

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DANIEL ANTHONY CARRILLO,
Petitioner.

No. 2 CA-CR 2014-0056-PR
Filed May 13, 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NOT FOR PUBLICATION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 Yuma County

No. S1400CR201101193

The Honorable Lisa W. Bleich, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Jon R. Smith, Yuma County Attorney
By Charles Platt, Deputy County Attorney, Yuma
Counsel for Respondent

Daniel Anthony Carrillo, Florence
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 Petitioner Daniel Carrillo seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Carrillo has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Carrillo was convicted of attempted molestation of a child and molestation of a child, dangerous crimes against children. The trial court imposed an aggravated, twenty-four year sentence on the molestation count and suspended the imposition of sentence on the attempted molestation count, placing Carrillo on a lifetime term of intensive probation.

¶3 Carrillo thereafter sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and was “unable to find any claims for relief to raise in post-conviction relief proceedings.” In a supplemental, pro se petition, however, Carrillo argued “the sentencing court and the state breach[ed] the term of [his] plea agreement.” Carrillo’s plea agreement included various terms and conditions, including paragraph seven, which provided that Carrillo would “consent[] to judicial fact finding by [a] preponderance of the evidence as to any aspect or enhancement of sentence,” including aggravating factors. Carrillo initialed each paragraph of the terms and conditions, except paragraph seven. At the end of the agreement was a statement that Carrillo had “personally and voluntarily placed [his] initials on each line of paragraphs one through ten and signed the signature line

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below to indicate [he] read and approved all of the previous paragraphs in this agreement, both individually and as a total binding agreement.” Carrillo signed his name on the line provided. In his pro se petition, Carrillo claimed he had been promised a presumptive sentence and had been advised not to initial paragraph seven in order to “preserv[e] his constitutional right to have aggravating factors determined by a jury of his peers.” The trial court summarily denied relief.

¶4 On review, Carrillo repeats his argument and contends the trial court erred in denying relief. We disagree. At his change of plea hearing, the trial court asked Carrillo if he had “initial[ed] each paragraph and sign[ed] the plea agreement,” and he stated that he had. He also indicated that he understood the plea agreement. The court then explained the possible sentences he faced under the plea agreement, including aggravated sentences, and explained that “[b]oth parties may present evidence and arguments to the Court in favor of an aggravated or mitigated sentence.” When the court asked if that was Carrillo’s “understanding of the plea agreement,” he stated, “Yes, ma’am.” The court further explained that by pleading guilty, Carrillo was giving up his right “to have the jury determine any factors which could aggravate [his] sentence.” The court expressly stated, “If you enter a plea of guilty, the Court, not a jury, will decide whether aggravating factors exist.” It stated again, “You’re giving up your right to have a jury determine any aggravating factors or exceptional circumstances that would be considered by the judge at the time of your sentencing.” The court asked if he understood his rights and if he wished to “give up those rights and plead guilty,” and Carrillo answered affirmatively. Carrillo also agreed that no additional promises or agreements had been made other than what was in the plea agreement.

¶5 At a later mitigation hearing, Carrillo testified and stated that he believed he should get “a lesser sentence” and that he thought twenty-four years was “too much time,” but he did not state he believed that he had only agreed to a lesser sentence in his plea agreement. Indeed, at no time did Carrillo object to the court hearing evidence in aggravation and mitigation or to the aggravated sentence when it was imposed.

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¶6 Thus, as the trial court correctly concluded, regardless of his intent when he failed to initial paragraph seven, Carrillo “waived his right to have a jury determine any aggravating factors which would be considered by the judge at [the] time of sentencing.” To establish a colorable claim for post-conviction relief, a petitioner is required to do more than merely contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998).

¶7 Therefore, although we grant the petition for review, we deny relief.