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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CLAY NELSON HULL, Petitioner.	2 CA-CR 2011-0335-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20081035

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Law Offices of Erin E. Duffy, P.L.L.C.
By Erin E. Duffy
Tucson
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Clay Hull seeks review of the trial court's order denying his 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). Hull has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Hull was convicted of sale or transfer of a narcotic drug based on his having sold crack cocaine to an undercover police officer. The trial court imposed an enhanced, presumptive, 9.25-year term of imprisonment. This court affirmed his conviction and sentence on appeal. *State v. Hull*, No. 2 CA-CR 2009-0022, ¶ 15 (memorandum decision filed Dec. 1, 2009).

¶3 Hull then initiated post-conviction relief proceedings, arguing in his petition (1) trial and appellate counsel had been ineffective in failing to assert the state had failed to present sufficient evidence to support his conviction because "no evidence was presented that would support a finding that . . . crack cocaine . . . was a narcotic drug," (2) trial and appellate counsel had been ineffective in failing to guard against or assert there had been a non-unanimous jury verdict, and (3) trial counsel had been ineffective in "failing to properly advise [him] with regard to the plea agreement" offered by the state before trial. The trial court summarily denied relief, concluding Hull's assertion of an entrapment defense had required him to admit the elements of the offense, he had not established that counsel's performance was deficient in relation to Hull's claim of a non-unanimous verdict, and he had not shown prejudice in relation to that claim or his claim that counsel had failed to properly advise him on his plea agreement.

¶4 On review, Hull argues first that the trial court was wrong in concluding that trial and appellate counsel had not been ineffective in relation to his claim of insufficient evidence. Citing, for the first time, *State v. Preston*, 197 Ariz. 461, 4 P.3d 1004 (App. 2000), Hull asserts the state must be required to meet its burden of proof, even when a defendant relies on an entrapment defense. This claim is meritless for

several reasons. First, the decision in *Preston* was based on a former version of A.R.S. § 13-206, which required the court to instruct the jury that the defendant had "'admitted the elements of the offense and that the only issue for their consideration is whether the person has proven the affirmative defense of entrapment by clear and convincing evidence.'" 197 Ariz. 461, ¶ 2, 4 P.3d at 1006, *quoting* former § 13-206(D).[1] Section 13-206 no longer requires such instruction, instead requiring only that a defendant "admit by [his or her] testimony or other evidence the substantial elements of the offense charged." *See* 2001 Ariz. Sess. Laws, Ch. 334, § 5. Thus, under the statute, the state will be held to its burden because the defendant seeking to claim entrapment must admit the elements by "testimony or other evidence" from which the jury can conclude beyond a reasonable doubt that he or she has committed the offense. *See also State v. Soule*, 168 Ariz. 134, 137, 811 P.2d 1071, 1074 (1991) (concluding defendant must admit all elements of offense to assert entrapment and noting: "Requiring a trial court to entertain an entrapment defense when the defendant has not admitted all elements of the crime does not serve the cause of criminal justice.").

¶5 Indeed, in this case, Hull admitted he had sold crack cocaine to the officer. And, as the trial court pointed out, "the trial transcripts are replete with the interchangeable use" of the terms cocaine, crack, cocaine base, and narcotics. In any event, Hull cites no authority to support the proposition that the state must, in addition to proving that a defendant sold crack cocaine, also establish that crack cocaine is a narcotic drug. *Cf. State v. Light*, 175 Ariz. 62, 63-64, 852 P.2d 1246, 1247-48 (App. 1993) ("The

[1]1997 Ariz. Sess. Laws, ch. 136, § 4.

state need not prove that methamphetamine has a potential for abuse associated with a stimulant effect on the central nervous system because the legislature has already made the determination that it does."). It is statutorily defined as such, A.R.S. § 13-3401(5), (20)(z), so the state was required only to present evidence from which the jury could determine beyond a reasonable doubt that Hull possessed crack cocaine in order to establish his guilt, *cf. id.* We agree with the trial court that it did so. Indeed the verdict form itself indicated the jury found Hull "guilty of the offense of Sale and/or Transfer of a Narcotic Drug, cocaine base," thereby specifically designating cocaine base as the narcotic drug the jury had found him guilty of selling. Because the state presented sufficient evidence to sustain Hull's convictions, we cannot conclude either trial or appellate counsel was ineffective for having failed to raise the issue. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prevail on claim of ineffective assistance defendant must show counsel's performance deficient and resulted in prejudice).

¶6 Hull also maintains on review that the trial court abused its discretion in denying him relief on his claim that appellate counsel was ineffective for failing to address on appeal the possibility there had been a non-unanimous jury verdict. But, the court correctly identified and addressed this argument in a manner that "will allow any court in the future to understand the resolution," and we see no purpose in repeating its analysis here.[2] *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

[2]We note, however, that to the extent the trial court suggested Hull's claim of ineffective assistance of counsel on this point was precluded because it was based on an

¶7 Finally, Hull does not challenge on review the trial court's decision rejecting his claims that trial counsel had been ineffective in relation to a possible non-unanimous jury verdict and to his declining a plea agreement. We therefore need not address them. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain "the reasons why the petition should be granted"). For the reasons above, although we grant the petition for review, relief is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

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issue that could have been raised on appeal, we disagree. A claim of ineffective assistance may be raised only in a petition for review. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).