Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00420-CR

Ex Parte Gustavo **GARZA**

From the 227th Judicial District Court, Bexar County, Texas
Trial Court No. 2019CR3143
Honorable Andrew Wyatt Carruthers, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: December 29, 2021

AFFIRMED

Gustavo Garza appeals the trial court's order denying his application for a writ of habeas corpus filed under article 11.072 of the Texas Code of Criminal Procedure. We affirm.

BACKGROUND

A grand jury indicted Garza for the offense of unlawful possession of a firearm by a felon. After the trial court appointed counsel to represent him, Garza pled no contest to the indicted offense in accordance with a plea bargain agreement. At the plea hearing, Garza represented, both in writing and in response to questioning in open court, that he was a United States citizen. The trial court accepted Garza's plea and sentenced him to three years' imprisonment, then suspended the sentence and placed Garza on two years' community supervision.

Despite his representations at the plea hearing, Garza was not a United States citizen. While on community supervision, the U.S. Department of Homeland Security notified Garza that he was subject to removal from the United States, arrested him, and placed him in a federal immigration detention facility pending a deportation hearing.

During his detention in the federal immigration facility, Garza, represented by different counsel, filed the underlying application for a writ of habeas corpus.[1] The application presented three grounds for habeas corpus relief. In one ground, Garza argued that he had received ineffective assistance of counsel from plea counsel during the plea proceedings. In a second ground, Garza argued his plea was involuntary. In a third ground, Garza argued that his detention in a federal immigration facility violated his Eighth Amendment right against cruel and unusual punishment. In his habeas corpus application, Garza asked the trial court to vacate his no-contest plea and grant him a new trial.

The trial court held a hearing on Garza's habeas corpus application.[2] At the hearing, the trial court took judicial notice of its file and the clerk's record, which contained three affidavits from Garza and the reporter's record from the plea hearing. Thereafter, Garza testified that he was a permanent resident, or "green card holder," and not a United States citizen. Garza also testified that before he entered his no-contest plea, he and his plea counsel had discussed the plea bargain; however, he did not remember if his plea counsel had asked him about his United States citizenship or his immigration status. Garza's plea counsel did not testify at the hearing.[3]

[1]All references are to Garza's second amended habeas corpus application.

[2]Because of the COVID-19 pandemic, the habeas corpus hearing was conducted remotely using Zoom video-conferencing technology.

[3]The reporter's record indicates that plea counsel left the Zoom waiting room before the habeas corpus hearing began. Garza did not object to plea counsel's absence from the hearing.

At the end of the hearing, the trial court expressly found that Garza's plea counsel "rendered effective assistance of counsel" and that plea counsel "had no notice that [Garza] was a noncitizen. In fact, when asked by the Court in the plea process, [Garza] indicated he was a U.S. citizen." The trial court further found that Garza's "plea was freely and voluntarily given." The trial court signed an order denying Garza's habeas corpus application. Garza appealed.

ARTICLE 11.072 HABEAS CORPUS RELIEF

An individual who is serving a term of community supervision may file an application for a writ of habeas corpus challenging "the legal validity of the conviction for which" "community supervision was imposed" or "the conditions of community supervision." *See* TEX. CODE CRIM. PROC. ANN. art. 11.072 § 2(b)(1),(2). We have jurisdiction to consider an appeal from an order denying habeas corpus relief under article 11.072. *Id*. 11.072 § 8.

"An applicant for a post-conviction writ of habeas corpus bears the burden of proving his claim by a preponderance of the evidence." *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016). In article 11.072 cases, the trial court is the sole finder of fact, and the reviewing court acts only as an appellate court. *Ex parte Sanchez*, 625 S.W.3d 139, 144 (Tex. Crim. App. 2021). As the reviewing appellate court, "we afford almost total deference to a trial court's factual findings when they are supported by the record, especially when those findings are based upon credibility and demeanor." *Ex parte Torres*, 483 S.W.3d at 42. Moreover, in conducting our review, we imply all findings of fact that are necessary to support the trial court's ruling. *Ex parte Martinez*, 451 S.W.3d 852, 856 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). "A trial court's denial of a writ of habeas corpus is reviewed under an abuse of discretion standard." *Ex parte Leal*, 427 S.W.3d 455, 459 (Tex. App.—San Antonio 2014, no pet.). "We review the facts in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion." *Id*.

INEFFECTIVE ASSISTANCE OF COUNSEL

Garza's arguments on appeal essentially mirror the grounds he presented in his habeas corpus application.[4] Garza first argues that the trial court erred in denying his habeas corpus application because he established that he received ineffective assistance of counsel during the plea proceedings. Garza's ineffective assistance of counsel claims focus both on plea counsel's alleged failure to advise him of the immigration consequences of his plea, and plea counsel's alleged failure to review the evidence and discuss possible suppression issues and defenses with him.

"To demonstrate that he is entitled to post-conviction relief on the basis of ineffective assistance of counsel, an applicant must demonstrate that (1) counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) the applicant was prejudiced as a result of counsel's errors, in that, but for those errors, there is a reasonable probability of a different outcome." *Ex parte Torres*, 483 S.W.3d at 43.

Proving deficient performance requires the applicant to show that trial counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms. *Ex parte Leal*, 427 S.W.3d at 459 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Courts indulge a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance and their review of counsel's representation is highly deferential. *Ex parte Chandler*, 182 S.W.3d 350, 354 (Tex. Crim. App. 2005).

[4]One additional complaint appears in Garza's appellate briefing. Garza complains about his inability to obtain an affidavit or testimony from plea counsel. Generally, to preserve a complaint for appellate review, the record must show that the complaint was made to the trial court by timely request, objection, or motion. TEX. R. APP. P. 33.1(a). Because the record does not show that Garza raised this complaint in the trial court, it is not preserved for our review. *See id.*; *Ex parte Mitchell*, No. 04-02-00533-CR, 2002 WL 31890896, at *1 (Tex. App.—San Antonio Dec. 31, 2002, no pet.) (not designated for publication) (concluding in an appeal from an order denying a habeas corpus application that issue not raised in the trial court was not preserved for appellate review).

Proving prejudice in a plea case requires the applicant to show a reasonable probability exists that, but for counsel's errors, he would not have pleaded guilty or no-contest and would have insisted on going to trial. *Ex parte Torres*, 483 S.W.3d at 47.

An applicant seeking post-conviction habeas corpus relief must prove both elements of his ineffective assistance claim by a preponderance of the evidence. *See Ex parte Martinez*, 330 S.W.3d 891, 900-01 (Tex. Crim. App. 2011). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). An ineffective assistance of counsel claim must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*.

We begin our analysis by determining if Garza met his burden to prove that his plea counsel's performance was deficient.

Alleged Failure to Advise of Immigration Consequences

In his habeas corpus application, Garza argued that plea counsel's performance was deficient because she "fail[ed] to inquire as to his citizenship and, thereby, fail[ed] to properly advise him regarding the immigration consequences" of his plea.

The United States Supreme Court has recognized that the scope of the Sixth Amendment requires an attorney representing a noncitizen criminal defendant to provide advice about the risk of deportation arising from a no-contest or guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010); *Ex parte Torres*, 483 S.W.3d at 43. "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." *Ex parte Aguilar*, 537 S.W.3d 122, 126 (Tex. Crim. App. 2017). "*Padilla* requires that counsel give a defendant accurate legal advice about the 'truly clear' consequences of a plea of guilty to an offense that, as a matter of law, renders him 'subject to

automatic deportation.'" *Ex parte Torres*, 483 S.W.3d at 46. When counsel fails to comply with the requirements articulated in *Padilla* and its progeny, her representation falls below an objective standard of reasonableness. *See Ex parte Aguilar*, 537 S.W.3d at 128 (holding counsel's performance was deficient when counsel knew his client was not a United States citizen, had been advised by an immigration attorney that a felony conviction would subject his client to removal, but nevertheless advised his client that the plea would not have negative immigration consequences); *Ex parte Torres*, 483 S.W.3d at 44-46 (holding that counsel's performance was deficient when, in the face of certain deportation, he advised his client that deportation was a mere possibility).

In conducting our review of plea counsel's performance, we defer to the trial court's express and implied factual findings that are supported by the record. *Ex parte Torres*, 483 S.W.3d at 42; *Ex parte Wheeler*, 203 S.W.3d 317, 325-26 (Tex. Crim. App. 2006). In the present case, the trial court made an express finding that plea counsel had no notice that Garza was not a United States citizen. This finding is supported by the record.

The clerk's record contains a copy of the written admonishments sworn to and signed by Garza on the day he entered his no-contest plea. At the habeas hearing, Garza conceded that he had received and signed the written admonishments, which state that: (1) Garza was warned that a plea of guilty or nolo contendere may result in deportation for noncitizens; (2) Garza's plea counsel explained his "immigration consequences" to him; and (3) Garza certified that he was a United States citizen.[5] Additionally, the reporter's record from the plea hearing shows that before

[5]These written admonishments state:

> If you are not a U.S. citizen, a plea of guilty or nolo contendere may result in deportation, exclusion from admission to this country or denial of naturalization under federal law. I have been explained these immigration consequences by my attorney.
> ….

Garza entered his plea, the trial court asked him, "Mr. Garza, are you a citizen of the United States of America, sir?" and Garza answered, "Yes, sir."

Garza argues plea counsel's performance was deficient because she failed to inquire about his citizenship during their pre-plea discussions. But this argument is not supported by the evidence. According to Garza's testimony, he could not recall whether or not his plea counsel had "ever inquire[d] as to whether or not [he was] a United States citizen." Similarly, in one of the affidavits submitted with his habeas corpus affidavit, Garza testified, "I don't remember if [plea counsel] ask[ed] me if I was a U.S. citizen or not." No other evidence was presented on the subject. Based on this record, Garza failed to prove that plea counsel did not inquire about his citizenship.

The record supports a finding that plea counsel had no notice that Garza was a non-citizen and, therefore, she was not required to provide him advice about the immigration consequences of his plea because no such consequences existed. *See Ex parte Aguilar*, 537 S.W.3d at 128 (holding that plea counsel was deficient for providing incorrect advice about the immigration consequences of a guilty plea when "counsel knew [appellant] was not a United States citizen and was concerned with the immigration consequences of the criminal charges."). Garza affirmatively represented to the trial court and plea counsel that he was a United States citizen. Because of these representations, it was reasonable for plea counsel to believe that no immigration consequences would flow from Garza's no-contest plea.

Deferring to the trial court's express and implied findings that are supported by the record, we conclude that Garza failed to prove, by a preponderance of the evidence, that plea counsel's

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I have been explained my immigration consequences by my attorney. I certify that:

____ I am a United States citizen
____ I am NOT a United States citizen.

Garza certified that he was a United States citizen by placing his initials on the first line.

performance fell below an objective standard of reasonableness by not advising him of the immigration consequences of his plea. *See Ex parte Izquiredo*, No. 01-18-00388-CR, 2019 WL 1119606, at *3 (Tex. App.—Houston [1st Dist.] Mar. 12, 2019, no pet.) (mem. op.) (not designated for publication) (holding trial counsel's performance was not deficient for failing to advise a criminal defendant of the immigration consequences of her plea when the defendant had represented that she was a United States citizen); *Ex parte Pinnock*, No. 14-17-00591-CR, 2018 WL 2106615, at *4 (Tex. App—Houston [14th Dist.] May 8, 2018, no pet.) (mem. op.) (not designated for publication) (concluding appellant failed to establish, by a preponderance of the evidence, trial counsel's deficient performance when the record showed that appellant told trial counsel that he was a United States citizen and, as a consequence, trial counsel was not aware of a need to advise appellant of the immigration consequences of his plea). Because Garza did not establish plea counsel's deficient performance, we need not discuss whether or not he established the required prejudice to prove his ineffective assistance of counsel claim. *See Ex parte Martinez*, 330 S.W.3d at 900 (providing that a successful ineffective assistance of counsel claim "requires the applicant to establish two components."); *Thompson*, 9 S.W.3d at 813 (same).

Alleged Failure to Review Evidence and Discuss Suppression Issues and Defenses

In his habeas corpus application, Garza argued he received ineffective assistance of counsel during the plea proceedings because plea counsel failed to review the evidence with him and failed to discuss possible suppression issues and defenses with him. However, in his appellate briefing, Garza does not cite to any legal authority setting out the prevailing professional norms regarding plea counsel's obligation to review the evidence and discuss possible suppression issues and defenses with her client during plea proceedings.

The Texas Rules of Appellate Procedure require an appellant's brief to contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the

record." TEX. R. APP. P. 38.1(i). "It is incumbent upon [an] [a]ppellant to cite specific legal authority and to provide legal arguments based upon that authority." *Bohannan v. State*, 546 S.W.3d 166, 180 (Tex. Crim. App. 2017). In the absence of such legal authority, an appellant's complaint is inadequately briefed and presents nothing for appellate review. *Id*.

Because Garza fails to support this complaint with any legal authority, this argument is inadequately briefed and presents nothing for our review. *See* TEX. R. APP. P. 38.1(i); *Bohannan*, 546 S.W.3d at 180 (concluding a due process complaint made without citing specific legal authority and providing arguments based upon that authority was inadequately briefed and declining to address it).

Viewing the evidence in the light most favorable to the trial court's order, the trial court did not err in concluding that Garza failed to prove, by a preponderance of the evidence, his ineffective assistance of counsel claims. We conclude the trial court did not abuse its discretion by denying Garza's habeas corpus application on this ground.

VOLUNTARINESS OF THE PLEA

Garza next argues the trial court abused its discretion by denying his habeas corpus application because his no-contest plea was involuntary.

"An applicant seeking habeas corpus relief on the basis of an involuntary guilty plea must prove his claim by a preponderance of the evidence." *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). "An appellate court reviewing a trial court's ruling on a habeas claim must review the record evidence in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion." *Id*.

"A plea of no contest or guilty must be free and voluntary." *Briggs v. State*, 560 S.W.3d 176, 187 (Tex. Crim. App. 2018). To be "voluntary," a no-contest or guilty plea must be made by a defendant who is aware of its direct consequences, and it cannot be induced by threats,

misrepresentations, or improper promises. *Brady v. United States*, 397 U.S. 742, 755 (1970). "When a defendant enters into a plea, attesting that [he] understands the nature of [his] plea and that it is being made knowingly and voluntarily, [he] has the burden on appeal to show that [his] plea was involuntary." *Briggs*, 560 S.W.3d at 187.

Garza's voluntariness argument is based, in part, on his claim that plea counsel was ineffective because she failed to advise him of the immigration consequences of his plea. However, as we concluded in the previous section, Garza did not establish that plea counsel's performance was deficient in this regard. The evidence showed Garza affirmatively misrepresented in writing and in open court that he was a United States citizen. Thus, Garza's plea was not rendered involuntary by ineffective assistance of counsel.

Independent of his ineffective assistance of counsel claims, Garza argues he met his burden to prove involuntariness based on the other circumstances surrounding his plea. Specifically, Garza argues: "[T]he court need not find fault in the performance of [plea] counsel" to conclude that his plea was involuntary. According to Garza, this court "can believe that [plea] counsel's performance was up to competent standards and still believe that [Garza] could not have entered into a knowing and voluntary plea."

"In considering the voluntariness of a guilty plea, the court should examine the record as a whole." *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). In this case, the reporter's record from the plea hearing shows that, prior to accepting Garza's plea, the trial court explained to Garza some of the admonishments contained in article 26.13 of the Texas Code of Criminal Procedure.[6] The trial court asked Garza if he had reviewed the written admonishments and other

[6]The purpose and function of the admonishments contained in article 26.13(a) of the Texas Code of Criminal Procedure are to assist the trial court in determining that a guilty plea is knowingly and voluntarily entered. *Fuller v. State*, 253 S.W.3d 220, 229 (Tex. Crim. App. 2008).

plea paperwork "in detail" with plea counsel before he signed the documents. The trial court also asked Garza if he understood the contents of the documents. Garza answered both questions in the affirmative. As previously stated, the written admonishments signed by Garza stated: "If you are not a U.S. citizen, a plea of guilty or nolo contendere may result in deportation, exclusion from admission to this country or denial of naturalization under federal law. I have been explained these immigration consequences by my attorney." *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4).

When, as here, the record demonstrates that a defendant was duly admonished, it creates a prima facie showing that the plea was entered knowingly and voluntarily. *See Martinez*, 981 S.W.2d at 197. "A defendant may still raise the claim that his plea was not voluntary; however, the burden shifts to the defendant to demonstrate that he did not fully understand the consequences of his plea such that he suffered harm." *Id*.

At the habeas corpus hearing, Garza presented no direct evidence that he lacked awareness of the immigration consequences of his plea at the time he entered it. The only evidence Garza presented was vague and indirect. Specifically, Garza's counsel asked him: "Had you known that a conviction for this case would have led to you being deported and having your green card status revoked, would you have accepted this deal?" In response, Garza answered: "No, I wouldn't. I would have taken it to trial." The trial court was not required to believe this testimony, much less infer from it that Garza lacked awareness of the immigration consequences of his no-contest plea. The trial court "is entitled to believe or disbelieve all or part of the witness's testimony—even if that testimony is uncontroverted—because [it] has the opportunity to observe the witness's demeanor and appearance." *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010).

Nevertheless, Garza maintains that he met his burden to establish that his plea was involuntary. Garza points out that the "only immigration advice" he received was "the blanket language given to all defendants in all felony criminal cases." Article 26.13(a)(4) requires the trial

court, prior to accepting a no-contest or guilty plea, to admonish the 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 of admission to this country, or the denial of naturalization under federal law." TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4).

To support his argument, Garza cites cases in which a guilty plea was held to be involuntary because the trial court wholly failed to provide required admonishments. *See,* e.g.*, Elliott v. State*, 874 S.W.2d 238, 240-41 (Tex. App.—El Paso 1994, no pet.) (reversing a conviction resulting from a guilty plea when the trial court wholly failed to admonish the appellant pursuant to article 26.13(a)(4)); *see also Boykin v. Alabama*, 395 U.S. 238, 239, 243-44 (1969) (holding a defendant's guilty plea was involuntary when the trial court accepted the plea without questioning the defendant to ascertain if he was knowingly and voluntarily waiving his rights). But here, unlike the situations in these cases, it is undisputed that Garza received the article 26.13(a)(4) admonishment in writing.[7] Again, the fact that Garza was admonished under article 26.13(a)(4) created a prima facie showing that his no-contest plea was voluntary. *See Martinez*, 981 S.W.2d at 197 (holding that an admonishment regarding the range of punishment, although imperfect, attained a level of substantial compliance and created a prima facie showing of voluntariness).

Garza further argues his understanding of the written admonishments was hampered by his English language skills and contends that an interpreter should have been appointed at the plea hearing to explain "the plea paperwork and the plea bargain" to him. Article 38.30 of the Texas Code of Criminal Procedure requires that an interpreter be provided for an accused person after a

[7]Effective September 1, 2019, the Legislature amended the statute to require that the article 26.13(a)(4) admonishment be provided "both orally and in writing." Act of May 10, 2019, 86th Leg., R.S., Ch. 185, §§ 1-3 (codified at TEX. CODE CRIM. PROC. ANN. art. 26.13(d), (d-1)). Because Garza pled no-contest on October 7, 2019, this amendment applied to him. However, Garza does not argue that the trial court's failure to provide the 26.13(a)(4) "both orally and in writing" had any bearing on the voluntariness of his plea.

determination is made that the person does not understand and speak English. TEX. CODE CRIM. PROC. ANN. art. 38.30(a). Because the trial court has the defendant in his presence, observes his level of comprehension, and asks him questions, it has discretion in determining whether or not a defendant is in need of an interpreter. *Linton v. State*, 275 S.W.3d 493, 500 (Tex. Crim. App. 2009) ("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.").

Contrary to Garza's argument, the record demonstrates that Garza was able to understand the written admonishments. At the habeas corpus hearing, Garza testified that he had been in the United States for more than forty years, that English was his second language, that he had learned English while attending middle school and high school in the United States, that he had earned "diplomas," and that even though he sometimes gets "slightly confused" he "speaks English well." The evidence simply does not show that Garza was unable to understand the written admonishments he received.

After examining the whole record and viewing the facts in the light most favorable to the trial court's ruling, we conclude that Garza did not prove, by a preponderance of the evidence, that his plea was involuntary. The trial court did not abuse its discretion by denying Garza's habeas corpus application on this ground.

CRUEL AND UNUSUAL PUNISHMENT

Garza argues the trial court abused its discretion by denying his habeas corpus application because he established that his detention in a federal immigration facility violated his Eighth Amendment right against cruel and unusual punishment. This ground focused on the conditions at the facility where he was awaiting his deportation hearing. At the habeas corpus hearing, Garza

testified that it was impossible for him to practice social distancing in the facility's dormitory and that he was worried about contracting COVID-19 while at the facility.

"Under article 11.072, an individual placed on community supervision for a felony offense may challenge his conviction at any time by filing an application for writ of habeas corpus with the trial court." *In re State*, 304 S.W.3d 581, 584 (Tex. App.—El Paso 2010, no pet.). "In so doing, that individual is simply challenging his state conviction and only seeking relief on his state conviction." *Id*. A trial court deciding a habeas corpus application under article 11.072, lacks the authority to order the individual's release from federal custody. *Id*. "[T]hat duty falls back on the individual to file a federal writ of habeas corpus in federal court, petitioning for his release from federal prison." *Id*.

Here, Garza's complaint about the conditions at the federal immigration facility where he was being held pending a deportation hearing did not relate to the validity of his conviction or the conditions of his community supervision. As such, this particular ground fell outside the parameters of an article 11.072 habeas proceeding. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072 (providing article 11.072 authorizes an applicant to file an application for habeas corpus to challenge the validity of the applicant's conviction ordering community supervision or the conditions of his community supervision); *cf*. *Ex parte Nguyen*, 31 S.W.3d 815, 816 (Tex. App.—Dallas 2000, no pet.) ("[T]o the extent appellant's request can be construed as an application for a writ of habeas corpus to secure his release from federal custody, this matter is one of exclusively federal jurisdiction.").

The trial court did not abuse its discretion by denying Garza's habeas corpus application on this ground.

CONCLUSION

The trial court's judgment is affirmed.

Irene Rios, Justice

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