

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

MAY 22 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0090-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BENJAMIN MERCADO VALDEZ,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2009048324001DT

Honorable Susan M. Brnovich, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel

Phoenix
Attorneys for Respondent

Benjamin Mercado Valdez

Kingman
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 Petitioner Benjamin Mercado Valdez was charged by indictment with seven counts of theft, class three felonies. After rejecting several plea offers, he pled guilty to those counts and admitted having six historical prior felony convictions. The trial court sentenced him to concurrent, fifteen-year prison terms. After an evidentiary hearing, the trial court denied Valdez's petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he claimed trial counsel had been ineffective in connection with plea negotiations. This petition for review followed. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Valdez contended in his Rule 32 petition that his privately retained counsel had failed to communicate to the prosecutor and the trial court that Valdez had accepted a favorable plea the state had offered him before the time for doing so had expired. The initial plea agreement would have permitted him to plead guilty to one count of theft, a class three felony, with one historical prior felony conviction, and stipulated that he would be sentenced to a ten-year prison term; a subsequent, amended plea agreement required less prison time, which Valdez signed but then rejected. Valdez asserted counsel's performance was both deficient and prejudicial under the standard set forth in *Strickland v. Washington*, 466 U.S. 671, 686 (1984).

¶3 After the evidentiary hearing, the trial court entered an order that contained factual findings related to the events that resulted in Valdez's convictions. Briefly, the court found Valdez had been offered the plea, that counsel communicated the offer to him and explained the deadline for accepting it, but Valdez rejected it on two occasions,

the first at the settlement conference on September 18, 2009, and then at the trial management conference when the plea offer was made again, just for that day. The court found defense counsel was not ineffective.

¶4 The trial court's findings were based primarily on its assessment of the credibility of the witnesses who testified at the hearing: prosecutor Christopher Rapp, defense counsel Xavier Sedillo, and Valdez. The court found Rapp and Sedillo credible, stating it did not believe that "after working so hard for weeks to convince the defendant to take the plea, [Sedillo had] just abandoned him in court after signing the plea." But the court found Valdez's testimony "incredible," based on the court's own "observations in Court." The court concluded: "Mr. Sedillo's testimony was more credible and consistent with defendant's behavior throughout the plea negotiation period, that he wasn't going to accept that plea. Defendant did not like the advice of his counsel and did not like the plea and rejected the plea offer."

¶5 A defendant has the burden of proving by a preponderance of the evidence the factual allegations raised in his petition for post-conviction relief. Ariz. R. Crim. P. 32.8(c). We review the factual findings that are the bases for the court's ruling with deference to the court, and will not disturb those findings unless they are clearly erroneous. *See State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994). And in conducting that review, we "view the facts in the light most favorable to sustaining the . . . ruling, . . . resolv[ing] all reasonable inferences against the defendant." *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). And, we keep in mind that "the trial court is the sole arbitrator of the credibility of witnesses" in post-

conviction proceedings, not this court. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). Similarly, we leave for the trial court the task of resolving any conflicts in the evidence that may exist with respect to counsel's performance and whether counsel performed in a deficient manner. *See State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995).

¶6 Viewed in this fashion, the record contains ample evidence to support the factual findings that are the bases for the trial court's determination that Valdez failed to establish he received ineffective assistance of counsel. Valdez essentially asks us to reweigh the evidence, which we will not do. *See State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003). Rather, because the record supports the court's ruling in its entirety, the salient portions of which we have summarized or quoted in this decision, we adopt it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 We note, in addition, that the question whether the trial court erred when it denied defense counsel's motion to withdraw and Valdez's request that Sedillo be removed from the case is not properly before us except as it related to his claim of ineffective assistance of counsel, which we have found the trial court properly rejected. And any challenge to those rulings other than as they related to the claim of ineffective assistance of counsel raised in his Rule 32 claim of ineffective assistance of counsel in connection with the plea process, were waived by the entry of the guilty pleas. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (by entering guilty plea

defendant waives all nonjurisdictional defects, including claim of ineffective assistance of counsel, except those relating to validity of plea).

¶8 For the reasons stated, therefore, we grant Valdez's petition for review but deny relief.

/s/ *Peter J. Eckerstrom*
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *Joseph W. Howard*
JOSEPH W. HOWARD, Chief Judge

/s/ *Michael Miller*
MICHAEL MILLER, Judge