

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DANIEL DIAZ,
Petitioner.

No. 2 CA-CR 2015-0376-PR
Filed December 21, 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NOT FOR PUBLICATION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. CR200700013

The Honorable John F. Kelliher Jr., Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Emily Danies, Tucson

By Emily Danies

Counsel for Petitioner

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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Daniel Diaz seeks review of the trial court’s order summarily denying his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “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). Diaz has not sustained his burden of establishing such abuse here.

¶2 Following a jury trial, Diaz was convicted of possession of a dangerous drug for sale and the trial court sentenced him to an aggravated, twenty-five year prison term. On appeal, we affirmed Diaz’s conviction but remanded for resentencing. *State v. Diaz*, 222 Ariz. 188, ¶ 1, 213 P.3d 337, 338 (App. 2009), *vacated in part*, 224 Ariz. 322, 230 P.3d 705 (2010). Our supreme court vacated the sentencing portion of our decision and affirmed Diaz’s twenty-five-year sentence. *Diaz*, 224 Ariz. 322, ¶ 18, 230 P.3d at 708.

¶3 Diaz filed a timely notice of post-conviction relief, but despite being granted several extensions of time, appointed counsel failed to file a petition for post-conviction relief. After the trial court dismissed the proceeding, Diaz sought review in this court; we granted review but denied relief. *State v. Diaz*, No. 2 CA-CR 2010-0300-PR (memorandum decision filed Jan. 21, 2011). Diaz then initiated a second Rule 32 proceeding, and a different appointed counsel again failed to file a petition for post-conviction relief and the proceeding was dismissed. Diaz sought relief in this court, which we denied. *State v. Diaz*, 228 Ariz. 541, ¶ 13, 269 P.3d 717, 721 (App. 2012).

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¶4 In 2013, Diaz initiated a third post-conviction proceeding, and his newly appointed counsel filed a petition claiming Diaz was not precluded from asserting trial counsel had been ineffective in failing to adequately advise him regarding the two plea offers by the state.¹ On review, we rejected Diaz's arguments, finding he had waived them. *State v. Diaz*, No. 2 CA-CR 2013-0387-PR (memorandum decision filed Feb. 13, 2014). However, finding that Diaz's failure to file a Rule 32 petition in the prior post-conviction proceedings was not his fault, our supreme court determined that Diaz had not waived his claims of ineffective assistance of counsel. *State v. Diaz*, 236 Ariz. 361, ¶ 13, 340 P.3d 1069, 1071 (2014). The court thus vacated our decision and the trial court's order, and remanded for further proceedings. *See id.* ¶ 14.

¶5 Diaz then filed a supplemental petition for post-conviction relief, which the trial court summarily denied, and this petition for review followed. In its ruling dismissing the petition below, the court found:

The Defendant's Affidavit in support of his Petition for Post-Conviction Relief expressly states that he was "hoping to win at trial."

The Defendant was offered a stipulated fifteen year sentence in a plea agreement he rejected. The State opined that the Defendant's exposure at trial was in excess of fifteen years. The Defendant expressed his understanding of said exposure. The Defendant was explicitly advised that if he was convicted at trial he could face a sentence greater than fifteen

¹The state extended a plea offer to Diaz in June 2007, requiring him to serve a prison term of nine years and on the third day of trial in December 2007, the state made a fifteen-year plea offer.

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years and the Defendant said he understood that possibility.

The Defendant accepted the risk of going to trial and being convicted and being sentenced to more than fifteen years of incarceration

¶6 Diaz asserts on review, as he did below, that because the trial court and counsel failed to advise him of the “specific sentence” he faced if convicted at trial, he did not “knowingly and intelligently make a decision to reject the plea.” As we summarized in one of our prior opinions in this matter:

[T]he state offered Diaz a fifteen-year plea agreement during trial. It then became clear that while Diaz’s counsel believed Diaz faced a maximum sentence of fifteen years, the state believed he would face a longer sentence. The trial court declined to take a position on the matter, but expressly advised Diaz: “[I]t’s the state’s position that if convicted you would be facing a maximum sentence of 28 years. Your attorney doesn’t agree with that . . . [and] is still of the opinion that . . . 15 years is the maximum amount.” Diaz stated he understood. Thus, although Diaz’s counsel advised him he faced fifteen years’ imprisonment if convicted, Diaz was aware he could face as many as twenty-eight years.

Diaz, 228 Ariz. 541, n.2, 269 P.3d at 719 n.2 (second, third, and fourth alterations in original).

¶7 Diaz argues that the trial court erred in rejecting his claim that trial counsel was ineffective. He asserts trial counsel failed to properly advise him regarding his sentencing exposure at

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trial, thus rendering his rejection of the state's plea offers ill-advised and unknowing. Despite acknowledging that he had told the court he understood that the state and his attorney had differing opinions regarding his sentencing exposure at trial, Diaz nonetheless maintains he "at all times assumed he was getting 15 years." Additionally, Diaz maintains that although trial counsel thought the statute for certain drug offenses (former A.R.S. § 13-712) applied to him and was the "correct" statute, counsel nonetheless should have told Diaz that "it was likely" he would be sentenced to a longer sentence as a repetitive offender (former A.R.S. § 13-604(D)), which is what occurred.²

¶8 "To prove ineffective assistance of trial counsel, a petitioner must show both deficient performance and prejudice." *State v. Donald*, 198 Ariz. 406, ¶ 15, 10 P.3d 1193, 1200 (App. 2000); see *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant may show deficient performance during plea negotiations by proving counsel gave him erroneous advice or "failed to give information necessary to allow the [defendant] to make an informed decision whether to accept the plea." *Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d at 1200. Under *Donald*, "[t]o establish prejudice in the rejection of the plea offer, a defendant must show 'a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer' and declined to go forward to trial." *Id.* ¶ 20, quoting *People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997).

¶9 Notably, before being reversed by our supreme court, this court agreed with defense counsel's position that Diaz should be sentenced under the statute applicable to drug offenses rather than the repetitive offender statute. *Diaz*, 222 Ariz. 188, ¶¶ 7-14, 213 P.3d at 340-41, *vacated in part*, 224 Ariz. 322, 230 P.3d 705. Therefore, we are unable to say counsel's performance in similarly advising Diaz failed to comply with prevailing professional norms and was in any way deficient. See *Strickland*, 466 U.S. at 687-88 (defendant claiming

²The relevant statutes in effect when Diaz committed his offense were former A.R.S. §§ 13-712 and 13-604(D). See 2005 Ariz. Sess. Laws, ch. 327, § 3; 2005 Ariz. Sess. Laws, ch. 188, § 1.

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ineffective assistance of counsel must prove attorney failed to provide reasonably effective assistance “under prevailing professional norms”).

¶10 Nor does the record support Diaz’s claim that he would have pled guilty *if* he properly had been advised of the sentence he might receive at trial. At least as to the fifteen-year plea offer, the trial court expressly informed Diaz that the state and his attorney disagreed regarding the applicable sentencing statute and the sentence he might receive, a fact he expressly acknowledged he understood.³ We thus find the court correctly denied Diaz’s claim of ineffective assistance of counsel. *See State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983) (claimant bears burden of establishing ineffective assistance and “[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation”); *see also Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201 (to warrant evidentiary hearing, Rule 32 claim “must consist of more than conclusory assertions”).

¶11 As he did below, Diaz also contends the trial court failed to advise him properly pursuant to Rule 17.2, Ariz. R. Crim.

³Diaz seems to blend his arguments regarding the nine- and fifteen-year plea offers, although he addressed only the former in the affidavit attached to his Rule 32 petition: “I was offered a nine (9) year plea and I declined to accept it, hoping to win at trial.” Additionally, to the extent Diaz asserts, apparently for the first time on review, the discrete argument that “[a]t the time the 9 year plea was rejected, nobody opined that Mr. Diaz was looking at more than 15 years,” we do not address that argument. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). Moreover, Diaz has not established that counsel’s conduct fell below prevailing professional norms. *See Strickland*, 466 U.S. at 687-88.

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P.⁴ He apparently relies on *Donald* not only for his claim of ineffective assistance of counsel, but for the further proposition that a trial court is required to conduct a *Donald* hearing and advise a defendant in relation to his or her rejection of a plea agreement. He also maintains “he would have accepted the plea offered” if the court had advised him of the “specific sentence he was facing” in a manner consistent with Rule 17.2. Because Diaz could have raised this argument on appeal, but did not, he is precluded from doing so now. *See* Ariz. R. Crim. P. 32.2(a)(1). In any event, this claim has no merit. Rule 17.2 applies when a defendant “accept[s] a plea of guilty or no contest,” however, Diaz did not plead guilty. Diaz cites no authority to support his assertion that “rejecting a plea must have the same requirements” as accepting a plea, and that the court was required to advise him in accordance with Rule 17.2 when he rejected the plea offers. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain “[t]he reasons why the petition should be granted”).

¶12 Finally, for all of the above-stated reasons, we also reject Diaz’s argument that, because of the differing opinions between this court and our supreme court regarding the applicable sentencing statute, “it is incomprehensible that [he] could have knowingly and intelligently rejected the plea at the time he did” because “[n]obody knew the sentence until the final opinion was filed by the Arizona Supreme Court.” Accordingly, we grant review but deny relief.

⁴Diaz mistakenly cites Rule 7.2 rather than Rule 17.2 in his petition for review.