

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KENNETH WAYNE SIMPSON JR.,
Petitioner.

No. 2 CA-CR 2013-0500-PR
Filed March 3, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2008179642001SE
The Honorable Joseph Kreamer, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Shaheen P. Torgoley, Deputy County Attorney, Phoenix
Counsel for Respondent

Kenneth W. Simpson Jr., San Luis
In Propria Persona

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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 Kenneth Simpson petitions this court for review of the trial court's order summarily dismissing his of-right petition for post-conviction relief filed 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). Simpson has not met his burden of demonstrating such abuse here.

¶2 Simpson pled guilty to attempted second-degree murder and second-degree murder. The plea agreement provided that Simpson would be sentenced to consecutive, presumptive prison terms of 10.5 and sixteen years, respectively. The trial court imposed sentences consistent with that agreement.

¶3 Simpson filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record, but did not "find any claims for relief to raise in post-conviction relief proceedings." Simpson then filed a pro se petition claiming his trial counsel had been ineffective in failing to "argue, advocate or even negotiate for concurrent sentences," present mitigating evidence, and "subject the state's case to any adversarial testing process." He asserted that counsel "prepared nothing and did no investigation and expended no eff[ort] for purposes of plea negotiations and sentencing." The trial court dismissed the petition, noting Simpson "was informed of and specifically agreed to the terms of the plea," including the stipulated sentences, and thus "[n]o amount of mitigation would have changed the outcome at sentencing."

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¶4 On review, Simpson repeats his claims. We agree with the trial court that they do not warrant relief. To present a colorable claim of ineffective assistance of counsel, Simpson must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced him. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶5 Although Simpson claims his trial counsel could have negotiated a more beneficial plea agreement, he does not explain what counsel could have done to accomplish that. Nor does he identify any fact or evidence suggesting the state would have offered a more lenient plea agreement had counsel conducted additional investigation. And, in any event, by pleading guilty, Simpson waived all non-jurisdictional defects except those related to the validity of his plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). Simpson did not assert below nor in his petition for review that his decision to plead guilty somehow was rendered involuntary by counsel's conduct or that it otherwise rendered the plea invalid.¹ Thus, even assuming counsel's conduct fell below prevailing professional norms, Simpson has not demonstrated resulting prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¹In his reply to the state's response to his petition for review, Simpson claims he did not "understand[]" his plea because trial counsel did not inform him that consecutive sentences were not required by law. To the extent Simpson thereby suggests his plea was involuntary, we do not address claims not first raised in the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also Ariz. R. Crim. P. 32.9(c)(1)(ii)* (petition for review limited to "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

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