IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-89,989-02

EX PARTE FERNANDO TREJO, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 2015-406,411-B IN THE 137TH DISTRICT COURT FROM LUBBOCK COUNTY

YEARY, J., filed a dissenting opinion in which SLAUGHTER, J., joined.

DISSENTING OPINION

Today the Court grants relief on Applicant's post-conviction application for writ of habeas corpus on the ground that his counsel did not properly inform him of the immigration consequences of his guilty plea as required by the United States Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010). I disagree with the Court's decision because Applicant was a noncitizen who was in the country illegally when he pled guilty, and thus he does not fall under the purview of *Padilla*. Moreover, according to *Padilla* itself, when immigration consequences are not truly "succinct" and "straightforward," a defendant need only be warned that a plea to pending criminal charges "*may* carry a risk of adverse immigration consequences." *Padilla*, 559 U.S. at 369 (emphasis added).

Applicant was properly warned, before his plea was accepted, pursuant to Article 26.13 of the Texas Code of Criminal Procedure, that if he was not a United States citizen, his plea "may result in deportation" or other negative immigration consequences. TEX. CODE CRIM. PROC. art. 26.13(a)(4). The Court today grants relief without ever deciding whether the immigration consequences—that Trejo might suffer by pleading guilty—are sufficiently succinct and straightforward that his attorney must have performed deficiently by failing to warn him of them any more specifically than by advising him that his plea "*may* carry a risk of adverse immigration consequences." In the absence of such a conclusion, I would decide that Applicant cannot establish that he suffered any prejudice, as required under *Strickland v. Washington*, 466 U.S. 668 (1984). I respectfully dissent.

I. FACTS

Applicant claims that he entered the United States in 2000 on a visitor visa, when he was 14 years old, and he has remained in the country ever since. He admits he is not a United States citizen. It is worth observing that a visitor visa is by design only a temporary visa. No evidence has been presented showing that Applicant ever renewed or extended his visa, or that he became a legal United States resident in some other way in the many years since he first entered this country. In fact, Applicant claims that he advised his counsel that he was "seeking" to "apply" for "Deferred Action for Childhood Arrivals" (DACA). The fact that Applicant admitted to telling his lawyer that he was "seeking" to "apply" for DACA suggests that he was not legally present in this country at the time of his plea. Further, even if he was legally present, it was his burden on habeas to plead facts that, if true, would entitle him to relief. *Ex parte Maldanado*, 688 S.W.2d 114, 116 (Tex. Crim.

App. 1985). Applicant has not pled facts that would indicate that he was legally present in the country at the time of his plea.

Applicant was charged by indictment with the offense of possession of a controlled substance, methamphetamine, in an amount less than one gram, a state jail felony. TEX. HEALTH & SAFETY CODE §§ 481.102(6) & 481.115(b). He pled guilty to that offense in 2016 and was sentenced to two days in the Lubbock County Detention Center. In 2019, after learning of the immigration consequences following his guilty plea, Applicant filed this application for post-conviction writ of habeas corpus relief in which he alleged that: (1) his counsel was constitutionally ineffective for failing to advise him of the immigration consequences of his plea; (2) his counsel was constitutionally ineffective during the plea-bargaining phase of his case; and (3) his plea was involuntary.

Applicant claims, and the convicting court agrees, that his guilty plea: (1) rendered him ineligible to apply for DACA, (2) rendered him ineligible to apply for cancellation of removal once placed into removal proceedings, and (3) rendered him permanently ineligible to apply for a family-based visa or lawful permanent residency. Applicant's trial counsel claimed in an affidavit that he advised Applicant that there were possible immigration consequences if he were to plead guilty. But the convicting court found that the affidavit submitted by trial counsel, insofar as it conflicted with Applicant's claims, was not credible. Still, the record reflects that Applicant was properly admonished, before his plea was accepted, pursuant to Article 26.13 of the Code of Criminal Procedure, that if he were not a U.S. citizen his plea "may result in deportation" or other negative immigration consequences. Habeas Record pp. 8–9, 101.

The convicting court ultimately found that trial counsel's advice was insufficient to meet his obligation under *Padilla* and that Applicant was prejudiced by counsel's deficient performance because there is a reasonable probability that, but for counsel's errors, Applicant would not have pled guilty and would have instead insisted on going to trial. The Court today agrees with the convicting court and grants Applicant relief.

II. WHAT *PADILLA* REQUIRES

This case is hardly on all fours with *Padilla* and I would not extend *Padilla's* holding to the facts in this case. In *Padilla v. Kentucky*, the defendant, a legal permanent resident of the United States, accepted a plea deal and entered a plea of guilty after his lawyer advised him that he "did not have to worry about immigration status since he had been in the country so long[,]" when his plea actually "made his deportation virtually mandatory." 559 U.S. at 359. *Padilla* did not involve a noncitizen who was present in the country illegally.[1] It involved a defendant who was a *legally present* noncitizen at the time that he pled guilty, and who—as a result of his guilty plea—lost his right to remain in the country.

In *Padilla*, the Court made clear that "the terms of the relevant immigration statute" in that case were "succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." *Id*. at 368. The Court explained that, "when the deportation consequence is truly clear," then "the duty to give correct advice is equally clear." *Id*. at

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[1] In *Chaidez v. United States*, 568 U.S. 342 (2013), the case in which the Supreme Court declared that *Padilla* represented a new rule, and therefore would not have retroactive effect, the defendant, though a noncitizen, was also "a lawful permanent resident of the United States" at the time of her prosecution. *Id*. at 345.

369. But the Court also observed that "[i]mmigration law can be complex, and it is a legal specialty of its own." *Id*. Noting that there will be "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain," the Court determined that the duty of counsel "in such cases is more limited." *Id*. "When the law is not succinct and straightforward," the Court explained, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id*. Nothing in the Court's opinion indicated that *Padilla*'s requirement extended to cases involving noncitizens who were in the country illegally at the time of their plea, or to those who may or may not, depending on a variety of different circumstances, pursuant to statutes or even Presidential Executive Branch orders or policy statements, be eligible for cancelation of removal or perhaps some other form of relief from deportation. And the Court never expressly included any of those classes of noncitizens in its holding.

Noncitizens who are in the country illegally are deportable regardless of whether they are ultimately convicted following a guilty plea or a trial. *See* 8 U.S.C 1227(a)(1)(B). It appears that there are some legal avenues by which some people are permitted to apply for exceptions to the rules permitting deportation, and some of those people who apply for those exceptions may be granted legal protection from deportation. *See, e.g.*, 8 U.S.C. § 1229b. But Applicant has not shown that he availed himself of any of those legal avenues or that he was granted legal protection from deportation. He only claimed that he was "interested" in "applying" for DACA relief. He has not established that he had any legal status in this country at all which was compromised by his plea and conviction, and he has

not even established that he would have been eligible for relief from deportation under any of the various avenues that he now claims have been foreclosed by his plea in this case. In any event, the Court grants Applicant relief today without ever inquiring whether the law upon which he would rely is sufficiently straightforward and succinct that a criminal defense attorney would perform deficiently in failing to clearly and correctly advise him of it, as opposed to merely warning him about the potential risk of negative immigration consequences, as *Padilla* requires. Absent such an inquiry, there is no reason to believe that the trial court's Article 26.13 instruction would not have sufficed to alert Applicant to the potential consequences of his plea.

We have previously observed that a noncitizen who is in the country illegally could be accused of a crime, decide to go to trial, and then subsequently still be removed as soon as the trial is over—even if he is acquitted. *See State v. Guerrero*, 400 S.W.3d 576, 588–89 (Tex. Crim. App. 2013). In those circumstances, we observed, "[t]he prospect of removal . . . could not reasonably have affected [the defendant's] decision" to plead guilty. *Id*. at 589. The same is undoubtedly true in this case.

This Court must follow the decision of United States Supreme Court in *Padilla*, but we need not unilaterally extend its reach to cases beyond its contemplation. It is not at all clear that the rule announced by the Supreme Court in *Padilla* should be applied to cases involving noncitizens who are in the country illegally. Also, Applicant's *Padilla*-based claim argues that his counsel was ineffective for failing to adequately inform him about immigration law consequences that are only ascertainable by searching for, reading, understanding, and advising him about different laws (and in this case Presidential

Executive Branch orders and policy statements) than those that were in play in *Padilla*. This Court, then, grants relief without even determining whether the laws he does rely upon are even, in fact, at all "succinct," "clear," and "explicit," as was the law at issue in *Padilla*. 559 U.S. at 368. It is incumbent upon the Court to make that determination first in addressing any claim that seeks relief under *Padilla* because the standard of conduct for counsel is different depending upon how "clear," "explicit," "straightforward," "certain," or "succinct" the law is. *See Padilla*, 559 U.S. at 369 ("When the law is not succinct and straightforward . . ., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.").

III. CONCLUSION

Because Applicant is a noncitizen who was in the country illegally at the time of his plea, I would not find that his counsel was deficient for failing to advise him of the immigration consequences of his guilty plea pursuant to *Padilla*. Moreover, even if I did not think Applicant's status as an illegal alien made a difference, I would not grant Applicant relief without first considering whether the laws upon which he relies to claim adverse immigration consequences are so "succinct," "straightforward," etc., that his lawyer's performance was constitutionally ineffective for his failure to more specifically advise him of them. Finally, because Applicant was properly warned pursuant to Article 26.13 of the Code of Criminal Procedure that his plea "may" result in deportation or other negative immigration consequences—which is all that *Padilla* requires unless the law is

"succinct," "straightforward," etc.—I would not find that *Strickland* prejudice has been demonstrated. I respectfully dissent.

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