COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00026-CR

EX PARTE HYUN CHUL LEE

FROM THE 16TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F-2012-2843-A

MEMORANDUM OPINION[1]

I. Introduction

A month after he was arrested for but not charged with possession of marijuana, Appellant Hyun Chul Lee was stopped for driving while intoxicated (DWI), during which stop he attempted to eat the marijuana that was in his possession. On this occasion, Appellant was charged with three offenses—DWI, possession of marijuana, and tampering with physical evidence.

[1]*See* Tex. R. App. P. 47.4.

On July 12, 2013, Appellant was convicted of the first two offenses. For the DWI, he was sentenced to 150 days' confinement probated for 15 months, and for the possession of marijuana he was given probation. *See* Tex. Penal Code Ann. § 12.22 (West 2011) (stating that an individual adjudged guilty of a Class B misdemeanor shall be punished by a fine not to exceed $2,000, confinement in jail for a term not to exceed 180 days, or both), § 49.04(b) (West Supp. 2016) (stating that, subject to exceptions, DWI is a Class B misdemeanor with a minimum term of confinement of 72 hours); Tex. Health & Safety Code Ann. § 481.121(b)(1)–(6) (West 2017) (stating that, depending on the quantity of marijuana possessed, the offense could be a Class A or B misdemeanor, a state jail felony, a third-degree felony, a second-degree felony, or punishable by imprisonment for life or for a term not less than 5 years and not more than 99 years).

With regard to the final charge—tampering with physical evidence, a third-degree felony offense and the one at issue in this habeas appeal—Appellant made an open plea of guilty. *See* Tex. Penal Code Ann. § 12.34 (West 2011) (stating the punishment range for a third-degree felony as two to ten years' confinement and up to a $10,000 fine), § 37.09(a), (c) (West 2016) (stating that tampering with physical evidence is a third-degree felony unless it involves a human corpse). At Appellant's counsel's request, the trial court sentenced him to four years' confinement, suspended the sentence, and placed him on community supervision for three years. Appellant did not appeal this sentence.

Appellant now appeals the trial court's denial of his habeas application under code of criminal procedure article 11.072, arguing that he received ineffective assistance of counsel with regard to the immigration consequences of his plea to the tampering charge because he is now ineligible for naturalization. *See* Tex. Code Crim. Proc. Ann. art. 11.072 (West 2015). We affirm.

II. Findings of Fact and Conclusions of Law

The trial court, which adopted the State's proposed findings of fact and conclusions of law in its order denying Appellant's habeas application, found as follows:

> 1. [Appellant] was indicted for the offense of Tampering with Physical Evidence.
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> 2. [Appellant] went before this Court on an open plea after entering a plea of guilty.
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> 3. This Court initially sought to place [Appellant] on deferred adjudication with thirty days in jail as a condition of his probation.
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> 4. [Appellant's] counsel told the judge that for immigration purposes, [Appellant] would prefer "straight probation."
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> 5. [Appellant] is a citizen of South Korea and a lawful permanent resident of the United States.
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> 6. After considering [Appellant's] request, this Court started to sentence him to five years['] imprisonment, probated for three years, but [Appellant's] counsel requested four years['] imprisonment probated for three years.
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> 7. [Appellant] was on probation for Driving While Intoxicated (DWI) at the time of the open plea in this case.
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> 8. The sentence for the prior DWI was one-hundred-and-fifty days probated for fifteen months.

> 9. In this case, this Court sentenced [Appellant] to four years[’] imprisonment, probated for three years, plus a five-hundred dollar fine.
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> 10. This Court granted early release from community supervision on March 2, 2016.
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> 11. [Appellant] did not file an appeal in this case.
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> 12. This is [Appellant’s] first application for writ of habeas corpus in this cause number.
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> 13. [Appellant] asserts a claim of ineffective assistance of trial counsel in this writ application.
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> 14. [Appellant] attached an affidavit from an immigration attorney . . . from the District of Columbia, to his application.
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> 15. [Appellant] did not assert in his application that he would have opted to go to trial rather than enter a plea before this Court if his trial counsel’s performance was determined to be deficient.

In its conclusions, the trial court acknowledged that the tampering offense counted as an aggravated felony for immigration law purposes. However, it stated that even if counsel’s performance had been deficient by requesting straight probation in lieu of deferred adjudication, Appellant would have been deemed “deportable” under immigration law “solely based upon the offense for which he was convicted and his plea of guilty” and thus, “[Appellant] has failed to prove that the outcome for immigration purposes would have been different had he requested and/or accepted deferred adjudication rather than straight probation.” The trial court alternatively concluded that Appellant’s pleadings were insufficient to meet his burden of proof that (1) he would have opted to go to

trial and that (2) such a decision would have been rational, "based upon the overwhelming amount of evidence in this case."

III. Discussion

We did not request additional briefing in this case, *see* Tex. R. App. P. 31.1, and will review whether the trial court abused its discretion by denying Appellant's application based on the ineffective-assistance-of-counsel ground he presented in his application.

In his application, Appellant argued that because a sentence of deferred adjudication would not have attached a specific jail term to his sentence, accepting the sentence as originally handed down would not have triggered federal immigration law's "aggravated felony" enhancement to the conviction. His trial counsel, by stating that Appellant would prefer "straight probation," in essence transformed the tampering felony into an aggravated felony for immigration purposes, thus subjecting him "to much harsher immigration consequences than necessary and anticipated" by foreclosing his eligibility for naturalization.

The State responded that based upon the offense for which he was indicted and to which he entered a guilty plea, Appellant would have been "deportable" even if he had been placed on deferred adjudication community supervision. *See* 8 U.S.C.A. § 1101(a)(48)(A–B) (West 2005 & Supp. 2016) (defining "conviction"); *State v. Guerrero*, 400 S.W.3d 576, 588 (Tex. Crim. App. 2013) (observing that Congress "has explicitly rejected any such notion [that

deferred adjudication is not a conviction] in the context of immigration law"). That is, the State pointed out to the trial court that even if Appellant had been successfully discharged from deferred adjudication community supervision, he would still be deemed deportable for his tampering conviction.[2] *See Ex parte Uribe*, 516 S.W.3d 658, 672 n.17 (Tex. App.—Fort Worth 2017, pet. ref'd) (citing 8 U.S.C.A. § 1101(a)(48)(A)(i)–(ii) for the proposition that a "conviction" that can make an alien deportable under the immigration and nationality act includes deferred adjudication). But deportation is not the issue before us—naturalization is.

The State also pointed out that Appellant's evidence was insufficient to prove that, even assuming his counsel's advice had been deficient, Appellant would have rationally decided to go to trial instead. *See Ex parte Torres*, 483 S.W.3d 35, 38 (Tex. Crim. App. 2016) (reinstating trial court's judgment denying habeas relief when applicant failed to show that he would have pursued a trial had he been correctly advised about his plea's immigration consequences).

[2]In *Guerrero*, the court of criminal appeals examined the legislative history of Congress's decision to eliminate the "finality" requirement for "convictions" for purposes of deportation and observed that Congress had deliberately broadened the definition to include deferred adjudication "so that 'aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered "convicted"' could no[] longer escape 'the immigration consequences normally attendant upon a conviction.'" 400 S.W.3d at 588 n.52 (citing H.R. Conf. Rep. No. 828, 104th Cong., 2nd Sess. 1996, 1996 WL 563320, at *469–97).

A. Standard of Review and Applicable Law

We review a trial court's denial of the relief requested in an application for a writ of habeas corpus under an abuse of discretion standard, viewing the record in the light most favorable to the trial court's ruling and affording great deference to its findings and conclusions, especially when they involve determinations of credibility and demeanor. *Uribe*, 516 S.W.3d at 665 (citing *Ex parte Moreno*, 382 S.W.3d 523, 526 (Tex. App.—Fort Worth 2012, pet. ref'd)). This deferential review applies even when the findings are based on affidavits rather than live testimony. *Ex parte Wheeler*, 203 S.W.3d 317, 325–26 (Tex. Crim. App. 2006).

The test for whether the trial court abused its discretion is whether its ruling was arbitrary or unreasonable, and the mere fact that a trial court may decide a matter within its discretionary authority in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion occurred. *Uribe*, 516 S.W.3d at 665. We will only overrule the trial court's ruling on an application for a writ of habeas corpus if the court's ruling was outside the zone of reasonable disagreement. *Id.* That is, absent an abuse of discretion, we must affirm the trial court's decision to deny the relief requested in the habeas corpus application. *Ex parte Mello*, 355 S.W.3d 827, 832 (Tex. App.—Fort Worth 2011, pet. ref'd) (op. on reh'g).

While a defendant is entitled to effective assistance of counsel when entering a guilty plea, *Moreno*, 382 S.W.3d at 526, when seeking post-conviction

habeas relief, he bears the burden of proving by a preponderance of the evidence that (1) counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and that (2) he was prejudiced as a result of counsel's errors, in that, but for those errors, "he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1969 (2017); *Torres*, 483 S.W.3d at 43. As we recited in *Uribe*,

> The test for determining the validity of a plea is whether it represents a voluntary and intelligent choice among alternative courses of action open to the defendant. To meet the burden under *Strickland*'s prejudice prong, the applicant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances, but he need not show that he would have received a more favorable outcome at trial. The test is objective and turns on what a reasonable person in the defendant's shoes would do.

516 S.W.3d at 666 (citations and footnote omitted).

In *Uribe*, we adopted a nonexclusive list of factors regarding the circumstances surrounding a defendant's guilty plea in light of the evidence presented to the trial court: (1) evidence of the applicant's guilt; (2) whether the applicant presented evidence of any factual or legal defenses to the charge; (3) whether the applicant presented evidence indicating that the immigration consequences of the plea had been his or her "paramount concern"; and (4) the circumstances of the plea deal compared to the penalties the applicant risked by going to trial. *Id.* at 667–68, 671–72. We also noted that the application of this test requires a record that is more than "marginally developed regarding the alleged prejudice." *Id.* at 671.

Since our issuance of *Uribe* in March 2017, the United States Supreme Court has once more weighed in on guilty pleas with deportation consequences, particularly the showing of prejudice required. *See Lee*, 137 S. Ct. at 1962. In *Lee*, the petitioner, who had spent thirty-five years in the United States as a lawful permanent resident since emigrating from South Korea when he was thirteen years old, was indicted on one count of possessing ecstasy with intent to distribute (which he both admitted was his and admitted that he had given some to friends). *Id.* at 1962–63. Lee informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of pleading guilty. *Id.* at 1963. When his attorney incorrectly assured him several times that the government would not deport him if he pleaded guilty—even after the trial judge warned Lee doing so could result in his being deported—Lee opted to accept a plea that carried a lesser prison sentence than he would have faced at trial. *Id.* at 1962, 1968 & n.4. No one disputed that his attorney's erroneous advice was deficient and that it subjected Lee to mandatory deportation because the offense qualified as an "aggravated felony" under the immigration and nationality act. *Id.* at 1962–64.

At the evidentiary hearing on Lee's motion to vacate his conviction and sentence based on ineffective assistance of counsel, Lee and his plea-stage attorney both testified that deportation was the "determinative issue" in Lee's decision to accept the plea. *Id.* at 1963. The Court reiterated that the prejudice inquiry required a case-by-case examination of the totality of the evidence

focused on the defendant's decision-making, "which may not turn solely on the likelihood of conviction after trial." *Id.* at 1966 (acknowledging that a defendant facing long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial but emphasizing that the focus is on the defendant's weighing of his prospects in deciding whether to accept a plea). The Court observed that when the consequences of going to trial or accepting a plea are, "from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Id.* For Lee, deportation after some time in prison was not meaningfully different from deportation after somewhat less time. *Id.* at 1967.

The Court stated that based on the record and circumstances of the case—including "the paramount importance Lee placed on avoiding deportation," Lee's three decades of living in the United States, his business ownership, his status as the only family member in the United States who could care for his elderly parents, who were both naturalized American citizens, and the lack of any indication that he had any ties to South Korea, to which he had never returned—it would not have been "irrational for a defendant in Lee's position to reject the plea offer in favor of trial," particularly because "[b]ut for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation," while going to trial would have made it only "[*a*]*lmost* certain[]." *Id.* at 1968. Because Lee's claim that he would not have accepted a plea had he known it would result in deportation was backed "by

substantial and uncontroverted evidence," the Court concluded that he had demonstrated a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.* at 1969.

From *Lee*, then, if a habeas applicant can show based on the totality of the circumstances that plea counsel's error was one that affected his understanding of pleading guilty, and if he can show by substantial and uncontroverted evidence (1) that deportation was the determinative issue for him in plea discussions; (2) that he had strong connections to the United States and no other country; and (3) that the consequences of taking a chance at trial were not markedly harsher than pleading guilty, then it might not be irrational to reject a guilty plea. *Id.* at 1965–67, 1969. We think that most of the nonexclusive list of factors that we adopted in *Uribe* fall under *Lee*'s "consequences of taking a chance at trial" factor, *see id.* at 1969, in that evidence of the applicant's guilt and any factual or legal defenses to the charge, along with the circumstances of the plea deal compared to the penalties risked at trial, would all be matters for the defendant to evaluate in making his decision, while the other—whether the applicant presented evidence indicating that his or her plea's immigration consequences had been his or her "paramount concern"—parallels a showing that the immigration consequences were the "determinative issue" in plea discussions. *See id.* at 1967; *Uribe*, 516 S.W.3d at 667–68, 671–72.

B. Evidence

To his application, Appellant attached the transcript of the March 13, 2014 sentencing hearing and his immigration attorney's affidavit. To its response, the State attached Appellant's indictment for tampering with physical evidence, Appellant's plea agreement on which it was noted that he would make an open plea of guilty to the court, Appellant's January 16, 2014 waivers and judicial confession, the trial court's admonition of statutory and constitutional rights with Appellant's acknowledgment, the March 13, 2014 judgment of conviction for the tampering offense, the trial court's March 14, 2014 certification of Appellant's right to appeal, and the trial court's March 2, 2016 order finding Appellant eligible for early release from community supervision.

1. Appellant's Evidence

a. Appellant's Pleadings

While not evidence, Appellant's application for habeas relief demonstrates his intentions. Contrary to the trial court's finding that Appellant did not assert in his application that he would have opted to go to trial rather than enter a guilty plea, Appellant did request in his prayer to be allowed to re-plead "Not Guilty." However, Appellant did not attach an affidavit averring that he would have opted to go to trial had he been aware that his plea and that the requested punishment would have affected his eligibility for naturalization.

b. March 13, 2014 Sentencing Hearing

The March 13, 2014 hearing reflected that the trial court had reviewed "the videotape," in addition to "the other evidence that was offered, [and] the other exhibits that were offered during the plea" in January 2014 but that it had not yet reviewed the presentence investigation report.[3] When the trial court asked whether the State wanted to present anything else, the prosecutor indicated that the State would rest on the evidence that was admitted during the plea hearing. The record of the plea hearing was not requested by Appellant for this appeal; instead, Appellant requested that only the record of his sentencing hearing be filed.

Appellant's other two judgments of conviction—the DWI and possession offenses that occurred on the same occasion as the tampering charge—were before the trial court, but they were not included with Appellant's application nor with the State's response. *Cf.* 8 U.S.C.A. § 1227(a)(2)(B) (West 2005 & Supp. 2016) (providing that an alien is deportable if he or she is convicted of a controlled substance law or regulation at any time after admission except for "a single offense involving possession for one's own use of 30 grams or less of marijuana").[4]

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[3]The record before us does not contain the videotape, the presentence investigation report, or any other evidence from the plea hearing.

[4]Thirty grams is the equivalent of around 1 ounce. The record contains no information about the quantity of marijuana that Appellant possessed with regard to his July 12, 2013 conviction, but under state law, possession of two ounces or

Appellant's mother, who testified through a translator, was the only person to testify at Appellant's sentencing hearing. She said that she had lived in the United States for twelve years and that Appellant had lived with her except when he was a freshman in college in New York. Appellant's mother said that Appellant had a brother in college and a sister in high school. Appellant had been working for his father for the last year while living at home, and his mother testified that Appellant had been a good son and that since his arrest, he had done everything his parents asked him to do. She opined that he would be successful at probation, and she affirmed that she would do everything in her power to help him be successful. Appellant's mother did not testify about whether she, her husband, or their other two children were United States citizens or lawful permanent residents or whether naturalization was a priority for Appellant.

At the conclusion of the hearing, Appellant's counsel first asked the trial court, "We will ask that the Court follow what we have requested, and that is a probationary period. There is [sic] additional issues, immigration wise, so we would ask the Court to take into account and keep the number of years on

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less is a Class B misdemeanor, possession of four ounces or less but more than two ounces is a Class A misdemeanor, and possession of five pounds or less but more than four ounces is a state jail felony. *See* Tex. Health & Safety Code Ann. § 481.121(b)(1)–(3). Possessing more than 5 pounds would subject a defendant to, depending on quantity, the third, second, or first degree felony ranges. *Id.* § 481.121(b)(4)–(6). We cannot tell from this record whether Appellant would have been deportable for his possession conviction.

probation be straight probation as much as possible." The record does not reflect what Appellant and his counsel had requested of the trial court prior to the hearing.

During sentencing arguments, the prosecutor argued against leniency because Appellant had previously been arrested for possession of marijuana the month before the traffic stop and then had shown no remorse when he was stopped again. According to the prosecutor, when the officer stopped Appellant for DWI and asked if he was "high," Appellant replied, "[A] little bit, but you just killed it," and then laughed, and when the officer told him he had been swerving, Appellant's excuse was that he had been making out with his girlfriend.

The trial court observed that Appellant was "a young man" with "some possibility" and a family who supported him and wanted to help him but also that Appellant was already on probation for his DWI and possession convictions. When the trial court asked Appellant if he agreed that he had made a series of decisions during that July 2012 evening that were "dumb," Appellant agreed.

The trial court chastised Appellant about how his actions could have hurt others and stated that it would give him three years of deferred adjudication community supervision and sentence him to 30 days in jail as one of the conditions, along with "all of the usual substance abuse terms" he would have in a felony probation, and a fine and court costs. The trial court also cautioned Appellant, "[W]hat you need to understand is there is a -- if you do not successfully complete the deferred adjudication or you have any violations of

that, you will be subject to the full range of punishment for the crime that you have been charged with, you understand that?"[5]

Before Appellant could respond to the trial court's question, his attorney interrupted and expressed his client's desire for "straight probation," stating,

> I think immigration wise he would prefer straight probation if the Court will allow that. There are some issues, as far as it has been explained to me, that deferred probation for terms of immigration actually subjects him to ten years, *which would result in deportation*. So if he could get three years[']straight probation, it is more beneficial for his immigration issues . . . . [Emphasis added.]

Appellant's counsel then asked the trial court for four years' confinement, probated to three, because "[t]otal exposure under five years is what we were asking for."[6] At the trial court's request, he explained,

> [W]hat immigration courts look at is if he has a total exposure of under five years aggregate, then he is *eligible for cancellation of removal.*[7] *If it goes over five years, his total exposure, then*

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[5]As noted above, the punishment range for tampering with physical evidence, a third-degree felony, is two to ten years' confinement and up to a $10,000 fine. *See* Tex. Penal Code Ann. §§ 12.34, 37.09(a), (c).

[6]Although he did not articulate it in this manner, counsel may have been taking into account that Appellant already had two convictions and that if Appellant received and violated his deferred adjudication, he would be subject to up to ten years' confinement. Under 8 U.S.C. § 1182(a)(2)(B), an alien is inadmissible if he is convicted of two or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were five years or more. 8 U.S.C.A. § 1182(a)(2)(B) (West 2005 & Supp. 2016). And an inadmissible alien is a deportable alien. *Id.* § 1227(a)(1)(A).

[7]Under 8 U.S.C. § 1229b(a), the Attorney General may cancel removal in the case of an alien who is inadmissible or deportable if he or she (1) has been

> *deportation becomes much more likely*. So if he was to receive deferred, which I know we're past that, but just for the Court's understanding, total exposure is ten.
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> . . . .
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> . . . So if he receives four, then his total exposure is four regardless and it doesn't go any higher.

Appellant's counsel explained that the calculation took into account the DWI that Appellant was also on probation for, stating, "It is not the probationary time, it is the actual time he is exposed to lock-up." When the trial court pointed out that Appellant had received 150 days' confinement, probated for 15 months, for the DWI offense, Appellant's counsel indicated that his understanding, as restated by the trial court, was that if the 150 days were added to the time assessed in the instant case, "as long as the aggregate is less than five years," then Appellant had much greater potential "to actually achieve success in an immigration issue." Appellant's counsel further explained that Appellant's "motivation for pleading guilty was to receive probation with a total exposure time of less than five years."

When the trial court told Appellant that he was going to get what he asked for, it also advised him, "[Y]ou got better things to do with your time. You need to save up your money, work with your dad, get back in college, okay." Appellant

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lawfully admitted for permanent residence for not less than five years, (2) has resided in the United States continuously for seven years after having been admitted in any status, and (3) has not been convicted of any aggravated felony. 8 U.S.C.A. § 1229b(a) (West 2005 & Supp. 2016).

replied, “That’s what I am trying to do.” The trial court then admonished him about his right to appeal the decision.

c. Immigration Counsel’s Affidavit

To his habeas application, Appellant attached the affidavit of his immigration lawyer, Ava C. Benach. Benach stated that Appellant was a citizen of South Korea and lawful permanent resident in the United States. She further stated that on July 16, 2016, upon Appellant’s return from an international trip, United States Customs and Border Protection charged him with inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(I)—conviction of a crime involving moral turpitude—and 8 U.S.C. § 1182(a)(2)(A)(i)(II)—conviction of a law relating to a controlled substance.[8] Consequently, the United States Department of Homeland Security detained Appellant from July 16 to October 17, 2016, when an immigration judge granted Appellant’s application for a discretionary waiver of

[8]8 U.S.C. § 1182(a)(2)(A)(i)(I) and (II) provide that an alien convicted of, or who admits having committed, or who admits committing acts that constitute the essential elements of either (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime or (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, is inadmissible. 8 U.S.C.A. § 1182(a)(2)(A)(i)(I)–(II). There is an exception to subsection (I), the crime-involving-moral-turpitude subsection, for an alien who committed only one crime if (1) the alien was under eighteen when he committed the crime and the crime was committed and the alien was released from confinement more than five years before the date of application for a visa or other documentation and the date of application for admission to the United States, or (2) the crime’s maximum possible penalty did not exceed one year’s confinement and, if convicted, the alien was not sentenced to a term in excess of six months. *Id.* § 1182(a)(2)(A)(ii).

inadmissibility under 8 U.S.C. § 1182(h).[9] Benach averred that she had represented Appellant during this time and despite the immigration judge's favorable exercise of discretion, Appellant continued to experience "a significant immigration[-]related consequence[]" from his tampering conviction in that he was "ineligible for naturalization to U.S. citizenship due to his conviction of an aggravated felony" under the immigration and nationality act.

Benach stated that based on her review of the March 13, 2014 hearing, if Appellant had successfully completed the deferred adjudication that was initially offered, no sentence of imprisonment would have been imposed and that, instead, his trial counsel had suggested to the trial court straight probation—a sentence of incarceration suspended in favor of community supervision—which transformed Appellant's conviction into an "aggravated felony" under federal immigration law. Benach opined that if the original sentence suggested by the trial court had been imposed, Appellant's conviction would not have qualified as

[9]The Attorney General may, in his discretion, waive the application of 8 U.S.C. § 1182(a)(2)(A)(i)(I) and may waive the application of 8 U.S.C. § 1182(a)(2)(A)(i)(II) insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana, if the immigrant is the spouse, parent, son, or daughter of a citizen or lawful 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 citizen or lawful resident spouse, parent, son, or daughter of such alien. *Id.* § 1182(h)(1)(B). We infer from the immigration judge's waiver that Appellant's parents were either United States citizens or lawful permanent residents in July 2016, but we do not know from this record what their status was at the January 2014 plea hearing or the March 2014 sentencing hearing.

an aggravated felony, and Appellant would have been eligible for naturalization because he met "all the other requirements."

2. State's Evidence

To its response, the State attached Appellant's indictment for tampering with physical evidence, his plea admonishments, which included his waivers and judicial confession, his judgment of conviction, and the trial court's certification of his right to appeal, which states that his case was not a plea-bargain case and that Appellant had the right of appeal. The State also attached the March 13, 2014 judgment of conviction for the tampering offense and the trial court's March 2, 2016 order finding Appellant eligible for early release from community supervision.

In Appellant's plea documents, Appellant stated that he would make an open plea of guilty to the court. Appellant's written plea admonishments, which he signed, included the following statement,

> I understand that if I am 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*. [Emphasis added.]

C. Analysis

Generally, to be eligible for naturalization, in addition to the residency requirements, the applicant must have been and must still be "a person of good moral character." 8 U.S.C.A. § 1427(a)(3) (West 2005). "No finding by the Attorney General that the applicant is not deportable shall be accepted as

conclusive evidence of good moral character." *Id.* § 1427(d). And in determining whether the applicant has sustained his or her burden of establishing good moral character, as well as other qualifications for citizenship, "the Attorney General shall not be limited to the applicant's conduct during the five years preceding the filing of the application, but may take into consideration as a basis for such determination the applicant's conduct and acts at any time prior to that period." *Id.* § 1427(e).

As argued by Appellant, under federal immigration law, his conviction of tampering is an "aggravated felony" that prevents him from being found as a person of good moral character. *See id.* § 1101(f)(8). That is, he was convicted of an offense "relating to obstruction of justice," and the term of imprisonment "is at least one year." *Id.* § 1101(a)(43)(S).

Assuming without deciding that trial counsel provided ineffective assistance, however, nothing in the record before us shows that naturalization was a concern of Appellant's at the time that he made his plea, and certainly not the "determinative issue" or "paramount concern" for him in plea discussions. We do not even have a record of the plea hearing itself that might otherwise demonstrate that naturalization was a concern of Appellant's. In contrast, based on the record of the punishment hearing, Appellant's concern appeared to be about deportation and cancellation of removal, and with good reason— Appellant went abroad after the trial court granted him early termination of his community supervision, and when he attempted to return to the United States, he was

charged with inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(I) and (II). The trial court admonished Appellant in writing that pleading guilty could result in his deportation, exclusion, or denial of naturalization, and Appellant clearly understood that he could be deported or denied entry based on his convictions. Appellant and his attorney did not raise the issue of naturalization at any point in that proceeding.

Appellant had apparently attempted to eat the evidence during his DWI stop, and the record reflects no legal or factual defenses to the tampering charge. The punishment range for the tampering offense was two to ten years' confinement, and Appellant would have been subject to this range whether he had received deferred adjudication (also considered a conviction for immigration purposes) and then had his deferred adjudication revoked or whether he proceeded to trial and was convicted. Instead, he opted for a four-year suspended sentence and three years of community supervision. Appellant's mother testified that Appellant had lived in the United States for twelve years. Appellant went abroad after receiving early release from his community supervision, leading to his detention upon reentry to the United States. When he was found inadmissible upon his attempt to re-enter the United States, he was granted cancellation of removal.

Appellant's habeas application, which focuses on the amount of time that his trial counsel bargained for, has failed to demonstrate that Appellant did not understand all of the potential immigration consequences of his plea—particularly

in light of the admonishments that Lee signed that stated that he understood that a plea of guilty could result in deportation, exclusion, "or the denial of naturalization under Federal law"—and has failed to demonstrate that Appellant would have pleaded not guilty and would have taken his chances at trial if he had understood the plea's effect on his ability to become a naturalized citizen. On this record, there is no indication that Appellant had any interest in becoming a naturalized citizen at the time of the plea hearing or sentencing hearing.[10]

Because the trial court could have reasonably concluded on this record that Appellant did not meet his burden to show that he would have opted to go to trial had he fully understood the consequences of his plea and that his decision to go to trial would have been rational under the circumstances, we overrule Appellant's ineffective assistance issue.

[10]Appellant also ignores that regardless of the amount of time he received for the tampering conviction, the tampering conviction itself could meet the definition of a crime involving moral turpitude and thus prevent him from meeting the "good moral character" requirement. *See Villatoro v. Holder*, 760 F.3d 872, 877–78 (8th Cir. 2014) (holding that a conviction for tampering with records under Iowa law is a crime involving moral turpitude); *see also* 8 U.S.C.A. § 1101(f)(3) (describing persons who cannot be regarded as of good moral character); *Smalley v. Ashcroft*, 354 F.3d 332, 335–36 (5th Cir. 2003) (explaining that the immigration and nationality act does not define "moral turpitude," which has been left to the Board of Immigration Appeals and the federal courts to define).

IV. Conclusion

Having concluded that the trial court did not abuse its discretion by denying Appellant's habeas application, we affirm the trial court's order.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; MEIER and GABRIEL, JJ.

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Tex. R. App. P. 47.2(b)

DELIVERED: October 12, 2017