

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LUIS AVELINO CAMACHO,
Petitioner.

No. 2 CA-CR 2014-0299-PR
Filed October 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NOT FOR PUBLICATION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 Maricopa County
No. CR2006005509001DT
The Honorable Jeanne Garcia, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Susan L. Luder, Deputy County Attorney, Phoenix
Counsel for Respondent

Michael P. Denea, PLC, Phoenix
By Michael P. Denea
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Luis Camacho petitions for review of the trial court’s denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but we deny relief.

¶2 After a jury trial, Camacho was convicted of kidnapping and conspiracy to commit first-degree murder. This court affirmed his convictions on appeal. *State v. Camacho*, No. 1 CA-CR 08-0074 (memorandum decision filed June 18, 2009). Camacho then raised numerous claims in a timely post-conviction relief proceeding, including a claim that counsel had been ineffective in failing to communicate a plea offer from the state that he would have accepted instead of proceeding to trial. After an evidentiary hearing, the trial court found Camacho had failed to establish he was entitled to relief and denied his petition. With respect to his claim of ineffective assistance during plea negotiations, the court found “no deficient performance from counsel . . . because the State never offered a formal plea [agreement].”

¶3 On review, this court concluded the trial court had abused its discretion in finding the state’s offer was not “sufficiently ‘formal’ to trigger a duty by trial counsel to communicate” the offer to Camacho. *State v. Camacho*, No. 2 CA-CR 2013-0348-PR, ¶ 6 (memorandum decision filed Nov. 29, 2013). We remanded the case and directed the court to make additional factual findings, including whether counsel had “communicated the offer to Camacho and whether Camacho had rejected it,” in order to address Camacho’s claim. *Id.* We adopted the court’s ruling denying relief on Camacho’s other claims. *Id.* ¶ 7.

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¶4 On remand, the trial court considered the record, including additional materials provided after remand, and again denied relief. The court concluded Camacho had failed to sustain his burden of proof and, based on credibility determinations and its assessment of probabilities, found counsel had communicated the state's offer to Camacho and he had rejected it. This petition for review followed. "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). We find none here.

¶5 On review, Camacho argues the trial court "did not make the necessary findings of fact required" on remand and its "conclusions are not supported by substantial evidence." In large part, Camacho focuses on an electronic mail ("e-mail") exchange between the prosecutor and Camacho's counsel, which he contends established "that his trial counsel told the prosecutor the offer was rejected, *without conferring with Camacho first.*"

¶6 In the exchange of e-mails in late April 2007, Camacho's counsel had proposed a plea agreement with a stipulated fifteen-year prison term to resolve this case and other matters pending against Camacho. In his response, the prosecutor rejected the proposal but stated that, if Camacho would accept a stipulated twenty-one-year prison term, "we're don[e]—if not, it looks like trial. Please let me know." The following morning, Camacho's counsel replied, "He won't accept that. I will advise him of the offer but he isn't going to accept 21 years. Looks like trial." Nothing in the e-mail exchange, and no evidence at the evidentiary hearing, suggested the prosecutor had set a deadline for responding to the offer.

¶7 Camacho appears to argue our remand required the trial court to determine only whether the state's twenty-one year offer had been communicated to and rejected by Camacho before counsel had sent his e-mailed reply to the prosecutor. But, had we regarded counsel's e-mailed reply as an unequivocal rejection of the state's offer, there would have been no need for a remand on the

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issue we identified.¹ From the face of counsel's e-mailed reply, he had not yet conveyed the offer to Camacho, and his testimony was consistent with that representation.

¶8 Camacho also argues "there is no evidence" to support the trial court's implicit finding that his attorney had informed him of the offer during a jail visit that occurred after he had sent his e-mailed reply but before trial, shortly before Camacho had moved for substitution of counsel. At the evidentiary hearing held five years later, the attorney had no specific recollection of discussing the twenty-one year plea offer with Camacho but testified that, as a matter of general practice, he would have done so and, in this case, would have advised Camacho to accept the offer. Camacho, in turn, testified he did not remember whether counsel had told him about the state's twenty-one year plea offer. But he also stated his attorneys "didn't explain everything the way they're supposed to explain it to me," and, had they done so, "then, most likely, I would have t[a]ken that plea."

¹The focus of our previous decision was our conclusion that the court had erred in finding no plea offer had been made by the state; our discussion of the offer's rejection was less extensive, and we may have used the term "rejected" somewhat broadly. *Camacho*, No. 2 CA-CR 2013-0348-PR, ¶ 5 & n.1. For example, we stated counsel had "conceded he had rejected this offer based on Camacho's previous rejection of all but a fifteen-year-sentence." *Id.* n.1. But although counsel acknowledged his e-mail had been based on previous discussions with Camacho, he insisted his statement that "[h]e won't accept that" could not be characterized as a rejection of the offer on Camacho's behalf, stating, "[N]ot when I followed up with, 'I will advise him of the offer.'" Unlike the existence of the offer, which we found established by the e-mails and related testimony, *id.* ¶ 5, the "rejection" of the offer could be evinced by inference; that is, the offer was necessarily rejected, if only by implication, because Camacho proceeded to trial. Our remand required the trial court to consider whether Camacho himself had made that decision. *Id.* ¶ 6.

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¶9 Noting Camacho’s credibility was diminished by discrepancies between his affidavit and his testimony at the hearing, the trial court concluded Camacho had failed to establish facts supporting his claim by a preponderance of the evidence. In the absence of any direct evidence on the issue, the court also found it “more likely” that counsel had conveyed the plea offer, consistent with his general practice. *Cf. State v. Murray*, 184 Ariz. 9, 31, 906 P.2d 542, 564 (1995) (“The probative value of evidence is not reduced because it is circumstantial.”).

¶10 It is a petitioner’s burden to prove by a preponderance of the evidence all factual allegations raised in his petition for post-conviction relief. Ariz. R. Crim. P. 32.8(c). And, when a trial court has held an evidentiary hearing, we defer to its factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). Thus, we “view the facts in the light most favorable to sustaining the lower court’s ruling, and we must resolve all reasonable inferences against the defendant.” *Id.* Moreover, “[t]he trial court is the sole arbitrator of the credibility of witnesses” in post-conviction proceedings. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). It is for that court, not this one, to resolve any factual disputes underlying an ineffective assistance of counsel claim. *See State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995).

¶11 The trial court did not abuse its discretion in concluding Camacho failed to establish his counsel had performed deficiently during plea negotiations. Accordingly, although we grant review, we deny relief.