

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KEVIN RAY THACKER,
Petitioner.

No. 2 CA-CR 2013-0344-PR
Filed January 22, 2014

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NOT FOR PUBLICATION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.

Petition for Review from the Superior Court in Cochise County
Nos. S0200CR201100381 and S0200CR201100620
The Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Petitioner

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Kevin Thacker petitions this court for review of the trial court's order denying his requested relief in his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. 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). Thacker has not met his burden of demonstrating such abuse here.

¶2 Thacker pled guilty in two cause numbers to shoplifting and attempted third-degree burglary and was sentenced in January 2012 to concurrent, three-year prison terms for each offense. In July 2012, he filed a notice of post-conviction relief listing both cause numbers upon receiving a letter from the Cochise County Public Defender informing him that his trial counsel had been involved in a personal relationship with the prosecutor assigned to his cases while they were pending. In his subsequent petition for post-conviction relief, Thacker argued his trial counsel had been ineffective in failing to disclose this relationship to him and his due process rights had been violated by "prosecutorial misconduct" because the state did not disclose the relationship. He also asserted that "[t]he only appropriate remedy is for th[e trial c]ourt to order that [his] convictions be vacated and the charges dismissed."

¶3 The trial court determined that Thacker had "failed to raise any colorable claim regarding a substantive due process violation" but had made a colorable claim of ineffective assistance of counsel. The court set an evidentiary hearing but noted that, "[i]f post-conviction relief is granted, [Thacker]'s conviction would be

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vacated and [he] would be permitted to withdraw from the plea agreement.”

¶4 The state conceded trial counsel had been ineffective and requested the court vacate the evidentiary hearing and instead conduct a hearing pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), to give Thacker “an opportunity to withdraw from the plea agreements.” Thacker objected, claiming he was “entitled to address the issue of a substantive due process violation at the evidentiary hearing,” stating that he did not wish to withdraw from his plea or to proceed to trial, and arguing that the proper remedy was for the court to vacate his convictions and dismiss the charges.

¶5 At a hearing on the state’s motion, the court granted Thacker’s petition for post-conviction relief on the basis of ineffective assistance of counsel but denied his substantive due process claim. But, because Thacker “declin[ed] the relief and d[id] not wish to withdraw from the plea agreement[s],” it “confirmed” Thacker’s convictions and sentences in both cases and vacated all future hearings. This petition for review followed.¹

¶6 On review, Thacker argues the trial court erred in concluding the only relief available to him was to withdraw from his plea agreements. He argues that remedy is inadequate because his post-conviction claim “amounts to whistle-blowing on th[e improper] relationship” and he should not be punished for doing so by being forced to withdraw from his plea. He also contends the court “did not adequately consider” the prosecutor’s misconduct in evaluating whether dismissal was an appropriate remedy.

¹It appears, based on the record before us, that Thacker did not timely seek post-conviction relief. See Ariz. R. Crim. P. 32.4(a). Because the state does not suggest otherwise, we will assume without deciding that he may properly raise these claims based on newly discovered material facts pursuant to Rule 32.1(e), which may be raised in an untimely proceeding pursuant to Rule 32.4(a).

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¶7 But Thacker provides no authority that supports, even by analogy, his position that dismissal is warranted here. He cites a decision by the California Court of Appeals, in which the court concluded that reversal was appropriate when defense counsel failed to disclose to his client a romantic relationship with the prosecuting attorney. *See People v. Jackson*, 213 Cal. Rptr. 521, 523 (Ct. App. 1985). Although the court concluded the defendant was not required to show prejudice to obtain relief in these circumstances,² nothing in the decision suggested that the state was barred from retrying him. *Id.* at 523-24.

¶8 Thacker also cites *Pool v. State*, 139 Ariz. 98, 677 P.2d 261 (1984), for the proposition that, when “there has been knowing and intentional prosecutorial misconduct, double jeopardy requires dismissal of the charges.” Thacker is correct that double jeopardy may bar retrial in cases of intentional, improper prosecutorial conduct. *Id.* at 108-09, 677 P.2d at 271-72. But Thacker ignores that prosecutorial misconduct warrants relief only upon a showing of prejudice to the defendant. *See id.* at 109, 677 P.2d at 272; *State v. Schneider*, 148 Ariz. 441, 447, 715 P.2d 297, 303 (App. 1985) (prosecutorial misconduct must prejudice defendant and deny fair trial). Thacker has not identified any prejudice, and the record reveals none. Indeed, Thacker acknowledged in his petition that “[t]he plea offers which were extended and accepted in this case appear to comport with the Cochise County Attorney’s general plea negotiation policies.”

¶9 Thacker also suggests, without citation to authority, that he unfairly faces “more punishment” as a result of seeking post-conviction relief. This argument is facetious. Thacker does not face

²Under Arizona law, Thacker must show any actual conflict had an adverse effect, that is, that the conflict reduced his counsel’s effectiveness such that it caused a “substantially negative impact.” *See State v. Jenkins*, 148 Ariz. 463, 466-67, 715 P.2d 716, 719-20 (1986). Because the state has conceded that counsel was ineffective and that Thacker should be permitted to withdraw from his pleas, we need not determine whether Thacker met this burden.

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additional punishment. Instead, he seeks a windfall based on conduct by his attorney and the prosecutor that did not affect the resolution of his case. He has identified no authority or public policy supporting that result.

¶10 For the reasons stated, although review is granted, relief is denied.