

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STEVEN DILBERN SMITH,
Petitioner.

No. 2 CA-CR 2015-0121-PR
Filed June 12, 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NOT FOR PUBLICATION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 Cochise County

No. CR201300315

The Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Cochise County Legal Defender
By Joel A. Larson, Legal Defender, Bisbee
Counsel for Petitioner

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Steven Smith 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 that ruling unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Smith has not met his burden of demonstrating such abuse here.

¶2 Smith pled guilty to two counts of forgery and one count of possession of a narcotic drug and was sentenced to concurrent, three-year prison terms for each offense. The trial court ordered his sentences to run concurrently with those imposed in another case, CR201100922.

¶3 Smith then sought post-conviction relief, arguing that, as part of his plea agreement in CR201100922, the state had agreed his plea would "resolve all Cochise County cases, including uncharged conduct" that formed the basis of the charges in the present case, CR201300315. Thus, he argued, he was entitled to "[s]pecific performance" of that plea agreement and his trial counsel had been ineffective in failing to seek dismissal of the charges in CR201300315. The trial court denied relief after an evidentiary hearing. It noted that Smith had not raised this issue during a *Donald*¹ hearing, during his change-of-plea hearing, or during sentencing. And the court found highly credible the testimony of Mark Higgins, Smith's counsel in CR201100922, that there had been no such agreement. This petition for review followed.

¹*State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

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¶4 On review, Smith argues the trial court erred in finding there had been no agreement, focusing on purported weaknesses in Higgins’s testimony. The trial court is the sole arbiter of witness credibility. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). We will not reweigh the evidence on review; we must instead “view the facts in the light most favorable to sustaining the lower court’s ruling, and . . . resolve all reasonable inferences against the defendant.” *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). And we must defer to the court’s factual findings unless they are unsupported by the record. *State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003).

¶5 Smith’s primary argument is that the trial court was required to find an agreement had existed because Higgins stated during Smith’s change-of-plea hearing in CR201100922, without objection from the state, that “this plea agreement only resolves cases in Cochise County,” and not other counties. As the trial court noted, however, Higgins’s previous statement was “not entirely clear” and, in any event, did not expressly refer to an agreement regarding future charges – only existing “cases.” Higgins testified at the evidentiary hearing that, had there been an agreement that the state would not bring additional charges, he would have ensured the provision was included in the written plea agreement and made clear in the record. And, although Smith is correct that Higgins testified he had no “memory of specific conversations” with Smith or with the prosecutor, the court was still free to accept Higgins’s explanation that, had any such agreement existed, he would have ensured it was clearly expressed in the plea and record.

¶6 Smith has identified no basis to disturb the trial court’s finding there had been no agreement in CR201100922 that would preclude additional future charges. We therefore need not address his additional argument that counsel in CR201300315 was ineffective for failing to seek dismissal on that basis.

¶7 Although we grant review, we deny relief.