TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00336-CR

Ex parte Jerome Oscar Castaneda

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 427TH JUDICIAL DISTRICT
NO. D-1-DC-12-203656-A, THE HONORABLE TAMARA NEEDLES, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant Jerome Oscar Castaneda appeals from the habeas court's denial of his application for writ of habeas corpus challenging his conviction for family violence aggravated assault causing serious bodily injury. *See* Tex. Code Crim. Proc. art. 11.072. In a single point of error, appellant contends that the habeas court erred by rejecting his claim that his trial counsel's ineffective assistance during the plea proceedings rendered his guilty plea involuntary. We affirm the habeas court's order denying relief.

BACKGROUND

Appellant was indicted for three aggravated assault offenses—one count of family violence aggravated assault with a deadly weapon causing serious bodily injury, a first degree felony, *see* Tex. Penal Code § 22.02(a)(1), (b)(1), and two counts of aggravated assault with a deadly weapon, both second degree felonies, *see id.* § 22.02(a)(2)—arising out of a stabbing incident involving his roommate and two friends. Pursuant to a negotiated plea bargain, the State waived the deadly weapon allegation of the first degree family violence aggravated assault, and appellant pled

guilty to second degree family violence aggravated assault causing serious bodily injury. *See id.* § 22.02(a)(1); Tex. Code Crim. Proc. art. 42.013. The trial court sentenced appellant to ten years in prison but suspended imposition of the sentence and placed appellant on community supervision for ten years. *See* Tex. Code Crim. Proc. art. 42A.053(a)(1). In accordance with the plea bargain, during sentencing, the trial court considered the two second degree charges of aggravated assault with a deadly weapon pursuant to section 12.45 of the Penal Code. *See* Tex. Penal Code § 12.45 (allowing trial court to take into account unadjudicated offenses when determining sentence for offense of which defendant has been adjudicated guilty, and barring further prosecution of those offenses).

Three years later, appellant filed a post-conviction application for writ of habeas corpus under article 11.072 of the Code of Criminal Procedure, alleging that his trial counsel's representation during the plea proceedings was constitutionally ineffective and rendered his guilty plea involuntary. *See* Tex. Code Crim. Proc. art. 11.072, § 1. Specifically, appellant asserted that his plea was involuntary because his trial counsel failed to advise him of the negative impact his conviction would have on his employment opportunities.[1] No sworn affidavit—of either appellant or his trial counsel—was attached to the application. The State filed a response, attaching an affidavit of appellant's trial counsel. *See id.* art. 11.072, § 5(b). The habeas court issued a written

[1] In the application, appellant maintained that his conviction "forever bar[red] him from his profession" because "he would never be able to work in engineering" and thus rendered his engineering degrees "worthless to him."

order denying habeas relief, concluding that appellant had failed to show deficient performance on the part of his trial counsel.[2] *See id.* art. 11.072, § 6(a).

DISCUSSION

In an article 11.072 post-conviction habeas corpus proceeding, the trial judge is the sole finder of fact. *Ex parte Torres*, 483 S.W.3d 35, 42–43 (Tex. Crim. App. 2016); *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013); *Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). Thus, in conducting our review of the habeas court's decision, we afford almost total deference to the habeas court's factual findings when supported by the record, especially when those findings are based upon credibility and demeanor. *Ex parte Torres*, 483 S.W.3d at 42–43; *Guerrero*, 400 S.W.3d at 583; *Ex parte Garcia*, 353 S.W.3d at 788. In addition, we afford almost total deference to the habeas court's application of law to the facts if the resolution of the ultimate question turns on an evaluation of credibility and demeanor. *See 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). We review de novo the habeas court's resolution of mixed questions of law and fact that do not turn on witness credibility and its resolution of pure questions of law. *Ex parte Beck*, — S.W.3d —, No. PD-0618-16, 2017 WL 5632978, at *4 (Tex. Crim. App. Nov. 22, 2017); *Absalon v. State*, 460 S.W.3d 158, 162 (Tex. Crim. App. 2015); *Ex parte Peterson*, 117 S.W.3d at 819.

[2] The judge who presided over the habeas proceeding was different than the judge who previously presided over the plea proceedings.

In reviewing a habeas court's decision to grant or deny habeas relief, we review the facts in the light most favorable to the court's ruling and, absent an abuse of discretion, must uphold the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). An abuse of discretion does not occur unless the court acts "arbitrarily or unreasonably" or "without reference to any guiding rules and principles," *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)), or unless the court's decision "falls outside the zone of reasonable disagreement," *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

To prevail on a claim of ineffective assistance of counsel, a habeas applicant must demonstrate, by a preponderance of the evidence, both deficient performance by counsel and prejudice suffered by the applicant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex parte Bowman*, 533 S.W.3d 337, 349 (Tex. Crim. App. 2017); *Ex parte Torres*, 483 S.W.3d at 43. The applicant must first demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88; *Ex parte Bowman*, 533 S.W.3d at 349; *Ex parte Torres*, 483 S.W.3d at 43. Appellate review of counsel's representation is highly deferential; we must "indulge in a strong presumption that counsel's conduct was *not* deficient," *Nava v. State*, 415 S.W.3d 289, 307–08 (Tex. Crim. App. 2013), and "that counsel's conduct [fell] within the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689. *See Ex parte Bowman*, 533 S.W.3d at 349. To rebut that presumption, a claim of ineffective assistance must be "firmly founded in the record," and "the record must affirmatively demonstrate" the meritorious nature of the claim. *Menefield v. State*, 363 S.W.3d 591, 592 (Tex.

Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999))). The applicant must further show the existence of a reasonable probability—one sufficient to undermine confidence in the outcome—that the result of the proceeding would have been different absent counsel's deficient performance. *Strickland*, 466 U.S. at 694; *Ex parte Torres*, 483 S.W.3d at 43; *Nava*, 415 S.W.3d at 308. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700; *see Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010); *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003); *see also Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry (the deficiency prong and the prejudice prong) if the defendant makes an insufficient showing on one.").

A criminal defendant has a constitutional right to effective assistance of counsel in plea proceedings. *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970); *Ex parte Harrington*, 310 S.W.3d 452, 458 (Tex. Crim. App. 2010); *see Ex parte Reedy*, 282 S.W.3d 492, 500 (Tex. Crim. App. 2009) (describing counsel's duties to provide effective assistance of counsel during plea proceedings). A guilty plea must represent a "voluntary and intelligent choice among the alternative courses of action open to the defendant." *Ex parte Mable*, 443 S.W.3d 129, 131 (Tex. Crim. App. 2014). A guilty plea is not voluntary if made as a result of ineffective assistance of counsel. *Ex parte Moussazadeh*, 361 S.W.3d 684, 689 (Tex. Crim. App. 2012); *Ex parte Burns*, 601 S.W.2d 370, 372 (Tex. Crim. App. 1980).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see Ex parte Ali*, 368 S.W.3d 827, 833 (Tex. App.—Austin 2012, pet. ref'd). Where, as here, a defendant is represented by counsel during the plea process, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771; *see Ex parte Ali*, 368 S.W.3d at 833. In the context of a collateral attack on a guilty plea, when a habeas applicant challenges the validity of a guilty plea contending that his counsel was ineffective, the applicant must show: (1) that counsel's advice with respect to the plea offer did not fall within the wide range of competence demanded of attorneys in criminal cases, and (2) that counsel's errors affected the outcome of the plea process—that is, that there is a reasonable probability that, but for counsel's errors, the applicant would not have accepted the offer and pled guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985); *Ex parte Torres*, 483 S.W.3d at 43; *Ex parte Harrington*, 310 S.W.3d at 458; *Ex parte Reedy*, 282 S.W.3d at 500.

To prevail on a post-conviction writ of habeas corpus, the applicant bears the burden of proving, by a preponderance of the evidence, the facts that would entitle him to relief. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002); *Ex parte Ali*, 368 S.W.3d at 830; *see Ex parte Torres*, 483 S.W.3d at 43. Here, appellant had the burden to produce evidence to develop the facts necessary to show: (1) that trial counsel's failure to advise appellant concerning the possible negative impact of the conviction on his employment opportunities in his chosen field—if counsel did not provide such advice—fell below the wide range of competence demanded of

attorneys in criminal plea proceedings, and (2) that the failure to give such advice affected the plea process—that is, that, but for trial counsel's failure to give such advice, appellant would not have accepted the plea offer and pled guilty but would have insisted on going to trial. *See Hill*, 474 U.S. at 56; *Ex parte Torres*, 483 S.W.3d at 43. A review of the record reveals that appellant did not meet this burden.

Initially, we note that appellant did not file a proper habeas application under article 11.072. "One of the requirements of a writ application is that an '[o]ath must be made that the allegations of the petition are true, according to the belief of the petitioner.'" *Ex parte Rendon*, 326 S.W.3d 221, 223–24 (Tex. Crim. App. 2010) (quoting Tex. Code Crim. Proc. art. 11.14(5)). While the application was signed by appellant's habeas counsel, neither appellant nor his habeas counsel verified the application.

Nevertheless, even had appellant's application been verified, "sworn pleadings must be substantiated by the record in order for relief to be granted." *Ex parte Garcia*, 353 S.W.3d at 788; *see Guerrero*, 400 S.W.3d at 583 ("[I]n all habeas cases, sworn pleadings are an inadequate basis upon which to grant relief."). The record here does not substantiate the ineffective-assistance claim asserted in appellant's habeas application.

In his habeas application, appellant maintained that he "was never admonished by the Court or his Counsel, that as a result of his plea, he would never be able to work in engineering and that because of his conviction his degrees were worthless to him." However, appellant provided no evidence to establish this claim. Appellant's habeas application did not contain affidavits, associated exhibits, a memorandum of law, or anything else to establish specific facts that might entitle him to

relief. *See Guerrero*, 400 S.W.3d at 584–85. The only facts appellant presented to the habeas court were the unsworn statements of habeas counsel in the unverified habeas application that counsel filed on appellant's behalf. However, habeas counsel had no personal, first-hand knowledge of the events surrounding appellant's plea. Thus, counsel's statements were not a description of facts remembered from the former plea proceeding. Consequently, even had habeas counsel's statements been sworn to and even if a sworn pleading alone was an adequate basis for habeas relief, habeas counsel's statements were not competent evidence before the habeas court. *See id.* at 586.

Moreover, the averments in appellant's habeas application address only the issue of trial counsel's alleged deficient performance—his purported failure to advise appellant about the possible negative impact of the conviction on his employment opportunities. Nowhere in his application did appellant mention prejudice or assert that counsel's failure to give such advice affected the outcome of the plea process. He did not state that, had he known that the conviction would negatively impact his employment opportunities in the engineering field, he would have rejected the State's plea offer and insisted on going to trial. *See, e.g.*, *Ex parte Nelson*, No. 01-14-00924-CR, 2015 WL 3981577, at *5 (Tex. App.—Houston [1st Dist.] June 30, 2015, no pet.) (mem. op., not designated for publication) ("Notably, [appellant] did not allege in either his unsworn affidavit or in his habeas application that he would have proceeded to trial.").

The only evidence in this habeas proceeding was offered by the State—an affidavit of appellant's trial counsel that was attached to the State's response to appellant's habeas application. Concerning appellant's claim that "he was not admonished that, as a result of his plea, he would never be able to work in engineering," counsel stated,

> I do not recall [appellant] ever asking me about the effect this conviction would have on his work in engineering. I normally give clients a general warning that a felony conviction can prevent them from going into certain fields and may jeopardize certain professional licenses, but I do not recall the exact time I gave such admonishments, or whether we specifically discussed it in this case as I met with [appellant] and his family dozens of times throughout the course of representation.

As noted previously, in reviewing the habeas court's decision to grant or deny habeas corpus relief, we view the facts in the light most favorable to the habeas court's ruling. *Ex parte Wheeler*, 203 S.W.3d at 324; *Kniatt*, 206 S.W.3d at 664; *Ex parte Ali*, 368 S.W.3d at 830; *see Ex parte Evans*, 338 S.W.3d 545, 546 (Tex. Crim. App. 2011) ("We consider the evidence and factual conclusions that may be implied from the evidence in the light most favorable to the habeas judge's findings."). Accordingly, even assuming that the failure to advise appellant about the possible negative impact of the conviction on his employment opportunities constitutes deficient performance (an issue we do not address),[3] this affidavit—viewed in the light most favorable to the habeas court's

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[3] "[W]hile the Sixth Amendment assures an accused of effective assistance of counsel in criminal prosecutions, this assurance does not extend to collateral consequences of the prosecution." *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). Collateral consequences are consequences that are not definite, practical consequences of a defendant's guilty plea, *id.*, and include consequences the imposition of which is controlled by agencies operating beyond the direct authority of the trial judge, *Mitschke v. State*, 129 S.W.3d 130, 134 n.4 (Tex. Crim. App. 2004). When a defendant is fully advised of the direct consequences of his plea, his ignorance of a collateral consequence does not render the plea involuntary. *Ex parte Morrow*, 952 S.W.2d at 536.

In concluding that appellant failed to show deficient performance on the part of his trial counsel, the habeas court stated in its finding of facts and conclusions of law that

> 6. Trial counsel does not have a duty to inform defendants of the collateral consequences of a guilty plea. *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997).
>
> 7. Because ineligibility for professional licenses is a collateral, rather than

ruling—supports a finding, at most, that trial counsel did not recall giving appellant advice concerning the possible negative impact of the conviction on appellant's employment opportunities in his chosen profession. The affidavit reflects only counsel's uncertainty about giving such advice. It does not establish, by a preponderance of the evidence, that counsel did not give such advice. Thus, counsel's affidavit does not constitute record evidence supporting appellant's claim, asserted in his unsworn habeas application, that counsel's performance was deficient in the manner that appellant complains.

Furthermore, concerning possible prejudice to appellant, the affidavit indicates that, even had appellant known about the possible negative impact of the conviction on his employment

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> direct, consequence of a guilty plea, Applicant's trial counsel was under no duty to admonish Applicant of this possible consequence.
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> 8. Applicant has failed to show that counsel's advice fell below the range of competence demanded of attorneys in criminal cases.

We note that at least one of our sister courts of appeals has concluded, consistent with the habeas court's conclusion here, that trial counsel does not have a duty to inform a defendant about a conviction's impact on employment prospects as it is a collateral consequence, and therefore a guilty plea is not rendered involuntary because of counsel's failure to advise a defendant about the collateral consequence of employment difficulties. *See Ex parte Nelson*, No. 01-14-00924-CR, 2015 WL 3981577, at *6 (Tex. App.—Houston [1st Dist.] June 30, 2015, no pet.) (mem. op., not designated for publication) (rejecting claim that counsel's failure to advise appellant about ramifications of plea on employment prospects constituted ineffective assistance of counsel that rendered plea involuntary because "[appellant's] employment difficulties are not a direct consequence of his plea"); *State v. Collazo*, 264 S.W.3d 121, 128 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (concluding that failure to admonish appellee that he would not be able to obtain peace officer license did not render his plea involuntary because "Appellee's employment difficulties are not a direct consequence of his plea"). Given our disposition, we do not decide the issue of whether trial counsel had a duty to inform appellant about the collateral consequences regarding employment opportunities.

opportunities, trial counsel was not persuaded that appellant would have rejected the plea offer and insisted on going to trial:

> I do not believe [appellant] would have taken this case to trial if he had known about the engineering consequences because the plea bargain was a very good deal. Applicant was charged with three aggravated assaults, one of which was a first degree felony, and [the prosecutor] wanted prison time. I tried to get [the prosecutor] to agree to deferred adjudication throughout the case but she was adamantly opposed to it based on the severe facts of the case and victim input. I was ultimately able to secure a plea bargain for probation in this cause and a 12.45 disposition in the two related aggravated assault charges. If [appellant] had rejected the plea offer and gone to trial, in my opinion, based on the strength of the State's case, [he] likely would have received three convictions for aggravated assault and a prison sentence.

Appellant did not assert, let alone prove by a preponderance of the evidence, that the outcome of the plea process was affected by counsel's alleged deficient performance, and trial counsel's sworn statements indicate the contrary. Thus, nothing before the habeas court demonstrated prejudice to appellant—that, but for trial counsel's failure to advise appellant about the possible negative impact the conviction would have on his employment opportunities, appellant would have rejected the plea offer and insisted on going to trial.

In sum, appellant presented no evidence to the habeas court to support his claim of ineffective assistance of counsel. Habeas counsel's statements in the habeas application—an unsworn pleading—do not constitute competent evidence before the habeas court. Furthermore, the only evidence before the habeas court was trial counsel's affidavit, offered by the State to rebut appellant's claim. Trial counsel's averments in the affidavit, viewed in the light most favorable to the habeas court's ruling, do not rebut the strong presumption that trial counsel provided constitutionally effective assistance to appellant during the plea proceedings. *See Ex parte Bowman*,

533 S.W.3d at 350 ("An applicant who cannot overcome this presumption by a preponderance of the evidence will not succeed in his Sixth Amendment claim."). Because appellant did not establish his claim of ineffective assistance of counsel, he failed to demonstrate, by a preponderance of the evidence, that his guilty plea was involuntary. Consequently, the habeas court did not abuse its discretion in denying appellant's application for writ of habeas corpus. We overrule appellant's sole point of error.

CONCLUSION

Because appellant provided no evidence in support of his claim for habeas corpus relief, he failed to satisfy his requisite burden of proving, by a preponderance of the evidence, facts that would entitle him to relief. *See Guerrero*, 400 S.W.3d at 586; *see, e.g.*, *Ex parte Scott*, 190 S.W.3d 672, 673 (Tex. Crim. App. 2006) ("It is the Applicant's burden to prove, by a preponderance of the evidence, that his attorney was constitutionally deficient before he might be entitled to relief on a writ of habeas corpus."). He failed to demonstrate, by a preponderance of the evidence, that his trial counsel rendered ineffective assistance during the plea proceedings and, thus, he failed to establish, by a preponderance of the evidence, that his guilty plea was involuntary. Accordingly, the habeas court did not abuse its discretion in denying appellant's application for writ of habeas corpus. We affirm the habeas court's order denying relief.

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Cindy Olson Bourland, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: February 23, 2018

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