

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRANCISCO ALBERTO BERRONES,
Petitioner.

No. 2 CA-CR 2013-0394-PR
Filed July 15, 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NOT FOR PUBLICATION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 Pima County

No. CR20063848

The Honorable Gus Aragón, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

STATE v. BERRONES
Decision of the Court

Francisco A. Berrones, Florence
In Propria Persona

MEMORANDUM DECISION

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

VÁSQUEZ, Judge:

¶1 Francisco Berrones seeks review of the trial court’s order summarily dismissing his petition for post-conviction relief. 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). For the reasons that follow, we grant review but deny relief.

¶2 On the fourth day of trial, Berrones pled guilty to two counts of sale and/or transfer of a narcotic drug, three counts of possession of a narcotic drug for sale, and one count of possession of drug paraphernalia. He was sentenced to concurrent prison terms, the longest of which were presumptive, 9.25-year terms.¹

¶3 Berrones filed a notice of appeal, which the trial court treated as a notice of post-conviction relief. Appointed counsel filed a notice stating he had reviewed the record but had found “no tenable issue for review.” Berrones did not file a pro se petition, and the trial court dismissed the proceeding in June 2009.

¹Berrones’s initial sentence provided that one of his prison terms was to be consecutive to the other terms imposed. That sentence was corrected after counsel pointed out it was inconsistent with the plea agreement.

STATE v. BERRONES
Decision of the Court

¶4 In 2011, Berrones filed a letter claiming he had not received counsel's notice nor anything else indicating he should file a pro se petition. The trial court initially granted an "extension of time" for Berrones to file his pro se petition. However, pursuant to a stipulation, the court later reinstated the proceeding and appointed counsel. Counsel filed a notice stating that, upon reviewing the record, he had found no "claims for relief to raise in Rule 32 post-conviction proceedings." The court set a due date for Berrones to file a pro se petition.

¶5 Counsel then filed a notice of post-conviction relief, ostensibly to permit Berrones to raise a claim of ineffective assistance of Rule 32 counsel, and Berrones filed a request that the trial court appoint counsel "to review a second Rule 32." Without dismissing the current proceeding, the court appointed new counsel to review the record "on the issue of ineffective assistance of counsel."² Counsel subsequently filed a notice stating he had reviewed the record but did not "believe that there is a sufficient basis in fact and/or law upon which to ground a good faith Rule 32 claim." The court again set a due date for Berrones to file a pro se petition.

¶6 Berrones did so, raising numerous claims of ineffective assistance of trial counsel. Berrones argued that trial counsel had been ineffective in failing to "attempt[] to exclude prosecution evidence on 4th Amendment grounds," "investigate . . . a violation of his 6th Amendment right," adequately impeach a witness based on his purportedly inconsistent statements, and investigate potential evidence tampering. Berrones further asserted counsel should have "mov[ed] for [a] mental exam," apparently to show he was not competent to stand trial or for use as mitigation evidence at

²We do not approve of the practice of appointing counsel to review previously appointed counsel's performance in the same Rule 32 proceeding. See *Osterkamp v. Browning*, 226 Ariz. 485, ¶¶ 19-20, 250 P.3d 551, 556-57 (App. 2011) (observing that indigent, pleading defendant should be "afforded counsel in the second proceeding" to address effectiveness of counsel in first proceeding).

STATE v. BERRONES
Decision of the Court

sentencing, additionally arguing that counsel was ineffective at sentencing and in failing to request a mitigation hearing. Berrones also claimed trial counsel had encouraged him to plead guilty by providing him with “erroneous advice and misinformation” because counsel had a “conflict of interest,” specifically that he had been “paid in full for the case” and thus did not want to go to trial. Finally, Berrones asserted that his trial should have been severed from that of his codefendant. The trial court summarily denied relief, and this petition for review followed.

¶7 On review, Berrones repeats his claims. “To state a colorable claim of ineffective assistance of counsel,” Berrones is required to “show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced [him].” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate resulting prejudice, Berrones must show a reasonable probability that the outcome would have been different absent counsel’s ineffectiveness. See *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). A claim for relief is colorable, and a defendant is therefore entitled to an evidentiary hearing, when the “allegations, if true, would have changed the verdict” or sentence. *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995).

¶8 Berrones first claims counsel was ineffective “by failing to contest evidence and testimony” and investigate so-called “missing evidence.” But, by pleading guilty, Berrones has waived all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the validity of his plea. See *State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). Berrones does not explain on review how counsel’s conduct in this regard renders his guilty plea invalid. This claim therefore fails.

¶9 Berrones next argues counsel was ineffective in failing to procure a psychological evaluation of him before trial or before sentencing. But, although he asserts the “record and evidence” show counsel was aware of his purported psychological problems, he identifies nothing in the record that supports this claim. For

STATE v. BERRONES
Decision of the Court

example, he refers to his presentence report, but that report states only that he was receiving medication for depression and that he thought “the medication [wa]s working.” And, although he claims he “was found incompetent” in another cause number, he does not assert counsel was aware of this fact nor identify anything in the record suggesting counsel should have been aware of it. Thus, Berrones has demonstrated neither deficient performance nor prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶10 Berrones next repeats his claim that counsel had a “conflict of interest” because counsel had requested “additional fees” for trial that Berrones was unable to pay. He reasons that this conflict caused counsel’s deficient performance in trial preparation and counsel’s purportedly “pressur[ing]” him to take a plea. He reasons that, because there was an “actual conflict of interest,” prejudice from counsel’s conduct is presumed.

¶11 In the event counsel has an actual conflict of interest, a defendant must show that the conflict “actually affected the adequacy of his representation” before we will presume prejudice. *Cuylar v. Sullivan*, 446 U.S. 335, 349-50 (1980); *see also State v. Jenkins*, 148 Ariz. 463, 466-67, 715 P.2d 716, 719-20 (1986). “Although a ‘defendant’s failure to pay fees may cause some divisiveness between attorney and client,’ courts generally presume that counsel will subordinate his or her pecuniary interests and honor his or her professional responsibility to a client.” *United States v. Taylor*, 139 F.3d 924, 932 (D.C. Cir. 1998), *quoting United States v. O’Neil*, 118 F.3d 65, 71 (2d Cir. 1997). Thus, a defendant “must establish that an actual financial conflict existed by showing that his counsel actively represented his own financial interest during [the defendant]’s trial, rather than showing [only] the possibility of an actual financial conflict.” *Caderno v. United States*, 256 F.3d 1213, 1218 (11th Cir. 2001).

¶12 Berrones’s assertions of conflict are entirely speculative. He has identified no evidence suggesting that counsel’s purportedly deficient performance resulted from a conflict between counsel’s financial interest and his representation. Indeed, in the letter Berrones attaches to his petition, counsel recognizes that Berrones

STATE v. BERRONES
Decision of the Court

was currently unable to pay any fees “due to the fact [he was] in custody,” and Berrones cites nothing showing counsel refused to proceed or even requested additional attorney fees. In any event, as we noted above, Berrones has waived any claim of ineffective assistance of counsel unrelated to the validity of his plea, and he does not explain how counsel unduly pressured him to accept the state’s plea offer.

¶13 Berrones further argues counsel was ineffective during the plea process because counsel told him incorrectly he would receive the same six-year prison sentence as his codefendant and because counsel failed to have the plea agreement “reduced to writing.” As to his first assertion, Berrones cannot show prejudice—the trial court advised Berrones during his plea colloquy of the sentencing range he would face upon pleading guilty. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. To obtain relief, Berrones must do more than contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant’s claim he was unaware sentence “must be served without possibility of early release” not colorable when “directly contradicted by the record”). And, to the extent Berrones suggests counsel was ineffective because the plea did not benefit him, he overlooks that the plea agreement called for concurrent sentences for separate offenses when he arguably could have faced consecutive sentences had he been convicted after trial. *See generally State v. Roseberry*, 210 Ariz. 360, ¶ 58, 111 P.3d 402, 412 (2005) (consecutive sentences permitted for separate acts); *see also* Ariz. R. Crim. P. 26.13. Additionally, although Berrones is correct that a plea agreement must be reduced to writing, Ariz. R. Crim. P. 17.4(b), he has identified no prejudice resulting from counsel’s failure to ensure that requirement was met here. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶14 Berrones’s claim that counsel was ineffective at sentencing also fails. Although he asserts that his sentence was based on “false information” that counsel failed to correct, he has not identified any false information that the court relied on in sentencing him. He additionally claims counsel should have requested a mitigation hearing, apparently to present evidence of his

STATE v. BERRONES
Decision of the Court

mental health, as well as evidence of family and community support, work history, and similar facts. But he has not provided any meaningful detail about what information he claims was omitted, much less demonstrated that mitigating evidence was not adequately presented in the presentence report, counsel's sentencing memorandum, and the letters submitted for his sentencing. Nor has he shown any reasonable likelihood that counsel having presenting the information would have altered the sentence imposed. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶15 Finally, Berrones repeats his argument that his trial should have been severed from that of his codefendant. But, having pled guilty, Berrones has waived this claim. *See Quick*, 177 Ariz. at 316, 868 P.2d at 329.

¶16 For the reasons stated, although we grant review, we deny relief.