

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

MARTIN EDWARD HUSSAK,  
*Petitioner.*

No. 2 CA-CR 2013-0216-PR  
Filed January 14, 2014

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Pinal County

No. S1100CR201102374

The Honorable Boyd T. Johnson, Judge

The Honorable Robert C. Brown, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

M. Lando Voyles, Pinal County Attorney  
By Ivan S. Abrams, Deputy County Attorney, Florence  
*Counsel for Respondent*

Martin Edward Hussak, Tucson  
*In Propria Persona*

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**MEMORANDUM DECISION**

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

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H O W A R D, Chief Judge:

¶1 Pursuant to a plea agreement, petitioner Martin Hussak was convicted of aggravated assault. The trial court sentenced him to the presumptive prison term of 3.5 years. He now seeks review of the trial court’s order denying his petition for post-conviction relief without an evidentiary hearing. We will not disturb the trial court’s ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In his pro se petition for review,<sup>1</sup> Hussak first contends the trial court violated his due process and equal protection rights because it did not consider the merits of the claims he had raised in this post-conviction proceeding. Although he does not specify which claims the court did not address, he accuses the court of “cherry picking” the issues it wished to address. But the record establishes the court attempted to characterize the claims Hussak had raised in the various memoranda he had filed after expressly stating it had reviewed all of Hussak’s filings, which the court identified by title and date filed; the state’s response; the transcripts and the presentence report; and the applicable legal authority. The

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<sup>1</sup>Hussak initially proceeded in propria persona, filing his own petition for post-conviction relief on October 30, 2012. The state filed its response in December, and before the reply was due, Hussak filed a request for the appointment of counsel. However, thereafter, appointed counsel avowed in a motion that he had consulted with Hussak, and Hussak wished to prepare the reply himself and to have counsel serve in an advisory capacity. The court appointed counsel to serve as advisory counsel thereafter.

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court concluded Hussak had knowingly, intelligently, and voluntarily entered the plea; the two attorneys who represented him had not been “ineffective and competently and properly advised and represented their client”; and the sentence was consistent with the plea agreement and within the lawful range of sentence.

¶3 That the trial court did not identify each and every argument Hussak had made does not permit the inference the court did not consider them. Rather, not only did the court state it had considered all relevant filings and authorities, we presume it did so in ruling on the petition before it. *Cf. Occidental Chem. Co. v. Connor*, 124 Ariz. 341, 344, 604 P.2d 605, 608 (1979) (presuming court considered affidavits in record before it); *Flynn v. Cornoyer-Hedrick Architects & Planners, Inc.*, 160 Ariz. 187, 193, 772 P.2d 10, 16 (App. 1988) (rejecting claim court failed to consider reply to motion because court did not specifically mention it in minute entry). Thus, to the extent Hussak is complaining that the court found some of his claims waived by the entry of the plea, and did not, in this respect, address the “merits” of his claims, we reject that argument.

¶4 Hussak has not otherwise established the trial court abused its discretion. He seems to be arguing that there was an inadequate factual basis for the plea. The record belies that contention. Counsel provided the factual basis for the plea and, when the court asked Hussak whether counsel had accurately summarized the facts and what had occurred, he responded, “Yes, sir.” Thus, he agreed he had fired a gun in a threatening manner and placed the victims in imminent fear of serious physical harm, thereby establishing Hussak had committed the offense of aggravated assault. *See* A.R.S. §§ 13-1203; 13-1204(A)(2).

¶5 Hussak’s related suggestions in this post-conviction proceeding that he had defenses to the charge do not establish grounds for vacating the plea. Hussak waived those defenses, like all non-jurisdictional defects, when he entered the guilty plea. *State v. Canaday*, 116 Ariz. 296, 296, 569 P.2d 238, 238 (1977); *see also Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise

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independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.”); *State v. Hostler*, 109 Ariz. 212, 214, 507 P.2d 974, 976 (1973) (defendant waives issues related to potential insanity defense by entering guilty plea). This includes all claims of ineffective assistance of counsel, except those that relate to the validity of the plea. See *State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993).

¶6 The record also shows the trial court addressed Hussak personally, reviewing with him the plea agreement and the constitutional rights he was waiving by entering the plea and assuring Hussak understood the terms of the plea agreement after having reviewed them with counsel. The court was entitled to rely on the representations Hussak made. See *State v. Hamilton*, 142 Ariz. 91, 93, 688 P.2d 983, 985 (1984); see also *State v. Djerf*, 191 Ariz. 583, ¶ 25, 959 P.2d 1274, 1283 (1998) (“defendant’s appropriate and rational responses” to court relevant to conclusion defendant understood consequences of entering plea and waiving rights).

¶7 Additionally, nothing in the record before us supports Hussak’s contention that the trial court abused its discretion by rejecting summarily his claim that trial counsel had been ineffective in connection with the entry of the plea, thereby invalidating it. See *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996) (“[t]o avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel,” petitioner must raise colorable claim on both parts of *Strickland*<sup>2</sup> test). In this context, Hussak was required to present evidence that, when taken as true, established competent counsel would have advised him not to plead guilty, and that his decision to enter a guilty plea was involuntary. See *State v. Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d 499, 504 (1998). Hussak presented no such evidence.

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<sup>2</sup>*Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance, defendant must show counsel’s performance fell below prevailing professional norms and outcome of case would have been different but for deficient performance).

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¶8 Finally, Hussak has not sustained his burden of establishing the trial court abused its discretion in imposing the presumptive, 3.5-year prison term, which was plainly set forth in the plea agreement as an option left to the discretion of the court, and was explained to Hussak at the change-of-plea hearing. Nor did he raise a colorable claim that trial counsel had been ineffective with respect to sentencing. Rather, the record shows counsel urged the court to place Hussak on probation and, alternatively, a mitigated prison term. Counsel presented ample evidence in mitigation including the fact that Hussak had been involved in an automobile accident that purportedly resulted in neurological impairment, and that his childhood was difficult.

¶9 For the reasons stated, we grant the petition for review but deny relief.