

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 24 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0072-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ZARIEL CANCANON,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20110617002

Honorable James Marner, Judge

REVIEW GRANTED; RELIEF DENIED

Higgins and Higgins, P.C.  
By Harold Higgins

Tucson  
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Zariel Cancanon seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Cancanon has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Cancanon was convicted of possession of more than four pounds of marijuana for sale. The trial court imposed a minimum 4.5-year sentence. Cancanon thereafter initiated a proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel. He maintained trial counsel had failed to adequately investigate the case and prepare for trial and, as a result, he “felt that he had no choice but to take a plea on the day the trial was to start.” Rejecting each alleged failure of counsel separately, but not addressing their impact on Cancanon’s choice to plead guilty, the court summarily denied relief.

¶3 On review, Cancanon contends the trial court abused its discretion in failing to address his overarching claim that counsel’s ineffectiveness had led him to plead guilty and again asserts that his plea was “involuntary” based on the “[in]effective assistance of counsel in the investigation and preparation of his case for trial,” which left “him no choice but to accept a plea and abandon his constitutional right to trial.” Citing *State v. Ysea*, 191 Ariz. 372, 956 P.2d 499 (1998) and *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), he asserts he had a right to effective assistance of counsel in deciding to plead guilty and claims his case is “directly on point” with *Ysea*, and that he is, like *Ysea*, entitled to withdraw his guilty plea. But, Cancanon’s argument blurs “the

distinction between counsel who is ineffective in connection with matters directly relating to the entry of a guilty plea and allegedly deficient performance as to other aspects of the representation.” *State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 239 (App. 1993).

¶4 A defendant who enters a valid guilty plea waives all nonjurisdictional defects, including deprivations of constitutional rights. *State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708-09 (App. 2008); *accord State v. Lerner*, 113 Ariz. 284, 284-85, 551 P.2d 553, 553-54 (1976). A claim of ineffective assistance of counsel brought by a pleading defendant such as Cancanon therefore does not encompass all errors that might be raised after a trial; rather, the claim is limited to those errors “directly relating to the entry of a guilty plea.” *Quick*, 177 Ariz. at 316, 868 P.2d at 329 (by entering guilty plea, defendant waives all nonjurisdictional defects, including claims of ineffective assistance of counsel, except as they relate to validity of plea). Thus, to the extent a defendant claims counsel was incompetent in failing to investigate evidence or file pretrial motions, he must establish that counsel’s advice to plead guilty based on those alleged defects was outside the “range of competence demanded of attorneys in criminal cases.” *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). And when “the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence,” prejudice “will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea,” which, “in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Cancanon has cited no authority, and we find none,

to suggest that a defendant's guilty plea is rendered involuntary solely based on a claim that counsel investigated or made pretrial motions in a deficient manner. Rather, such a claim can only lie when counsel's allegedly deficient performance leads counsel to provide deficient advice as to whether to accept a plea offer. *See id.* To conclude otherwise would vitiate the rule that a defendant waives all nonjurisdictional defects by entering a guilty plea.

¶5 In this case, Cancanon alleges counsel was ineffective in failing to (1) file a motion pursuant to Rule 12.9, Ariz. R. Crim. P., based on alleged discrepancies in the evidence presented to the grand jury; (2) move to suppress evidence obtained based on a search warrant affidavit containing allegedly erroneous information; (3) interview Cancanon's codefendant, who had agreed to testify against him at trial; (4) interview more than one officer involved in the investigation or to question the officer who was interviewed about photographs of the marijuana that had been lost; (5) interview officers about Cancanon's fingerprints found on the marijuana packaging when "discrepancies" about the packaging arose before trial; and (6) test a gun found at the scene for Cancanon's fingerprints.<sup>1</sup> We cannot say that counsel having undertaken any of these actions would have changed his apparent advice to accept the state's plea offer in this

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<sup>1</sup>In his petition for post-conviction relief, Cancanon also alleged counsel's performance was deficient based on his having failed to show Cancanon a surveillance video taken at the scene until two weeks before trial. He does not reassert this claim on review.

matter,<sup>2</sup> particularly in light of the plea offer, which reduced Cancanon's exposure significantly; resulting in his conviction on one, class-two felony when he had been charged with seven felonies.

¶6 Even had counsel made pretrial motions or further investigated Cancanon's related claims of error in regard to the grand jury proceedings and the search warrant affidavit, such action would not have changed the outcome of any proceeding and therefore would not have altered any advice to accept a plea bargain. Cancanon bases his argument on an alleged conflict in the testimony of a law enforcement officer before the grand jury and a statement in the affidavit used to procure a search warrant. Before the grand jury, the officer testified that both Cancanon and his codefendant had been seen in the garage of a suspected stash house loading items into a pickup truck that later was stopped by police and found to contain ninety-three pounds of marijuana in four bales. In the affidavit, however, the officer stated the codefendant had loaded the items and Cancanon had stood watch. Whether Cancanon loaded the marijuana himself or stood watch, however, such actions would support a finding of probable cause to indict on the charged offenses. *See* A.R.S. §§ 13-301 (accomplice one who aids another in committing offense); 13-303 (criminal culpability extends to accomplice); 13-3405(A)(2), (4) (knowing possession or transport of marijuana for sale).

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<sup>2</sup>Cancanon does not specifically assert in his affidavit that counsel advised him to accept the state's plea agreement. But Cancanon's arguments suggest counsel did so, as does the fact that counsel requested the reinstatement of a plea offer as a remedy for the state's failure to timely disclose fingerprint testing results.

¶7 Likewise, we cannot say any further action by counsel in interviewing police officers involved in the investigation would have affected the outcome of the proceeding. Cancanon's claims on this point revolve around fingerprint testing showing his fingerprints on black plastic bags, which the state alleged had been wrapped around the bales of marijuana. Until the fingerprint-test report was disclosed eleven days before trial, no mention had been made of black plastic bags being wrapped around the bales. When the report was disclosed, counsel moved to preclude the test results based on late disclosure and the lack of any other evidence linking the black plastic bags to the marijuana. In response to the motion, the state asserted that the bags had been around the marijuana, but that photographs of the marijuana had been deleted inadvertently and were not available. The state agreed, however, to allow counsel to interview the officer who had taken the photographs. Counsel did so, and the officer reported that the marijuana bales had been wrapped in green cellophane and then black bags. The next day, apparently before the trial court ruled on the motion to preclude, the state offered the plea bargain that Cancanon accepted.

¶8 Because the trial court did not rule on the motion to preclude, Cancanon cannot now establish that the fingerprint-testing results would have been admitted. But, even had they been admitted, in light of the officer's statements in his interview that the marijuana bales had been wrapped in black plastic bags, we cannot say that further interviewing by counsel would have changed any assessment of the likelihood of success at trial or the advisability of a plea bargain.

¶9 Furthermore, Cancanon asserted in his affidavit below that because counsel did not interview his codefendant he would be “going to trial with no idea how [his codefendant] might react to questions on [Cancanon’s] behalf.” But, “mere generalizations and unsubstantiated claims” are insufficient to raise a colorable claim of ineffective assistance. *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998). Cancanon has not set forth any specific facts as to what may have arisen from further interviews with his codefendant that would have altered counsel’s advice.

¶10 Likewise, we cannot say that fingerprint testing of the gun found near Cancanon’s tax documents would have altered any advice in relation to a plea offer. The gun was found in proximity to Cancanon’s W-2 form and Florida identification card. And, although a lack of fingerprints on the weapon may have been helpful to Cancanon’s defense, it would not, as Cancanon asserts, have established conclusively he had not touched the gun. In any event, when viewed in light of the charges against Cancanon separate from the two class-four weapon possession charges—three class two felonies, a class three felony, and a class six felony—Cancanon has not shown that the possibility of some favorable evidence on the weapons charges would have altered counsel’s advice to accept a plea agreement leading to a conviction for a single class-two felony.

¶11 For all these reasons, Cancanon has not shown that counsel’s advice in relation to acceptance of the plea agreement was deficient based on his actions in pretrial motions or investigation. We therefore cannot say the trial court abused its discretion in dismissing his petition. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219

(1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason). Thus, although we grant the petition for review, we deny relief.

*/s/ Joseph W. Howard*

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

*/s/ Michael Miller*

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MICHAEL MILLER, Judge

*/s/ J. William Brammer, Jr.*

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J. WILLIAM BRAMMER, JR., Judge\*

\*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.