DIVISION ONE
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IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0321 PRPC
	)	
Petitioner/Cross-Respondent,	)	DEPARTMENT D
	)	
v.	)	Maricopa County
	)	Superior Court
DWAYNE ALVIN PITRE	)	No. CR 2002-001911
	)	
Respondent/Cross-Petitioner.	)	
	)	
	)	**DECISION ORDER**
	)	

The State of Arizona and Dwayne Alvin Pitre have petitioned this court to review the superior court's orders in Pitre's post-conviction relief proceeding. Presiding Judge Michael J. Brown, and Judges Jon W. Thompson and Sheldon H. Weisberg, have considered Pitre's cross-petition for review and deny review. Having considered the State's petition for review, we grant review and grant relief for the reasons stated.

BACKGROUND

We discuss only the factual and procedural history necessary to our disposition of this matter. Pitre was convicted by a jury of five counts of armed robbery, five counts

of kidnapping, three counts of aggravated assault, and one count of theft of means of transportation. Pitre had four prior felony convictions. He was sentenced as a non-dangerous repetitive offender to a total of 160 years' imprisonment. In *State v. Pitre*, 1 CA-CR 03-0526 (Ariz. App. Feb. 3, 2005) (mem. decision), this court affirmed the convictions, but remanded for resentencing in light of *Blakely v. Washington*, 542 U.S. 296 (2004). On review, the Arizona Supreme Court granted the State's petition and remanded this case to the Court of Appeals for reconsideration in light of *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005) (existence of a single *Blakely* complaint or exempt aggravating factor permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in that statute).

On remand, this court noted that the trial court had used two of Pitre's four prior felony convictions as aggravating factors, and because the existence of a prior felony conviction may be found by the trial judge, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this court concluded that the trial judge's "reliance on other aggravating factors was not erroneous, and

affirmed." *State v. Pitre*, 1 CA-CR 03-0526, 2006 WL 1686506, at *3, ¶ 14 (Ariz. App. Feb. 7, 2006)(mem. decision) (citing *Martinez* 210 Ariz. at 585, ¶ 26, 115 P.3d at 625).

Pitre then commenced post-conviction relief proceedings, and raised claims of ineffective assistance of counsel. He claimed that counsel failed to adequately advise him of his maximum sentence exposure which caused him to reject the State's plea offer (the "*Donald*" claim),[1] counsel failed to interview an eyewitness who could have contradicted the testimony of one police officer who identified Pitre at the scene, and counsel failed to object when the court sentenced him as a non-dangerous, repetitive offender, rather than as a dangerous, non-repetitive offender. The State filed a response and argued that Pitre presented no colorable claims. Pitre filed a reply. The trial court summarily dismissed the sentencing claim, but found that the *Donald* and failure to interview a witness claims were colorable and set an evidentiary hearing.

At the evidentiary hearing, Pitre did not call the eyewitness to testify, but presented her affidavit through the

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

testimony of a private investigator. Statements in the affidavit were inconsistent with trial testimony from a police officer who identified Pitre.

Pitre testified that trial counsel never explained the maximum sentences he faced if convicted at trial on all counts. He also testified that although they had discussed a possible plea offer which required prison time, he wanted to proceed to trial because he "didn't do the robbery."

> [PROSECUTOR] [I]sn't it true that when [defense counsel] began reviewing the [] plea offer with you, that you told him that you didn't want any plea offer that would involve prison because you were an innocent man; isn't that true?
>
> [PITRE] I think I did.

Trial counsel testified and admitted that he did not tell Pitre he could be sentenced up to 160 years' imprisonment if convicted of all counts. However, he did testify that he told Pitre that Pitre would "certainly spend the rest of his natural life in prison. And I do recall discussing somewhere over 100 years." He also testified that Pitre had it made it clear that he was not interested in any "prison plea offer."

> [PROSECUTOR] When you told him the plea offer of a maximum of 21 years and you told him that he was facing, you know, decades at

> a minimum, if not 100 plus years, in prison if he went to trial, did he express any interest at all in a plea offer of 21 years maximum?
>
> . . .
>
> [DEFENSE COUNSEL] He was not interested in any prison plea offer, I recall that.

After the evidentiary hearing, the trial court found Pitre had failed to establish his claim that counsel had been ineffective for failing to call the eyewitness:

> [The witness] was listed in the police report and purportedly would have testified that the suspect in the robbery was wearing a ski mask as he exited the grocery store which prevented her from identifying the suspect. The Court finds the testimony of another eyewitness at trial . . . conflicted with [the witness'] testimony on the issue of the suspect wearing a ski mask as he exited the store. The Court further finds there were other eyewitnesses who identified the Defendant as the person who committed the robbery and other offenses that night. Accordingly, the Defendant has failed to establish that there was a reasonable probability that the outcome of the trial would have been different if [the witness] had been called . . . in Defendant's case.

However, the trial court granted relief on the *Donald* claim. The court found that Pitre had not been advised that he faced up to 160 years' imprisonment if convicted of all counts at trial, and that he had been so advised, Pitre "may have

accepted a plea offer." Thus the court concluded:

> [T]hat but for counsel's error; there is a reasonable probability that the outcome of the case would have been different. The State did not prove this error was harmless beyond a reasonable doubt. Under the test set forth in *Strickland v. Washington,* the Court finds that counsel was ineffective for failing to fully advise Defendant of the sentencing possibilities he faced if convicted at trial.

The State timely petitioned this court for review on the ineffective assistance of counsel claim, and Pitre timely cross-petitioned for review of the dismissed claims.[2] Because we find the record does not support Pitre's *Donald* claim, we grant review of the State's petition, and grant relief.

DISCUSSION

The State argues that even if Pitre established deficient performance, he failed to establish prejudice.[3]

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[2] The trial court clearly identified the issues presented and correctly ruled on the claims. Though not cited by the trial court, *State v. Laughter*, 128 Ariz. 264, 269, 625 P.2d 327, 332 (App. 1980) (defendant convicted of armed robbery could be sentenced as repeat offender because of his prior convictions for two felonies, although armed robbery was a dangerous offense) supports its ruling. Based on this, we deny Pitre's cross-petition for review. *See State v. Whipple*, 177 Ariz. 272, 866 P.2d 1358 (App. 1993).

[3] On rehearing below, the State for the first time asserted that because Pitre was not interested in plea bargaining, the

Specifically, the State correctly notes that Pitre testified at the evidentiary hearing that he would not accept any plea offer that would require prison. His counsel also testified that Pitre unambiguously informed him that he was not interested in any plea agreement that required prison. Additionally, we note Pitre never testified at the evidentiary hearing that had he been properly advised about the maximum sentence, he would have accepted a plea agreement.

The elements of a *Donald* claim are of course, deficient performance and prejudice. In this case, even if we accept that counsel's performance was deficient, Pitre failed to establish prejudice; a reasonable probability that "absent his attorney's deficient advice, he would have accepted the plea offer." *Donald*, 198 Ariz. at 414, ¶ 20, 10 P.3d at 1201. This failure is reflected in the finding of the trial court that Pitre "*may* have accepted a plea offer." (Emphasis added.) The burden is on the petitioner seeking post-conviction relief to show ineffective assistance of counsel, and the showing must be that of a provable reality, not mere speculation. *State v.*

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trial prosecutor never offered a plea agreement to Pitre. We do not address this argument because of our resolution of this issue on other grounds.

Rosario, 195 Ariz. 264, 268, ¶ 23, 987 P.2d 226, 230 (App. 1999).

CONCLUSION

Because Pitre failed to prove prejudice, he was not entitled to relief on his *Donald* claim. Therefore, we grant review and we vacate the trial court's order dated March 4, 2009, which granted relief.

/s/
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MICHAEL J. BROWN, Presiding Judge