Affirmed and Memorandum Opinion filed January 25, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00193-CR
NO. 14-17-00194-CR
NO. 14-17-00195-CR

EX PARTE MARCELA A. BESADA-PERU, Appellant

On Appeal from the County Criminal Court at Law No. 2
Harris County, Texas
Trial Court Cause Nos. 2118654, 2118655, 2118652

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

Appellant Marcela A. Besada-Peru, born in Argentina and a legal United States resident since 2004, was convicted of two misdemeanors in 2009 after pleading guilty to the charges. Appellant contends that she is now subject to deportation as a result of her convictions. Appellant filed three applications for writ of habeas corpus, in which she alleged that her "guilty" pleas were involuntary for three reasons: (1) she was not admonished of the immigration consequences of her pleas; (2) she was unable to understand the proceedings in English and an interpreter was required; and (3) her counsel provided ineffective assistance. After a hearing,

the trial court denied her applications. She now challenges those rulings in these appeals.

We conclude the trial court did not abuse its discretion in denying relief. As to appellant's first ground, we hold that Texas Code of Criminal Procedure article 26.13—the statute on which appellant relies—imposed no obligation on the trial court to admonish appellant on the deportation consequences of her pleas for the charged misdemeanor offenses. We reject appellant's second argument because she failed to prove by a preponderance of the evidence that the trial court was aware that appellant could not speak or understand English at the time she entered her pleas. Finally, as to appellant's third argument, appellant failed to prove by a preponderance of the evidence that her trial counsel's performance fell below reasonable standards of competence by failing to request an interpreter or that counsel misled appellant as to the availability of expunction. Accordingly, we affirm the trial court's judgments.

Background

Appellant is a native of Argentina and a permanent legal resident of the United States. Appellant pleaded guilty on November 10, 2009, to charges for (1) prostitution and (2) disorderly conduct. The charges arose from appellant's alleged conduct while working at a sexually oriented business. The trial court assessed punishment of six days' confinement in county jail for the prostitution conviction and a $200 fine for the disorderly conduct conviction. As part of the plea agreement, the State dismissed a third charge, also for prostitution. Appellant did not appeal the convictions.

Almost seven years after her convictions, appellant filed three applications for writ of habeas corpus.[1] In each application, appellant challenged the voluntariness of her convictions on three grounds. First, she alleged that her counsel rendered ineffective assistance because (a) before appellant pleaded guilty, her counsel failed to advise her that a "guilty" plea and conviction for the charged offenses involving moral turpitude may affect her immigration status,[2] and (b) counsel knew appellant was not fluent in English but failed to request an interpreter. Second, appellant argued that the trial court accepting the plea failed to admonish appellant regarding the immigration consequences of a "guilty" plea, in violation of Texas Code of Criminal Procedure article 26.13(a)(4). Tex. Code Crim. Proc. art. 26.13(a)(4). Third, because she did not speak English, appellant claimed she did not understand the plea proceedings and an interpreter was not made available to her.

In support of her applications, appellant submitted her affidavit, her husband's affidavit, and an affidavit from her counsel during the plea proceedings, James Butler. According to appellant and her husband, appellant spoke "almost no English" in 2009, and Butler did not speak Spanish. Appellant's husband interpreted conversations between appellant and Butler. Appellant stated in her affidavit that Butler told her that her "guilty pleas" would not affect her immigration status and that she could remove her convictions from her record in three to five years. After five years passed, appellant attempted unsuccessfully to contact Butler. Appellant and her husband then spoke to other attorneys, who told them that appellant could not have her convictions expunged. Appellant contends that she is now at risk of

[1] Though appellant sought to have two convictions vacated, she filed three habeas applications because the State "should have their dismissal [of the third charge] back if the other two were returned."

[2] Appellant has abandoned this ground on appeal.

immediate deportation because her convictions are considered crimes of moral turpitude.

Butler stated in his affidavit that he could not recall with reasonable certainty whether he or the trial court specifically admonished appellant as to the possible immigration consequences of her pleas, but that he "always review[ed] the plea papers in detail before allowing [his] clients to sign."

The trial court held a hearing on appellant's applications. Appellant and her husband testified to essentially the same facts set forth in their affidavits. Appellant testified through an interpreter. Appellant did not offer any exhibits into evidence. No party introduced a reporter's record from the plea proceedings or copies of the judgments. The State called no witnesses.

The habeas judge was the same trial judge who accepted appellant's "guilty" pleas in 2009. During the hearing on appellant's habeas applications, the trial judge stated that he found appellant's testimony not credible. After the hearing, the trial court denied habeas relief.

Appellant now appeals.

Jurisdiction and Standard of Review

Appellant was convicted of two misdemeanors. Texas Code of Criminal Procedure article 11.09 allows a person who is "confined on a charge of misdemeanor" to apply for habeas relief. Tex. Code Crim. Proc. art. 11.09.[3] We

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[3] The State does not dispute that appellant is "confined" for purposes of article 11.09 because she faces collateral legal consequences resulting from her misdemeanor convictions. *See, e.g.*, *Le v. State*, 300 S.W.3d 324, 326-27 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (applicant's federal detention and potential deportation were based on Texas misdemeanor convictions and thus she faced "collateral legal consequences"); *State v. Collazo*, 264 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (the term "confinement" encompasses, *inter alia*, any restraint on personal liberty).

have appellate jurisdiction from the denial of an application for writ of habeas corpus challenging a misdemeanor conviction. *See Ex parte Jordan*, 659 S.W.2d 827, 828 (Tex. Crim. App. 1983).

We review a trial court's decision on an application for writ of habeas corpus for abuse of discretion. *See Ex parte Garcia*, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011); *Ex parte Roberts*, 494 S.W.3d 771, 774 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). An applicant seeking misdemeanor post-conviction habeas corpus relief must establish entitlement to such relief by a preponderance of the evidence. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002).

The trial court sits as the fact finder in a habeas proceeding brought under article 11.09. *See Ex parte Martinez*, 451 S.W.3d 852, 856 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). In such cases, the habeas court is the sole judge of witness credibility, and we will not disturb its ruling absent a clear abuse of discretion. *See id.*; *see also Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007). The trial court may accept or reject any or all of any witness's testimony, even if that testimony is uncontroverted. *Ex parte Peterson*, 117 S.W.3d at 819 n.68; *Rios v. State*, 377 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *see also, e.g.*, *Cantu v. State*, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008) (describing abuse-of-discretion standard generally); *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000) (stating, in motion to suppress context, "the judge may believe or disbelieve all or any part of a witness's testimony, even if that testimony is not controverted"); *cf. Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (holding that, in motion for new trial context, trial court not required to accept as true testimony of accused or any defense witness simply because it was uncontroverted).

We infer all implied findings of fact that are necessary to support the habeas court's ruling. *See Ex parte Martinez*, 451 S.W.3d at 856. We defer to the habeas court's implied or explicit findings of fact that are supported by the record, even when no witnesses testify and all of the evidence is submitted through affidavits. *See Ex parte Wheeler*, 203 S.W.3d 317, 325-26 (Tex. Crim. App. 2006). We consider the evidence presented in the light most favorable to the habeas court's ruling. *Ex parte Fassi*, 388 S.W.3d 881, 886 (Tex. App.—Houston [14th Dist.] 2012, no pet.). We will uphold the habeas court's judgment as long as it is correct on any theory of law applicable to the case. *Ex parte Taylor*, 36 S.W.3d 883, 886 (Tex. Crim. App. 2001) (per curiam).

Analysis

When a criminal defendant pleads guilty she waives several constitutional rights, such as the right to a trial by jury, the right to confront the witnesses against her, and her Fifth Amendment privilege against self-incrimination. *Davison v. State*, 405 S.W.3d 682, 686 (Tex. Crim. App. 2013). Given that a "guilty" plea is a "grave and solemn act to be accepted only with care and discernment," *Brady v. United States*, 397 U.S. 742, 748 (1970), the waiver of constitutional rights associated with such a plea "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* It follows, therefore, that for a "guilty" plea to be valid, the defendant must have an actual awareness of the constitutional rights and privileges that she necessarily relinquishes. *Davison*, 405 S.W.3d at 686. In other words, she must have "a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). A person who proves by a preponderance of the evidence that a "guilty" plea was not voluntary or knowing is

entitled to habeas relief. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006).

Appellant argues that she pled guilty involuntarily and without knowledge of the immigration consequences because: (1) the court did not admonish her regarding the immigration consequences of her pleas; (2) she did not speak English and could not understand the plea proceedings; and (3) her trial counsel misled her as to whether her convictions could be expunged and failed to request an interpreter.

We address each contention in turn.[4]

A. Immigration Consequences of Appellant's Guilty Pleas

In her first issue, appellant argues that her due process rights were violated because the trial court accepting her pleas in 2009 did not admonish her regarding the immigration consequences of a "guilty" plea, thereby rendering appellant's pleas involuntary.

As the sole basis for her argument, appellant contends the trial court violated Texas Code of Criminal Procedure article 26.13. That statute requires a trial court, prior to accepting a plea of guilty or nolo contendere, to 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." Tex. Code Crim. Proc. art. 26.13(a)(4).

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[4] The State argues for the first time on appeal that the doctrine of laches bars appellant's requests for habeas relief. *See Ex parte Bowman*, 447 S.W.3d 887, 888 (Tex. Crim. App. 2014) (per curiam) (State does not waive defense of laches by failing to assert the defense in the trial court). Because we conclude the trial court did not abuse its discretion in denying the applications, we need not consider the State's laches argument. *Accord Ex parte Martinez*, 451 S.W.3d at 855 (addressing appellant's merits-based issue rather than trial court's alternative laches ruling).

Appellant's reliance on article 26.13 is misplaced. The Court of Criminal Appeals has long held that article 26.13's statutory admonishments do not apply to misdemeanor cases. *See, e.g.*, *State v. Guerrero*, 400 S.W.3d 576, 589 (Tex. Crim. App. 2013) ("[A]s we have repeatedly stated, [article 26.13] does not apply to misdemeanor cases."). According to appellant, both of her convictions were misdemeanors. Thus, the trial court accepting the 2009 pleas was not required to admonish appellant under article 26.13. *See id.*

We therefore hold that the trial court did not abuse its discretion in denying appellant's habeas applications on the ground that she was not admonished under article 26.13 on the immigration consequences of her pleas. *See Ex parte Garcia*, 353 S.W.3d at 787.

We overrule appellant's first issue.

B. Appellant's Ability to Understand the Plea Proceedings

In her second issue, appellant argues that the trial court violated her due process rights by failing to admonish appellant in a language she could understand, i.e., Spanish, thereby rendering her pleas involuntary.[5]

Providing an interpreter to an accused who does not understand English is required by the Confrontation Clause. *See Garcia v. State*, 149 S.W.3d 135, 141 (Tex. Crim. App. 2004). The protections afforded by the Confrontation Clause extend to foreign nationals[6] and apply in plea proceedings. *See Linton v. State*, 275 S.W.3d 493, 501 (Tex. Crim. App. 2009); *Aleman v. State*, 957 S.W.2d 592, 594

[5] In her third issue, which we address in the next section, appellant challenges her trial counsel's failure to have an interpreter appointed during the plea proceedings. This second issue solely concerns whether the trial court erred in not appointing an interpreter.

[6] *Garcia*, 149 S.W.3d at 141 (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

(Tex. App.—El Paso 1997, no pet.). If a defendant cannot hear or does not speak English well enough to understand plea proceedings or communicate with counsel, fundamental fairness and due process of law require that an interpreter be provided to translate between English and the accused's language. *Linton*, 275 S.W.3d at 500. Appointment of an interpreter is mandatory when the court determines on motion that "a person charged or a witness does not understand and speak the English language,"[7] or when the trial court becomes aware that a defendant does not speak or understand English. *See Garcia*, 149 S.W.3d at 145; *Baltierra v. State*, 586 S.W.2d 553, 559 & n.9 (Tex. Crim. App. 1979). Absent a knowing and voluntary waiver made on the record, "the judge has an independent duty to implement this right," regardless of whether the matter is raised by the parties. *Garcia*, 149 S.W.3d at 145. A failure to do so results not only in a statutory violation but can render a defendant's plea constitutionally involuntary, *Aleman*, 957 S.W.2d at 594, or violate the defendant's right to confront the witnesses against the defendant. *Garcia*, 149 S.W.3d at 145. However, that a defendant is more fluent in a language other than English does not necessitate an interpreter if the defendant demonstrates an ability to understand and speak English. *See Hernandez v. State*, 986 S.W.2d 817, 822 (Tex. App.—Austin 1999, pet. ref'd).

A trial court may become aware that the defendant does not understand English if informed by a party or "by noticing the problem *sua sponte*." *Garcia*, 149 S.W.3d at 145. "Decisions regarding adequate interpretive services depend upon a potpourri of factors, including the defendant's understanding of the English language and the complexity of the pertinent law and its procedures, and the testimony." *Linton*, 275 S.W.3d at 500. Accordingly, because the trial court has the defendant in its presence, "observ[es] his level of comprehension, and ask[s] him

[7] Tex. Code Crim. Proc. art. 38.30(a).

questions," it "has wide discretion in determining the adequacy of interpretive services." *Id*.

Appellant has not proven by a preponderance of the evidence that the trial court was aware of an alleged problem with appellant's understanding of the English language during the plea proceedings. The only evidence appellant provided in support of her claim was her own testimony and that of her husband. According to her affidavit, appellant's primary language is Spanish, and she testified at the habeas hearing that, at the time of her pleas, she did not speak or understand English. Appellant also testified that her trial counsel did not speak Spanish. Appellant's husband translated the conversations between appellant and her counsel. Butler's affidavit, attached to appellant's habeas petitions, did not address whether Butler spoke English or Spanish to appellant, but he nonetheless knew "with certainty" that he "always review[ed] the plea papers in detail before allowing [his] clients to sign."

We do not have a reporter's record of the plea hearing, and nothing in the record provided shows that appellant requested an interpreter at the plea hearing. Appellant did not file a motion for an interpreter. When asked questions in English during the plea proceedings, she answered in English. Although appellant contends her answers were prompted by her counsel, she has not shown that she raised any objection during plea proceedings. Nothing in the record reflects that the trial court was made aware of appellant's purported inability to speak, read, and understand English. In fact, in making her ineffective assistance of counsel arguments, appellant asserts (and thus confirms) that her counsel failed to alert the trial court to her inability to speak English and her need for an interpreter.

Even though the State did not offer evidence to controvert appellant's and her husband's affidavits, it was within the trial court's discretion to disbelieve their assertions that appellant did not read or speak English at the time of the plea

proceedings. *See Charles v. State*, 146 S.W.3d 204, 210 (Tex. Crim. App. 2004), *superseded by rule on other grounds as stated in State v. Herndon*, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007); *Shanklin v. State*, 190 S.W.3d 154, 167 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd); *see also Le*, 300 S.W.3d at 327 (holding that appellate court must defer to all implied factual findings supported by record). As stated on the record, the trial judge did not believe that appellant "does not understand sufficient English in order to have participated in a plea in a criminal court." The trial court, and not this court, is in the best position to have determined whether appellant understood what she was stipulating to at the time she entered her plea. *See Ex parte Wilson*, 171 S.W.3d 925, 928 (Tex. App.—Dallas 2005, no pet.). We give almost total deference to the trial court's determination of historical facts supported by the record, especially the court's findings that are based on an evaluation of credibility. *See Ex parte Klem*, 269 S.W.3d 711, 718 (Tex. App.—Beaumont 2009, pet. ref'd); *Ex parte Wilson*, 171 S.W.3d at 928. Given the conflicting evidence regarding appellant's ability to understand and speak English, the judge reasonably could have disbelieved appellant's and appellant's husband's testimony that appellant did not speak or understand English at the time of the plea hearing, and we will not disturb that determination on appeal. *See, e.g.*, *Ex parte Obi*, 446 S.W.3d 590, 599 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (op. on reh'g) ("The trial court did not credit Obi's self-serving testimony; and, given the conflicting evidence, it was free to disregard it.") (citing *Ex parte Fassi*, 388 S.W.3d at 888). We defer to the habeas court's implied finding that there was no need for an interpreter at the time appellant entered her "guilty" pleas. *See Le*, 300 S.W.3d at 327.

Appellant has not shown by a preponderance of the evidence that the trial court was aware during the plea proceedings that appellant could not speak and

understand English. *Accord, e.g.*, *Valdez v. State*, 82 S.W.3d 784, 788 (Tex. App.—Corpus Christi 2002, no pet.) (affirming denial of habeas relief where appellant failed to show by a preponderance of the evidence that he was not aware of the consequences of his plea). We therefore hold that, on this record, the trial court did not abuse its discretion in denying appellant's habeas applications on the ground that she was not properly admonished in a language she could understand. *See Ex parte Obi*, 446 S.W.3d at 599; *Valdez*, 82 S.W.3d at 788.

We overrule appellant's second issue.

C. Ineffective Assistance of Counsel Claim

In her third issue, appellant argues that she received ineffective assistance of counsel, rendering her pleas involuntary.

A defendant has a constitutional right to effective assistance of counsel in plea proceedings. *Ex parte Reedy*, 282 S.W.3d 492, 500-01 (Tex. Crim. App. 2009); *see also* U.S. Const. amend. VI; Tex. Const. art. I, § 10. This right extends to the plea bargaining process. *See Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991). When an applicant for habeas corpus relief challenges the validity of a plea entered upon the advice of counsel and contends that her counsel was ineffective, she must show that (1) her trial counsel's advice with respect to accepting a plea offer did not fall within the range of competence demanded of attorneys in criminal cases, and (2) but for the attorney's errors or deficiencies, the applicant would not have pleaded guilty and would have insisted on going to trial. *Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010) (citing *Ex parte Reedy*, 282 S.W.3d at 500; *Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex. Crim. App. 1999)).

As the reviewing court, we indulge a strong presumption that counsel's actions and decisions fell within the wide range of reasonable professional

assistance. *See Ex parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005). To overcome this presumption, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the ineffectiveness. *See Ex parte Wolf*, 296 S.W.3d 160, 168-69 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999)). A habeas applicant has the burden to show by a preponderance of the evidence that counsel's performance fell below a reasonable standard of competence. *See Ex parte Moody*, 991 S.W.2d at 858.

Appellant claims she received ineffective assistance of counsel in two respects: (1) her attorney failed to request an interpreter; and (2) her attorney misrepresented to her that she could "clear up her record in three to five years, [so] the best thing she could do is plead guilty to crimes she did not commit." We address each claim in turn.

1. *Failure to request an interpreter*

Appellant contends that her counsel should have requested the court appoint an interpreter during the plea proceedings. Appellant admitted, however, that she answered the trial court's questions in English when entering her pleas. The only contrary evidence in the record regarding whether Butler knew appellant required an interpreter is appellant's and her husband's testimony. By denying relief, the trial court impliedly found appellant and her husband not credible.[8] We defer, as we must, to the trial court's assessment of credibility. *See Ex parte Martinez*, 451

[8] Though the habeas court did not enter findings of facts, the judge and appellant's counsel engaged in the following exchange during the hearing on appellant's applications:

> [Appellant's counsel]: And I think the testimony is uncontroverted that her lawyer did not do a stellar job representing her. . . .
>
> [Court]: You're right, it is uncontroverted only if I believe her testimony about that is true, and I got to tell you I don't.

S.W.3d at 856 ("The trial court was free to disbelieve this testimony, and in its findings of fact, it expressly determined that appellant's account was not credible. The court did not make a similar finding with respect to [other] affidavit testimony . . . but we can infer that this testimony was implicitly rejected.") (citing *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013) (holding that appellate court must defer to trial court's implicit determination that an affiant lacks credibility, regardless of whether the affidavit testimony is controverted)).

As we determined above, given the conflicting evidence regarding appellant's ability to speak English, the habeas judge reasonably could have disbelieved appellant's testimony that she did not speak or understand English at the time of the plea hearing, and we will not disturb that determination on appeal absent an abuse of discretion. *See Ex parte Obi*, 446 S.W.3d at 599.

Viewing the evidence in the light most favorable to the habeas court's ruling, we conclude that appellant has not met her burden of showing that counsel's performance fell below a reasonable standard of competence by not moving to appoint an interpreter during the plea proceedings. *See Ex parte Fassi*, 388 S.W.3d at 886.

2. *Alleged failure to correctly advise regarding the availability of expunction*

Appellant has also failed to meet her burden of showing that counsel misled her as to the availability of expunction. Again, the only evidence of counsel's alleged misrepresentation that appellant could have her convictions removed from her record came from appellant and her husband, whom the trial court found not credible. We defer to the trial court's determination. *Ex parte Martinez*, 451 S.W.3d at 856.

Further, appellant's counsel stated in his affidavit that he could state with certainty that he "always review[ed] the plea papers in detail before allowing [his]

clients to sign." From this, the trial court reasonably could infer that counsel reviewed with appellant the charges against her and the consequences of her plea. Our prior precedent informs this conclusion. In *Le*, the appellant claimed that her counsel had erroneously told her that if she pleaded guilty, she could pay court fees and the case would be dismissed. *Le*, 300 S.W.3d at 327. The attorney's affidavit indicated that he "fully discussed" with appellant the case, charges, and consequences of her plea. *Id.* This court affirmed the trial court's denial of habeas relief, holding that the attorney's affidavit supported the trial court's implied finding that counsel provided effective assistance. *Id.* Similarly here, counsel's affidavit supports the habeas court's implied finding that appellant received effective assistance of counsel. *See id.*

* * *

For the foregoing reasons, we hold that the trial court did not abuse its discretion in denying appellant's applications for habeas corpus relief on the ground that appellant received ineffective assistance of counsel. We overrule appellant's third issue.

Conclusion

Appellant has failed to show by a preponderance of the evidence that her pleas of "guilty" were not entered voluntarily. Accordingly, we affirm the trial court's orders denying habeas corpus relief.

/s/ Kevin Jewell
Justice

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