Ira Chenkin to represent him. During plea negotiations, the State offered Applicant a "time-served" plea agreement, in which the State would recommend to the trial court that Applicant be sentenced to three days' confinement in the Harris County Jail—the same amount applicant had already served—and a $100 fine. After discussing the facts of the case and the terms of the plea bargain with Chenkin, Applicant accepted the plea agreement rather than take the case to trial. The trial court accepted Applicant's plea and sentenced him as recommended in the plea agreement. Applicant did not pursue a direct appeal of his conviction.

In 2013, Applicant submitted a Form I-485 "Application to Register Permanent Residence or Adjust Status" with the United States Citizenship and Immigration Services ("USCIS"). On March 4, 2014, after an Immigration Services officer interviewed Applicant and reviewed his application materials and background, the USCIS denied Applicant's application, based on his 2010 guilty plea in Harris County and a previous guilty plea on a similar charge in Brazos County in 2002, in which Applicant was placed on community supervision for one year. In the USCIS's decision, Applicant also was advised that because of his convictions, he was "inadmissible to the United States" and there was no waiver available to him for the inadmissibility. Additionally, because Applicant's lawful

nonimmigrant or parole status had already expired when he applied, Applicant was not authorized to remain in the United States. Consequently, the USCIS instructed Applicant to "depart as soon as possible."

In June 2014, Applicant filed a pro se "emergency" application for a writ of habeas corpus seeking relief from his conviction in Harris County on several grounds. The State filed an answer to Applicant's writ application, with attached exhibits including the USCIS's decision to deny applicant's Form I-485 and an affidavit by attorney Chenkin in response to applicant's allegation of ineffective assistance of counsel. The substance of Chenkin's affidavit is as follows:

> . . . I recall meeting with Defendant and discussing the facts of the case. I recall advising Defendant that a plea of guilty could and likely would result in collateral immigration consequences. I specifically told Defendant that he could be denied citizenship and naturalization if he pled guilty. I gave Defendant ample opportunity to weigh the consequences of a guilty plea. Defendant expressed to me that he was not concerned with the collateral immigration consequences and wanted to plead guilty to the offense of Possession of Marihuana. Defendant expressed to me that he believed that he looked and sounded sufficiently "American" as to not arouse the suspicion of the United States government, notwithstanding his plea of guilty. I also advised Defendant that [he] waived his right to appeal upon a plea of guilty.
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> Defendant expressly stated to me that he did not want to try to the case to a judge or jury, but would rather plead guilty. I went over the applicable plea paperwork and made sure that Defendant understood his rights and that he was pleading [sic] voluntarily pleading guilty prior to helping Defendant enter his plea before the court. Defendant's responses to me led me to believe that his plea was voluntary and that he understood the consequences of a plea of guilty.
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> Before assisting Defendant [to] plead guilty, I procured the offense report and lab results related to Defendant's case. I observed that the amount of marihuana that Defendant was alleged to possess was small, but was nonetheless tested by a State agency laboratory. I determined that evidence suggested that the amount Defendant

> possessed was, at a minimum, an arguably useable amount. I investigated and was sufficiently familiar with the facts and laws surrounding Defendant's case sufficiently to properly advise defendant.

The trial court subsequently appointed defense counsel to assist Applicant with his writ proceedings.

In an amended application, the sole ground Applicant advanced for relief was that his trial attorney did not advise him of the possible collateral consequences of pleading guilty to the charge, and the lack of adequate legal advice constituted a denial of effective assistance of counsel. Applicant supported his application with his affidavit, in which he detailed his background and the impact of deportation on himself and his family. In the affidavit, Applicant stated that if he had been informed of the possible immigration consequences, he would have pleaded "not guilty" and taken the case to trial, because he believed that the amount of marijuana he was accused of possessing "was not a usable amount." Applicant also stated that "Mr. Chenkin did not inform me of these dire consequences, and if he had, I would not have accepted the plea bargain I was offered."

The State filed an answer to Applicant's amended application, re-urging its arguments originally advanced in response to Applicant's allegation of ineffective assistance. On September 10, 2015, the trial judge held a non-evidentiary hearing in which he took judicial notice of the parties' filings and supporting affidavits. At the conclusion of the hearing, the judge orally announced his ruling denying applicant's requested relief. The trial judge also signed a judgment reflecting his ruling that same day. Findings of fact were neither requested nor made.

ANALYSIS OF APPELLANT'S ISSUE

In his sole issue on appeal, Applicant contends that the trial court erred in denying relief because his trial counsel rendered ineffective assistance of counsel by failing to advise Applicant of the immigration consequences of his plea. Applicant maintains that he was harmed because if his attorney had informed him of the immigration consequences of his plea, Applicant would not have pleaded guilty and would have insisted on going to trial.

Standard of Review and Applicable Law

We review a trial court's determination on an application for writ of habeas corpus for abuse of discretion. *Ex parte Fassi*, 388 S.W.3d 881, 886 (Tex. App.—Houston [14th Dist.] 2012, no pet.). An applicant seeking post-conviction habeas corpus relief bears the burden of establishing 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 to grant or deny relief, we view the facts in the light most favorable to the trial court's ruling, regardless of whether the court's findings are implied or explicit, or based on affidavits or live testimony. *Fassi*, 388 S.W.3d at 886. We afford almost total deference to the trial court's findings, especially when the factual findings are based on an evaluation of credibility and demeanor. *Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006). If the resolution of the ultimate question turns on an application of legal standards, we review the issue do novo. *Fassi*, 388 S.W.3d at 886.

The test for determining the validity of a guilty plea is whether it represents a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). A guilty plea is

not knowing or voluntary if it is made as a result of ineffective assistance of counsel. *Ex parte Moussazadeh*, 361 S.W.3d 684, 689 (Tex. Crim. App. 2012). The two-pronged *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To be entitled to habeas relief, the applicant must show by a preponderance of the evidence that (1) trial counsel's performance fell below the objective standard of reasonableness, and (2) there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687−88, 694 (1984).

Under *Padilla v. Kentucky*, trial counsel's performance is deficient if the trial counsel fails to advise a non-citizen client about deportation consequences that are "truly clear." 559 U.S. 356, 369 (2010). Therefore, trial counsel performs deficiently if he "merely mentions the possibility of deportation when the relevant immigration provisions are presumptively mandatory." *Fassi*, 388 S.W.3d at 886.

When the prejudice prong of the *Strickland* test is dispositive, we need only address that prong on appeal. *Ex parte Murillo*, 389 S.W.3d 922, 927 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also My Thi Tieu v. State*, 299 S.W.3d 216, 225 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) ("[I]t is not necessary to determine whether trial counsel's representation was deficient if appellant cannot satisfy the second *Strickland* prong."). Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. As with any ineffective-assistance claim, we review the ultimate question of prejudice under *Strickland* de novo, giving deference to any underlying historical fact determinations by the trial court. *Fassi*, 388 S.W.3d at 887.

No Abuse of Discretion in Determining Applicant Not Prejudiced

Applicant contends that he was prejudiced because if he had been fully advised that his plea carried with it immigration consequences, he would not have pleaded guilty. In his affidavit, Applicant stated that his attorney Chenkin did not inform him of the possible immigration consequences of his guilty plea, and had Applicant been informed, he would have pleaded "not guilty" and taken the case to trial.

Under the prejudice prong, the applicant must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on proceeding to trial. *Hill*, 474 U.S. at 59. This standard requires the applicant to demonstrate that a decision to reject the plea agreement would have been rational under the circumstances. *See Padilla*, 559 U.S. at 372; *Fassi*, 388 S.W.3d at 886–87.

The test is objective, turning "'on what a reasonable person in the defendant's shoes would do.'" *Fassi*, 388 S.W.3d at 887 (quoting *United States v. Smith*, 844 F.2d 203, 209 (5th Cir. 1988) (per curiam)). The inquiry is made on a case-by-case basis, considering the circumstances surrounding the plea and the gravity of the alleged failure. *Murillo*, 389 S.W.3d at 928; *Fassi*, 388 S.W.3d at 887–88. When analyzing whether it would have been rational for an applicant to reject a plea agreement, this Court has identified four factors to consider: (1) whether there is evidence of the applicant's guilt, (2) whether the applicant had any factual or legal defenses, (3) whether immigration status was the applicant's primary concern, and (4) how the plea deal compared to the penalties risked at trial. *Murillo*, 389 S.W.3d at 928–30.

Concerning the evidence of Applicant's guilt, Applicant stated in his affidavit that he believed he did not possess a useable amount of marijuana. In

contrast, Chenkin averred that, although he observed that the amount of marijuana Applicant was alleged to have possessed was small, it was nonetheless tested by a State agency laboratory, and Chenkin determined that the evidence suggested that the amount was "an arguably useable amount." Thus, even though the record does not demonstrate overwhelming evidence against Applicant, there was evidence from which the trial court could have determined that a rational person in Applicant's position would not have foregone the State's time-served plea offer and risked an adverse result upon trial. Further, other than his belief that he did not possess a useable amount of marijuana, Applicant points to no affirmative evidence that he had any factual or legal defenses to the charged offense. *See Murillo*, 389 S.W.3d at 929 (taking into consideration applicant's failure to present any affirmative evidence that he had any factual or legal defenses to the charge or that he believed he was not guilty).

The trial court also could have concluded that Applicant's primary concern during the negotiation and plea process was resolving his case as soon as possible, not the immigration consequences of his plea. Although Chenkin explained to Applicant that a guilty plea "could and likely would result in collateral immigration consequences" including the denial of citizenship and naturalization, and gave Applicant "ample opportunity to weigh" those consequences, Applicant specifically advised Chenkin that he "was not concerned with the collateral immigration consequences and wanted to plead guilty . . . ." Chenkin further recounted that Applicant justified his disregard for the potential immigration consequences of his plea by telling Chenkin that he "believed that he looked and sounded sufficiently 'American' as to not arouse the suspicion of the United States government, notwithstanding his plea of guilty." Accordingly, the trial court was free to disbelieve Applicant's testimony and accept Chenkin's testimony that

Applicant's primary concern at the time of the plea negotiations was not the immigration consequences of a guilty plea. *See Fassi*, 388 S.W.3d at 888 ("[W]e note that the habeas court was free to disbelieve appellant's self-serving testimony that he would not have pled guilty if he had been aware of the immigration consequences of his plea."); *Ex parte Moreno*, 382 S.W.3d 523, 528–29 (Tex. App.—Fort Worth 2012, pet. ref'd) (stating that when weighing conflicting evidence, the trial court must make a judgment call on the credibility of the evidence and is not required to accept appellant's factual statements made in his affidavit).

Finally, the trial court could have concluded that a decision to reject the plea bargain and proceed to trial would not have been rational, and thus Applicant was not prejudiced by Chenkin's performance, because the benefits of the plea deal outweighed the risks of conviction at trial. Had Applicant insisted on a trial, he would have faced not only the same potentially adverse immigration consequences as those that resulted from his guilty plea, but also the more severe penal consequences of up to 180 days incarceration in jail, a potential fine of up to $2,000.00, or both. *See* Tex. Penal Code § 12.22 (establishing the punishment range for a Class B misdemeanor). Moreover, there is no evidence in the record that the State had offered or was willing to offer Applicant any alternative plea deals that would have permitted applicant to avoid adverse immigration consequences. *See Murillo*, 389 S.W.3d at 930–31 (finding against the defendant on the issue of prejudice when the defendant faced the choices of either accepting a plea deal for little or no jail time and presumptively mandatory deportation, or rejecting the plea deal, proceeding to trial, risking a significant likelihood of conviction, and then facing the exact same deportation consequence, along with a harsher criminal penalty and jail time).

Viewing the evidence in the light most favorable to the trial court's ruling and deferring to all of the trial court's implied factual findings that are supported by the record, we conclude that the trial court did not abuse its discretion by denying Applicant a writ of habeas corpus. We therefore overrule Applicant's issue.

CONCLUSION

We affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.
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