

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 22 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0331-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOHN BAPTIST CATANIA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094000001

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena

Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 John Catania petitions this court for review of the trial court's summary denial of his of-right petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Catania was charged with two counts each of armed robbery, aggravated assault with a deadly weapon, and kidnapping, as well as one charge of possession of a deadly weapon by a prohibited possessor. The state additionally alleged that each offense was dangerous pursuant to A.R.S. § 13-704 and that Catania had several prior felony convictions. After a hearing held pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), Catania rejected the state's offer that he plead guilty to a single count of armed robbery, a class two dangerous felony. Several months later, on the first day of trial, Catania opted to plead guilty to the indictment and admit two previous felony convictions, and the state opted to withdraw the dangerousness allegations. After amending its initial imposition of sentence, the trial court ultimately sentenced Catania to concurrent prison terms, the longest of which was a partially aggravated 22.5-year prison term for armed robbery.

¶3 Catania then filed a notice and petition for post-conviction relief, asserting the trial court had erred in amending his sentence in his absence and in calculating the credit for time already served and requesting that he be resentenced. He additionally claimed his trial counsel had been ineffective because (1) counsel had not adequately explained the state's first plea offer, specifically, that counsel had not questioned Catania about why he was rejecting the state's plea and, had he done so, he would have

discovered it was because Catania overestimated the import of the dangerousness allegations and (2) counsel had advised him to plead guilty to the indictment without explaining to Catania that he would “receive[] absolutely no benefit” by doing so and counsel’s stated reason for advising Catania to plead guilty—that he might receive a lesser sentence by accepting responsibility—was not reasonable. Catania included with his petition an affidavit in which he claimed, inter alia, that he did not “recall discussing with [his] trial counsel about why [he] did not accept the plea” and that, had “counsel explained to [him] that there was essentially no legal consequence (except a positive one) for pleading guilty to a ‘dangerous-nature’ offense versus losing at trial, . . . [he] would have accepted the state’s plea offer.”

¶4 The trial court granted relief on Catania’s sentencing claims and set a hearing for Catania “to hear the sentencing correction that was done in his absence” and to correct the credit for time served. The court, however, rejected Catania’s claims of ineffective assistance of counsel. Based on evidence of telephone calls Catania had made before trial and an affidavit by Catania’s trial counsel, the court concluded it was clear that counsel had discussed the state’s plea offer with Catania and that Catania had understood “the significance of a dangerous nature allegation.” The court also determined counsel had made a valid tactical decision to recommend that Catania plead guilty to the indictment, noting that “judges consider acceptance of responsibility a mitigating factor in almost every case in which a plea offer is accepted.”

¶5 On review, Catania asserts the trial court erred in summarily rejecting his claims and contends he was entitled to an evidentiary hearing. “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." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). A defendant may obtain post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary. *See State v. Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d 499, 504 (1998); *Donald*, 198 Ariz. 406, ¶¶ 9, 14, 10 P.3d at 1198, 1200.

¶6 Catania first argues the trial court erred "in making factual findings based on controverting affidavits." We agree that the trial court, in determining whether Catania was entitled to an evidentiary hearing, was required to treat as true Catania's assertion that trial counsel did not ask him about his reasons for rejecting the state's plea offer, notwithstanding the contrary evidence presented by the state. *See State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). Thus, the court's basis for rejecting Catania's claim was improper.

¶7 Nonetheless, Catania has not stated a colorable claim. It is not sufficient for Catania to demonstrate counsel failed to do something that might have resulted in Catania accepting the state's plea offer. He also must show that counsel's failure to act fell below prevailing professional norms. *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Although counsel must explain a plea offer sufficiently "to permit the defendant to make a reasonably informed decision whether to accept or reject a plea offer," *Donald*, 198 Ariz. 406, ¶ 9, 10 P.3d at 1198, Catania has provided no evidence and cites no authority

suggesting competent counsel would have explored Catania's unspoken reasons for rejecting the plea in an effort to correct any potential misconceptions Catania may have had. Accordingly, the trial court did not abuse its discretion in summarily rejecting Catania's claim based on the state's plea offer. *See* Ariz. R. Crim. P. 32.6(c); *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *see also State v. Haight-Gyuro*, 218 Ariz. 356, n.5, 186 P.3d 33, 37 n.5 (App. 2008) (reviewing court may affirm trial court if correct for any reason supported by record).

¶8 Catania also argues the trial court erred in rejecting his claim based on his decision to plead guilty to the indictment and admit two previous felony convictions. Catania's only argument on review is that advising a client to plead guilty solely to increase the likelihood of a lesser sentence "is not effective assistance of counsel." But he identifies no evidence or authority¹ supporting this assertion or contradicting the trial court's conclusion that counsel made a reasoned decision to recommend to Catania that he plead guilty. Accordingly, Catania has not demonstrated counsel's conduct fell below

¹Although Catania relies on *State v. Ysea*, 191 Ariz. 372, 956 P.2d 499 (1998), to support his claim that counsel fell below prevailing professional norms, that case does not support his argument. In *Ysea*, our supreme court determined that an attorney fell below prevailing professional norms when he advised a defendant to plead guilty based on the incorrect belief the defendant might face the death penalty if he proceeded to trial. 191 Ariz. 372, ¶¶ 14, 16, 956 P.2d at 503, 504. Catania has identified no such legal error here. Although *Ysea* states that a defendant might decide "to go to trial, knowing that if he were convicted . . . the penalty would not be more serious than that specified in the plea offer," that determination would have been relevant to the court's assessment of prejudice, not to its conclusion that counsel was ineffective. *Id.* ¶¶ 17, 21.

prevailing professional norms and has not made a colorable claim of ineffective assistance of counsel.² *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶9 For the reasons stated, although we grant review, relief is denied.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

²To the extent Catania suggests his counsel was ineffective in failing to fully explain the consequences of the state’s decision to withdraw the dangerousness allegation, he does not suggest that information would have been material to his decision to plead guilty. *See Ysea*, 191 Ariz. 372, ¶ 17, 956 P.2d at 504 (“To establish prejudice in the context of a plea agreement, a defendant must show a reasonable probability that except for his lawyer’s error he would not have waived his right to trial and entered a plea.”).