DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0674 PRPC
	)	
Respondent,	)	DEPARTMENT D
	)	
v.	)	Maricopa County
	)	Superior Court
CARL JAY OTTO,	)	No. CR-2007-138828-001 DT
	)	
Petitioner.	)	
	)	**DECISION ORDER**

Carl Jay Otto petitions this court to review the trial court's summary denial of post-conviction relief. Presiding Judge Lawrence F. Winthrop and Judges Patricia K. Norris and Patrick Irvine have considered this petition for review. For the reasons stated, we grant review, grant relief, and remand this matter to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

We discuss only the facts necessary to our disposition of this matter. Otto was charged with third degree burglary, a class four felony. He pled guilty to the charged offense with two prior felony convictions. The parties stipulated Otto would be sentenced to eight years' imprisonment. At sentencing, the trial court indicated it would reject the stipulated sentence.

The court suggested the parties amend the plea agreement and stipulate to the presumptive ten-year sentence. The court also stated it would run the sentence concurrent to the sentence imposed in a probation violation matter.[1] The court did not personally address Otto, nor did it comply with Rule 17.4 of the Arizona Rules of Criminal Procedure:

> THE COURT: Can I have counsel approach on this, please[?]
>
> (Whereupon an off-the-record bench conference ensued.)
>
> DEFENSE COUNSEL: Okay.
>
> THE COURT: Is he agreeable? Okay, at bench we discussed the total lack of mitigating circumstances in this case, for me to find a mitigated sentence is [not] appropriate. I was going to reject the plea.
>
> What I had proposed, to both sides is we amend the plea agreement to reflect I can sentence him to the presumptive term of ten years at the Department of Corrections. In exchange for that, I have agreed I am also going to have him serve a concurrent term with respect to [the] probation violation matter.
>
> Is that agreeable to counsel?
>
> DEFENSE COUNSEL: That's right, correct.

[1] Otto was on probation for an earlier burglary in Maricopa County Cause No. CR2003-010054-001 DT.

The agreement was amended, and the trial court sentenced Otto to ten years' imprisonment.

Otto then timely filed a notice of post-conviction relief. In his petition, Otto claimed the trial court failed to personally address him and establish he voluntarily agreed to amend the plea agreement. He noted the provisions of Rule 17 had not been followed. He also claimed, via affidavit, that he was on medication for a diagnosis of paranoid schizophrenia and did not understand the proceeding. Otto stated he "purposefully did not take my medication" on the day of his change of plea "so that I could make clear decisions." On the day of sentencing, however, he had taken medication that "adversely affected my judgment. Had my decision making ability not been impaired, I would not have entered the amended plea."

The State conceded Otto had not been informed of his right to withdraw from the plea or to have the trial judge disqualify himself pursuant to Rule 17.4(e) and (g). The State also noted the record did not reflect Otto knowingly and voluntarily agreed to the increased prison sentence. Consequently, the State requested an evidentiary hearing "to determine whether Otto understood and voluntarily agreed to the change of sentence in this case."

At oral argument, the trial court noted the error:

> After reviewing the transcripts in this matter, I have some concerns relating to the efficacy of my having not mentioned or not gone through the change of plea colloquy to allow the defendant the opportunity to make [a] clear and distinct record relating to his knowing intelligent and voluntary waiver of any rights he had with respect to entering into the subsequent plea, which was the ten-year plea.
>
> It seemed like a good idea at the time, but as I read back over the cases and I studied the law, I think we have a problem on that.
>
> . . . .
>
> Now, what I know about the defendant's mental health issues, I might well have found that to be a mitigating circumstance, especially after reviewing the record and going back it over [sic] on a second time, and understanding his affidavit that he filed along with the petition for postconviction relief, and the effects of the medication that he was taking at the time that he entered into the subsequent change of plea.
>
> Because in truth, in my estimation, it was a subsequent change of plea, I think. I am going to take this matter under advisement, but I am pretty sure that the way it came down was that I was required to have him enter into a change of plea with respect to the ten-year sentence, which I gave him.

After oral argument, however, the trial court denied relief because it found Otto had not suffered any prejudice. The court found no prejudice because, it speculated:

> Had the matter been sentenced separately from his plea in the Post Conviction Relief matter, it is probable that the Defendant would have served 2.5 additional years in the Department of Corrections which is the presumptive term of imprisonment [f]or a Class 4 Felony Offense. Given the Defendant's history, it is also probable that he would have served that term consecutive to the term of imprisonment imposed in the Post Conviction Relief matter. This is especially true in view of the prior felony convictions and given that his violation was the result of a new finding of guilt in the Post Conviction Relief matter. By pleading as he did and being sentenced by the Court as he was, the Defendant actually served a half year less of a sentence than he ordinarily would have.

Otto filed a motion for rehearing, but the trial court denied the motion, and Otto timely petitioned this court for review.

ANALYSIS

This court reviews the grant or denial of post-conviction relief for an abuse of discretion. *State v. Jenkins*, 193 Ariz. 115, 118, ¶ 5, 970 P.2d 947, 950 (App. 1998). A court abuses its discretion if the reasons given for its action are legally incorrect. *State v. Ward*, 211 Ariz. 158, 161, ¶ 7, 118 P.3d 1122, 1125 (App. 2005). In this case, we find the trial court

abused its discretion. The record does not reflect Otto was advised as required by Rule 17.4 when the trial court rejected the stipulated sentence, or that Otto knowingly and intelligently agreed to the plea agreement amendment. Otto asserted prejudice in that had he been properly advised, he would not have agreed to the amendment. *See State v. Morales*, 215 Ariz. 59, 62, ¶ 11, 157 P.3d 479, 482 (2007) (concluding that prejudice was established by showing the defendant would not have agreed had the required advice been given). The court erred when it found lack of prejudice based on what probably would have happened if the court had not amended the plea agreement.

When a court rejects a plea provision, Rule 17.4(e) requires:

> **e. Rejection of Plea.** If an agreement or any provision thereof is rejected by the court, it shall give the defendant an opportunity to withdraw his or her plea, advising the defendant that if he or she permits the plea to stand, the disposition of the case may be less favorable to him or her than that contemplated by the agreement.

Because the presentence report in this matter had been prepared and submitted, Rule 17.4(g) also applied, and that rule provides:

> **g. Automatic Change of Judge.** If a plea is withdrawn after submission of the

> presentence report, the judge, upon request of the defendant, shall disqualify himself or herself, but no additional disqualification of judges under this rule shall be permitted.

In its response to the petition for post-conviction relief, the State did not contest the record lacked evidence Otto knowingly, voluntarily, and intelligently agreed to amend the plea, or that the trial court failed to comply with Rule 17.4(c), which states in part:

> **c. Determining the Accuracy of the Agreement and the Voluntariness and Intelligence of the Plea.** The parties shall file the agreement with the court, which shall address the defendant personally and determine that he or she understands and agrees to its terms, [and] that the written document contains all the terms of the agreement.

Relying, however, on *State v. Crowder*, 155 Ariz. 477, 747 P.2d 1176 (1987), the State argued Otto may have had sufficient knowledge from other sources sufficient to find a knowing and voluntary plea, and therefore requested an evidentiary hearing. In *Crowder*, the court noted:

> Of course, the word "record" is not limited to the formal record of the change of plea proceedings. When the defendant claims his plea was unknowing and therefore involuntary, the question is not simply what the defendant was told in court but what he knew from any source.

Id. at 479, 747 P.2d at 1178.

The *Crowder* court therefore remanded the matter for an evidentiary hearing. *Id*. at 482, 747 P.2d at 1181. Likewise, in this matter, whether Otto was made aware of the provisions in Rule 17.4 and whether he accepted the revised plea knowingly, voluntarily, and intelligently can only be determined after an evidentiary hearing.

CONCLUSION

Otto's claim is colorable, and the trial court should have held an evidentiary hearing. Therefore, we grant review and grant relief. We vacate the trial court's order of April 14, 2009, which denied post-conviction relief, and remand this matter to the trial court for further proceedings.

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LAWRENCE F. WINTHROP, Presiding Judge