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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

CHARLES FORREST RICHARDS, *Petitioner*.

No. 1 CA-CR 15-0829 PRPC
FILED 6-22-2017

Petition for Review from the Superior Court in Mohave County
No. CR2012-0940
The Honorable Derek C. Carlisle, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mohave County Attorney's Office, Kingman
By Jonathan C. Taylor
Counsel for Respondent

The Brewer Law Office, Show Low
By Benjamin M. Brewer
Counsel for Petitioner

STATE v. RICHARDS
Decision of the Court

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Jon W. Thompson joined.

M c M U R D I E, Judge:

¶1 Petitioner Charles Forrest Richards petitions this court for review from the dismissal of his petition for post-conviction relief. “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, 393, ¶ 4 (App. 2007). Richards has not sustained his burden of establishing such abuse here. Therefore, we grant review but deny relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 On July 19, 2012, Officer Jenkins, who at that time worked for the Kingman Police Department, responded to a call of a vehicle crashing into a motel in Kingman, Arizona. As the officer arrived, a male, later identified as Richards, exited the driver’s side of the vehicle. Richards was wearing blue jeans and socks, but no shirt or shoes, and it appeared he had urinated on himself. Richards had a strong odor of alcohol on his person, and he was swaying from side to side. When asked where he lived, Richards provided Officer Jenkins with the wrong address, and when the officer asked Richards for his driver’s license, Richards initially provided the officer with a debit card. Richards eventually provided the officer with a driver’s license that had been issued on June 22, 2012.

¶3 Officer Zerr of the Kingman Police Department arrived and asked Richards what happened. Richards advised the officer he was “not sure,” but remembered driving his truck on the way home when he hit the building. Although Richards denied drinking, he was unable to complete and/or performed poorly on field sobriety tests, and struggled to maintain his balance throughout the tests. Richards was arrested and transported to the police station, where he was advised of his rights pursuant to *Miranda*.¹ Richards was also provided an admin per se/implied consent affidavit. Richards agreed to take a breath test, and he registered separate results

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

STATE v. RICHARDS
Decision of the Court

equivalent to a BAC of .237 and .235 six minutes apart after a 15-minute deprivation period.

¶4 Richards was charged with felony aggravated DUI because his driver's license had been suspended due to a prior DUI in the month before his arrest, although Richards claimed he believed his license was valid and his prior DUI case had been dismissed.

¶5 Deputy Apfel of the Mohave County Sheriff's Office testified that before the July 19 incident, he had arrested Richards for a DUI. Deputy Apfel further testified that this previous arrest had resulted in the suspension of Richards' driver's license. This previous arrest happened on the night of June 19-20, 2012. Richards was provided an admin per se/implied consent affidavit, and he agreed to submit to a breath test. Richards registered separate results equivalent to a BAC of .138 and .129 on the breath test that night. Consequently, as explained on the admin per se/implied consent affidavit, Richards' driver's license was to be suspended for a period of 90 days, to begin 15 days after June 19, 2012.

¶6 To comport with the suspension information provided to Richards, Deputy Apfel confiscated Richards' driver's license, explained the admin per se/implied consent affidavit would be Richards' license for the next 15 days (until the suspension went into effect), and advised Richards to obtain an identification card from the Motor Vehicle Division ("MVD"). The deputy also explained the difference between a civil suspension by the MVD and criminal proceedings in a court, and provided Richards with a copy of the admin per se/implied consent affidavit, which Richards signed. Two days later, on June 22, 2012, Richards went to the MVD and obtained a new driver's license. Deputy Apfel testified he gave the admin per se/implied consent affidavit to his office, which would have typically mailed the form to the MVD. Because of the time involved in mailing the form, it would have been unlikely for the MVD to know by June 22 of an arrest made on June 20.

¶7 In February 2014, a jury found Richards guilty of aggravated driving a vehicle while under the influence of intoxicating liquor and aggravated driving a vehicle while under the extreme influence of intoxicating liquor with an alcohol concentration of .20 or more.² The superior court found the offenses to be non-dangerous but repetitive based

² Richards first trial in this case ended in a mistrial when the jurors were unable to agree on a final verdict.

STATE v. RICHARDS
Decision of the Court

on three historical prior felony convictions and sentenced Richards to an aggravated sentence of ten years' imprisonment. This court affirmed the convictions and sentences on direct appeal. *State v. Richards*, 1 CA-CR 14-0210, 2014 WL 7277824 (Ariz. App. Dec. 23, 2014) (mem. decision).

¶8 Richards filed a timely notice of post-conviction relief and requested the representation of counsel. After a review of the record, appointed counsel notified the court that he was unable to find any issue or colorable claim to raise that would achieve the goal Richards sought and requested that Richards be afforded an extension of time to file a *pro se* petition. Richards timely filed a petition for post-conviction relief that claimed ineffective assistance of trial counsel for providing erroneous information and advice which led to Richards making the uninformed decision to reject a plea offer of 5.5 years' imprisonment. Specifically, Richards claimed he did not know his license was suspended and that counsel never explained the legal standard to be "knew or should have known." Richards complained that the prejudice he suffered was the imposition of the presumptive ten-year sentence after trial.

¶9 The superior court found Richards presented a colorable claim and granted an evidentiary hearing. At the evidentiary hearing, the superior court allowed PCR counsel to resume representing Richards. Richards was the only witness called at the hearing.

¶10 Richards testified as follows regarding the plea and the conversation he had with one of his lawyers during the plea process:

Q. Did Mr. Bolobonoff [trial counsel] recommend whether you take a plea or not?

A. Yes, he did.

Q. And what did he recommend?

A. He said I should—I should take the plea, that I have no case. He didn't explain why.

Q. So at no point did you ever talk to him about the case?

A. No. We argued about what the facts were and he told me not to even worry about going to trial, to take the plea, but he didn't explain why or where.

...

Q. Do you think in this case the status of your license at any given point is an important element of the case?

STATE v. RICHARDS
Decision of the Court

- A. Status of my license, yes.
- Q. At the time; correct?
- A. Yes.
- Q. And so when you spoke with Alex Bolobonoff about the facts in this case, the license came up, did it not?
- A. Yeah. The affidavit did, the abstract.

¶11 The superior court dismissed Richards’ petition for post-conviction relief. The superior court found that counsel was ineffective for failing to advise Richards of the law based on a lack of evidence to the contrary. But the superior court further found that Richards suffered no prejudice because Richards failed to articulate why the difference between “know” and “should have known” mattered to his decision to reject the plea. And most importantly, the court found Richards’ testimony was not credible. Richards’ repeated assertion prior to his trial that he wanted to go to trial because he did not know that his license was suspended given the facts as described above, convinced the superior court that Richards still would have opted to go to trial even with the correct information from counsel.

¶12 Richards filed a timely petition for review.

DISCUSSION

¶13 To establish a claim of ineffective assistance of counsel, a defendant must prove his counsel’s performance fell below objectively reasonable standards and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶14 A defendant is entitled to relief if he proves he was prejudiced by ineffective assistance of counsel causing him to reject a favorable plea offer. *State v. Donald*, 198 Ariz. 406, 413, ¶ 14 (App. 2000); *see also Missouri v. Frye*, 566 U.S. 133, 145 (2012) (Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected). To establish prejudice on a claim of rejection of a plea offer due to ineffective assistance of counsel,

a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening

STATE v. RICHARDS
Decision of the Court

circumstances), the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler v. Cooper, 566 U.S. 156, 164 (2012).

¶15 The superior court found that Richards' counsel failed to provide Richards with appropriate advice regarding the distinction under the law regarding "knew or should have known." As noted by the superior court, the State failed to present contradictory evidence on that issue. Therefore, we affirm the finding that superior counsel failed to provide Richards with appropriate legal information to make an informed decision regarding the plea agreement.

¶16 However, the superior court likewise found Richards was not credible regarding his testimony that had he known about the legal distinction, he would have accepted the State's offer. "We examine a trial court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous." *State v. Berryman*, 178 Ariz. 617, 620 (App. 1994). The determination of the credibility of witnesses at an evidentiary hearing in a post-conviction relief proceeding rests solely with the trial judge. *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988). The superior court expressly found Richards was not credible with respect to his claim that had he known the standard was "should have known," he would have taken the plea offer. Therefore, this court agrees that Richards has failed to demonstrate he suffered prejudice. He has failed to make a sufficient showing that he would have accepted the plea offer. *See Lafler*, 566 U.S. at 164.

CONCLUSION

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



AMY M. WOOD • Clerk of the Court
FILED: AA