

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAMIEN ANGEL FLORES,
Petitioner.

No. 2 CA-CR 2015-0133-PR
Filed July 14, 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NOT FOR PUBLICATION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 Pinal County

No. S1100CR201100405

The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Renee J. Waters, Deputy County Attorney, Florence
Counsel for Respondent

Michael Villarreal, Florence
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 Damien Flores 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). Flores has not met his burden of demonstrating such abuse here.

¶2 In 2011, Flores pled guilty to conspiracy to possess marijuana for sale and was placed on a five-year term of probation. In 2012, the state filed a petition to revoke probation. The minute entry for Flores's arraignment notes that Judge Neal "advised [him] of a potential court conflict" and that Flores "waive[d] the same." However, at the violation hearing, Judge Neal "remov[ed] herself from this matter for the Contested Violation Hearing due to the Plea Agreement having been signed by [her husband] and this case does arise out of the drug and auto theft unit," which was supervised by her husband. Flores later admitted having violated his probation, and his disposition was set for August 6, 2012, before Judge Johnson.

¶3 On July 26, however, Flores was brought before Judge Neal. He was represented by new counsel, with whom he had never had contact before that hearing. After conferring with Flores, counsel informed Judge Neal that Flores wished to proceed with the disposition that day rather than wait until August 6. Flores, through counsel, asked Judge Neal to sentence him in accordance with the recommendation in the predisposition report to a "minimum," four-year prison term, concurrent with a prison term Flores was already serving in another matter. The state asked Judge Neal to sentence Flores to a presumptive five-year prison term to run consecutively to

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Flores's other prison term. Noting Flores had "two [drug] sale cases . . . within months of each other," Judge Neal adopted the state's recommendation.

¶4 Later that day, counsel informed Judge Neal that he had not conferred with Flores before the disposition hearing, and he thus had not "advised [him] of all the issues, including any potential judicial conflicts for the purposes of [that day]'s proceeding." Although the judge observed that Flores had previously waived any conflict of interest, she nonetheless appointed new counsel to "determin[e] . . . any appropriate post-disposition matters." Flores then sought post-conviction relief, arguing his disposition counsel had been ineffective in failing to advise him of Judge Neal's conflict of interest and in failing to confer with him prior to sentencing. He claimed "it [was] clear" that counsel had told him "he was going to be sentenced to the concurrent term" and that, had counsel consulted with him, he would have told counsel his mother was expected to testify at the scheduled disposition. Flores further argued Judge Neal should not have sentenced him due to her purported conflict of interest and earlier recusal.

¶5 Flores included with his petition an affidavit from disposition counsel in which he stated he was unaware Judge Neal had recused herself. He also averred he did not confer with Flores because, based on his experience, he believed Judge Neal would follow the recommendation in the predisposition report. Counsel acknowledged that Flores had been "present [before his disposition began] when Judge Neal gave the general advisement regarding a potential conflict on drug related cases due to her husband," but he stated "after calling the case, no mention was made of the potential conflict and [Flores] did not specifically waive the conflict." In his own affidavit, Flores averred counsel had "advised" him he would receive a four-year concurrent sentence and, had counsel consulted with him, he would have told counsel his mother planned to testify about his "upbringing," "mental health issues," and "other pertinent issues regarding [his] following [his] father's orders regarding engaging in criminal conduct." The trial court summarily denied relief, and this petition for review followed.

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¶6 On review, Flores repeats his claims that Judge Neal erred by proceeding with sentencing and that counsel was ineffective at sentencing because he did not discuss the case with Flores. He asserts that Judge Neal violated Rule 2.11 of Arizona’s Code of Judicial Conduct, Ariz. R. Sup. Ct. 81, which provides a judge “shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned,” including when the judge “has a personal bias or prejudice concerning a party or a party’s lawyer” or the spouse of the judge is a “managing member . . . of a party” to the proceeding. But Flores does not claim Judge Neal had any actual bias or prejudice, or that her husband had any present interest in the case. Accordingly, any bias was subject to waiver pursuant to Rule 2.11(C). Although we agree the better practice would have been for Judge Neal to renew her decision to recuse, Flores has never responded to the state’s argument that his earlier waiver of any conflict remained effective. Absent such a response, we have no basis to disturb the trial court’s summary denial of relief on this claim. *Cf. State v. Morgan*, 204 Ariz. 166, ¶ 9, 61 P.3d 460, 463 (App. 2002) (rejecting claim on appeal due to failure to respond to state’s argument); *cf. also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (lack of adequate argument waives claim on appeal).

¶7 Flores also argues his disposition counsel was ineffective because he was not adequately prepared for sentencing and did not discuss his case with him. “To state a colorable claim of ineffective assistance of counsel,” Flores 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). Even assuming Flores has made a colorable claim that his counsel fell below prevailing professional norms, he has not done so with respect to prejudice.

¶8 To show prejudice, Flores was required to demonstrate there is a reasonable probability that “the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability is one “sufficient to undermine confidence in the outcome.” *Id.* Although Flores argues he lost the opportunity to

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“present[] mitigation evidence and witness testimony,” the only such evidence he identifies is the testimony his mother purportedly would have offered. He has not explained what mitigation evidence was presented in the predisposition report nor provided sufficient detail about his mother’s testimony for the trial court to evaluate whether it is likely that Flores would have received a different sentence had that testimony been presented. To be entitled to an evidentiary hearing, a defendant must offer “more than conclusory assertions.” *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000). Without more, Flores has not met his burden of demonstrating the court erred in summarily rejecting this claim.

¶9 Although we grant review, we deny relief.