

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GABRIEL IGNACIO SALAZAR,
Petitioner.

No. 2 CA-CR 2015-0309-PR
Filed December 3, 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NOT FOR PUBLICATION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. CR201000073
The Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

Gabriel I. Salazar, San Luis
In Propria Persona

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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 Gabriel Salazar petitions for review of the trial court's summary dismissal of his pro se petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but we deny relief.

¶2 Pursuant to a plea agreement, Salazar was convicted of possession of more than four pounds of marijuana for sale. Consistent with stipulations in his plea agreement, the trial court sentenced him as a non-repetitive offender to a presumptive term of five years' imprisonment, to be served consecutively to sentences to be imposed for his convictions, after a jury trial held in his absence, of transportation of marijuana for sale, fleeing from a law enforcement vehicle, and resisting arrest in Cochise County Superior Court Cause No. CR200900302.¹ The plea agreement also provided that Salazar would admit, for the purpose of enhancement of sentences imposed in Cochise County No. CR200900302 only, his historical prior felony conviction in a federal case, and that the state would not allege any enhancement or aggravating factors in the instant case, would dismiss other pending charges, and would forego prosecution in another matter.

¹Although the sentencing transcript and minute entry include references to Salazar's "one historical prior felony conviction," and describe him as a "repetitive" offender, the trial court's order dismissing Salazar's petition correctly reflects his sentence, "[p]ursuant to the terms of the plea agreement," as "the presumptive term of 5 years imprisonment for a Class 2 non-repetitive felony offense."

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¶3 Salazar filed a timely notice of post-conviction relief and, after appointed counsel notified the court she could find no arguable claim to raise under Rule 32, he filed a petition raising claims of ineffective assistance of counsel and apparently alleging his plea had been involuntary. He first alleged counsel had been ineffective in failing to “request a continuance” of a plea agreement offered by the state in Cochise County No. CR200900302, despite Salazar’s having told counsel he was “prevented . . . from” entering a plea agreement in that case because he and his family were being threatened as a result of a “drug deal gone bad” and accepting the plea would “leav[e his] family in jeopardy.” He also alleged counsel had been ineffective in the instant case by permitting him to be “pressured into a plea that [he] requested more time to consider,” without affording him “time to consult with [his] family or consider [his] options.” He maintained he had been unable “to make the proper and correct decision” because at the change of plea hearing, held more than a week after he had been arrested and incarcerated, “[he] was coming down off a drug induced state and withdrawals from heroin use.” As relief, he proposed he should “be granted a new trial [in Cochise County No.] CR200900302 and allowed to enter a new plea [agreement]” in the instant case.

¶4 The trial court dismissed the petition, finding there was no “material issue of fact or law which would entitle [Salazar] to post-conviction relief and no purpose would be served by further proceedings.” The court stated, “[Salazar] cannot complain that his trial counsel was ineffective for negotiating a sentence of 5 years imprisonment,” noting that the minimum sentence available had he been convicted after trial was 15.75 years “and the aggravated sentence could have been 35 years.” The court further stated Salazar had “failed to raise any facts which could change [its] finding” at the change of plea hearing that Salazar had “voluntarily entered his plea of guilty.” This petition for review followed.

¶5 We review a summary denial of post-conviction relief for an abuse of discretion, *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find none here. First, this Rule 32 proceeding does not concern Salazar’s convictions and sentences in

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Cochise County No. CR200900302, and the record in that case is not before us. *See* Ariz. R. Crim. P. 32.4(a) (notice of post-conviction relief “shall bear the caption of the original criminal action or actions to which it pertains”). Accordingly, to the extent Salazar continues to challenge counsel’s performance in that case, his claims are not properly before us on review, and we will not consider them.

¶6 With respect to counsel’s performance during plea proceedings in this case, Salazar repeats the argument made in his petition below. He suggests counsel was aware that Salazar was suffering from “an obvious d[y]sfunction of [his] mental competenc[e]” at the change of plea hearing and that he required “information, time, and input” from his family and from counsel in order “to make a voluntary decision,” but counsel “deci[ded] to finalize [Salazar’s] case in order to suit his own convenience.”

¶7 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68, *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish a colorable claim of prejudice, a defendant must “show a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* ¶ 25, *quoting Strickland*, 466 U.S. at 694.

¶8 At Salazar’s change of plea hearing, his attorney said he previously explained to Salazar that the state had set that day for his acceptance of the offer, and the trial court also explained to Salazar, “[I]t’s the State that makes the plea offer” and “if the State says the offer is no longer open . . . [that is] completely up to the State.” The court’s explanation was a correct statement of the law. Neither the court nor defense counsel could have required the state to leave the offer open for a longer period of time. *See Rivera-Longoria v. Slayton*, 228 Ariz. 156, ¶ 13, 264 P.3d 866, 869 (2011) (state has “discretion to determine whether to make a plea offer, the terms of any offer, the length of time an offer will remain open, and the other particulars of plea bargaining”). In addition, Salazar does not claim that, had his attorney convinced the state to allow him additional time to consider

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the plea offer, he would have rejected it and proceeded to trial. *See State v. Ysea*, 191 Ariz. 372, ¶ 17, 956 P.2d 499, 504 (1998) (for *Strickland* prejudice in context of accepted plea agreement, defendant must show reasonable probability that but for counsel's alleged error "he would not have waived his right to trial and entered a plea"), *citing Hill v. Lockhart*, 474 U.S. 52, 57 (1985), *superseded by statute on other grounds as recognized in State v. Martinez*, 196 Ariz. 451, ¶ 44, 999 P.2d 795, 462 (2000). The trial court did not abuse its discretion in finding Salazar had failed to state a colorable claim of ineffective assistance of counsel.

¶9 Nor did the trial court abuse its discretion in finding Salazar failed to state a colorable claim that he had lacked competence to enter a guilty plea. To the extent Salazar suffered any mental or physical impairment, the record clearly shows the court took extra time and effort to ensure he understood the plea agreement and entered his plea voluntarily. *Cf. State v. Bishop*, 162 Ariz. 103, 107, 781 P.2d 581, 585 (1989) (affirming conviction based on guilty plea where substantial evidence supported conclusion that defendant, "even though impaired mentally, physically, and emotionally[,] understood his predicament and the charges he faced").

¶10 For the foregoing reasons, we grant review, but we deny relief.