

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSEPH RANDY NORZAGARAY,
Petitioner.

No. 2 CA-CR 2015-0009-PR
Filed April 27, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20132330004

The Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Petitioner

STATE v. NORZAGARAY
Decision of the Court

MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Joseph Norzagaray seeks review of the trial court's order denying 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. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We grant review and, for the reasons that follow, grant relief.

¶2 Pursuant to a plea agreement, Norzagaray pled guilty to aggravated assault and armed robbery and was sentenced to consecutive prison terms totaling eighteen years. Before pleading guilty, Norzagaray asked the trial court to order an examination pursuant to Rule 11, Ariz. R. Crim. P., to examine his competency to stand trial based on a head injury that purportedly was causing Norzagaray "neuropsychological problems." The court denied the request.

¶3 Norzagaray sought post-conviction relief, asserting his trial counsel had been ineffective in failing to present adequate evidence to support the Rule 11 motion and in failing to renew the request for a Rule 11 evaluation based on a neuropsychological examination prepared for sentencing. In that report, the examining psychologist concluded Norzagaray had suffered two traumatic brain injuries, resulting in permanent "severely impaired cognitive function" and "profound memory impairment" such that he would "encounter frequent difficulties in everyday living." The psychologist noted Norzagaray's full-scale intelligence quotient was sixty-four, which is "in the lowest 1% of the general population." The psychologist further observed that Norzagaray's ability to understand and solve problems was significantly impaired, and that

STATE v. NORZAGARAY
Decision of the Court

he would be particularly vulnerable to suggestion “by people in positions of perceived authority.”

¶4 The trial court summarily denied relief. It noted that, based on Norzagaray’s demeanor at the plea colloquy, “[n]othing indicated that [he] did not understand the nature of the proceedings.” It further reasoned that the neuropsychological report “did not state that [Norzagaray] was unable to understand the nature of the proceedings, could not adequately assist his counsel, or was incapable of entering a plea agreement.” Thus, the court concluded, that report would not have provided “a reasonable basis” to grant a renewed Rule 11 motion. The court further observed that Norzagaray had not suffered prejudice because his “potential [sentencing] exposure at trial was in excess of 100 years” and conviction seemed likely based on the evidence. This petition for review followed.

¶5 On review, Norzagaray reurges his claim that trial counsel was ineffective in failing to renew the Rule 11 motion in light of the neuropsychological report. He asserts he presented a colorable claim and is entitled to an evidentiary hearing. A defendant is entitled to an evidentiary hearing only if his or her claim is colorable, that is, 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). “To state a colorable claim of ineffective assistance of counsel,” Norzagaray was 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).

¶6 A person may “not be tried, convicted, sentenced or punished for a public offense” if he or she, “as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense.” Ariz. R. Crim. P. 11.1. “For a guilty plea to be valid, it must be knowing and voluntary.” *State v. Stefanovich*, 232 Ariz. 154, ¶ 12, 302 P.3d 679, 682 (App. 2013). “A criminal defendant ‘is not competent to plead guilty if the mental illness has substantially

STATE v. NORZAGARAY
Decision of the Court

impaired his ability to make a reasoned choice among the alternatives presented to him and understand the nature of the consequences of his plea.” *State v. Brewer*, 170 Ariz. 486, 495, 826 P.2d 783, 792 (1992), *quoting State v. Bishop*, 162 Ariz. 103, 105, 781 P.2d 581, 583 (1989).

¶7 On a party’s or the trial court’s own motion, the court may order an examination to determine competence, or it may order a preliminary examination “to assist the court in determining if reasonable grounds exist to order further examination of the defendant,” Ariz. R. Crim. P. 11.2(a), (c), and it may “request that a mental health expert assist the court” in making that initial determination, A.R.S. § 13-4503(C). If the court determines that reasonable grounds exist to order a competency evaluation, the court may conduct a “retrospective competency hearing” to determine whether a defendant was competent to plead guilty. *Bishop*, 162 Ariz. at 104, 781 P.2d at 582. “We review a trial court’s decision on whether to order an examination and competency hearing for abuse of discretion.” *State v. Mendoza-Tapia*, 229 Ariz. 224, ¶ 22, 273 P.3d 676, 683 (App. 2012). However, if there is sufficient evidence “to give rise to a doubt in the mind of the court as to whether defendant is competent, it is a mandatory duty of the court to hold a hearing.” *State v. Messier*, 114 Ariz. 522, 525, 562 P.2d 402, 405 (App. 1977). A trial court has “a continuing duty to inquire into a defendant’s competency,” *Mendoza-Tapia*, 229 Ariz. 224, ¶ 22, 273 P.3d at 683, as does counsel, *see Bishop v. Superior Court*, 150 Ariz. 404, 407-08, n.4, 724 P.2d 23, 26-27, 30 n.4 (1986).

¶8 We presume “‘counsel’s conduct falls within the wide range of reasonable professional assistance’ that ‘might be considered sound trial strategy.’” *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting Strickland*, 466 U.S. at 689. To overcome that presumption, Norzagaray must show counsel’s decision not to renew the Rule 11 motion was “not tactical in nature, but w[as] instead the result of ‘ineptitude, inexperience or lack of preparation.’” *Id.*, *quoting State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). But, in light of counsel’s duty to ensure his client is competent and the psychologist’s conclusions following the neuropsychological evaluation, we can identify no valid tactical

STATE v. NORZAGARAY
Decision of the Court

reason for counsel to have failed to renew the Rule 11 motion upon receipt of the report.

¶9 Nor, at least on the record before us,¹ does there appear to be any basis for counsel to have declined to renew the Rule 11 motion. The neuropsychological evaluation identified profound defects in Norzagaray's cognitive and decision-making abilities. Although Norzagaray's low IQ does not necessarily mean he is incompetent to plead guilty, *see Bishop*, 162 Ariz. at 104-05, 781 P.2d at 582-83 (defendant with 77 IQ found competent to plead guilty), it does raise significant concerns about his competency.² And Norzagaray's other cognitive deficiencies, including his impaired memory and problem-solving capacity, as well as vulnerability to suggestion, directly call into his question his capacity to make a voluntary, intelligent, and informed decision to plead guilty. The psychological report therefore placed counsel on clear notice that his earlier concerns about Norzagaray's competence had some foundation. Thus, Norzagaray has made a colorable claim that counsel's failure to renew the Rule 11 motion fell below prevailing professional norms. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶10 And Norzagaray has made a colorable claim that he was prejudiced by counsel's conduct. *See id.* We disagree with the trial court's conclusion that the neuropsychological evaluation report is insufficient to warrant, at minimum, a preliminary Rule 11 examination or consultation pursuant to Rule 11.2(c) and § 13-4503(C). As noted above, the report details permanent and severe deficiencies in Norzagaray's cognitive and decision-making abilities, as well a risk that Norzagaray was unduly vulnerable to suggestion.

¹We do not preclude the possibility that, on remand, evidence could be presented that counsel had information reasonably indicating that renewing the Rule 11 motion was inappropriate.

²The law expressly recognizes that a low IQ indicates a meaningfully diminished capacity. For example, a murder defendant with Norzagaray's IQ would presumptively have an intellectual disability that would render him or her ineligible for the death penalty. *See A.R.S. § 13-753(G), (H).*

STATE v. NORZAGARAY
Decision of the Court

These issues could significantly influence the determination whether Norzagaray was competent to waive his constitutional rights by pleading guilty. Thus, the report was sufficient “to give rise to a doubt” concerning Norzagaray’s competence and the court would have abused its discretion by declining to proceed with at least a preliminary evaluation or consultation.³ See *Messier*, 114 Ariz. at 525, 562 P.2d at 405. We also note that the likelihood of conviction at trial or the prison sentences Norzagaray could face if convicted at trial are irrelevant to the prejudice determination in these circumstances. The issue is whether Norzagaray was competent to make the choice to plead guilty, not whether that choice was a wise one.

¶11 Norzagaray has made a colorable claim of ineffective assistance of counsel. Therefore, both review and relief are granted, and the case is remanded to the trial court for further proceedings consistent with this decision.

³Norzagaray does not argue the trial court erred by failing to sua sponte order an examination. Although the trial court correctly noted the report did not expressly conclude Norzagaray was incompetent to plead guilty, that is not surprising given that it was prepared for sentencing, not Rule 11 purposes. And there was no reason for the report to contain a specific finding that he was incompetent to plead guilty. The relevant issue was whether the report was sufficient to require further evaluation, not whether it compelled a finding of incompetence. We do not suggest, however, that a trial court cannot rely, in part, on its own observations of a defendant in determining whether a Rule 11 examination is warranted. See *State v. Moody*, 208 Ariz. 424, ¶ 48, 94 P.3d 1119, 1138 (2004) (“In determining whether reasonable grounds exist [for a competency hearing], a judge may rely, among other factors, on his own observations of the defendant’s demeanor and ability to answer questions.”). However, given the conclusions in the neuropsychological evaluation report, the court’s observations here are insufficient to dispel the doubt the report created. See *Messier*, 114 Ariz. at 525, 562 P.2d at 405.