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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STATE OF ARIZONA, Respondent, v. ARNOLD LESTER GEIB, Petitioner.	2 CA-CR 2011-0337-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20064480

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Arnold L. Geib
Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Arnold Geib was convicted of child molestation and attempted sexual assault. He sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and after the trial court denied the petition summarily, he sought review by this court. Granting review and relief, we found Geib had raised a colorable claim that his guilty plea had not been knowing, voluntary, and intelligent, entitling him to an evidentiary hearing. *State v. Geib*, No. 2 CA-CR 2011-0019-PR (memorandum decision filed Apr. 28, 2011). After conducting that hearing, the trial court again denied relief. This petition for review followed. We will not disturb the trial court's ruling unless Geib establishes the court abused its discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 A defendant is required to prove the factual allegations in the petition for post-conviction relief by a preponderance of evidence. *See* Ariz. R. Crim. P. 32.8(c). In reviewing a trial court's ruling following an evidentiary hearing, we are mindful that it is for that court to determine the credibility of witnesses, resolve any conflicts in the evidence, and weigh the evidence accordingly. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). The appellate court does not determine the credibility of witnesses, *see State v. Ossana*, 199 Ariz. 459, ¶ 7, 18 P.3d 1258, 1260 (App. 2001), and will not reweigh the evidence, *see State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003). That is because the trial court "'is in the best position to evaluate credibility and accuracy, as well as draw inferences, weigh, and balance'" the evidence that was presented at the evidentiary hearing. *See State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997, 1019 (2000), *quoting State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993). Consequently, in reviewing a denial of post-conviction relief, "[w]e 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, 875 P.2d 850, 853 (App. 1994).

¶3 As we noted in our earlier memorandum decision, the plea agreement provided Geib would be eligible for early release after serving eighty-five percent of any prison terms imposed. The trial court sentenced him to consecutive prison terms of ten and seven years but said nothing at the sentencing hearing about his eligibility for early release. In his Rule 32 petition, Geib alleged the Arizona Department of Corrections (ADOC) had designated the prison term for child molestation as a "flat-time" term, which would require him to serve that term in its entirety. He conceded ADOC was correct based on former A.R.S. § 13-604.01, *see* 1994 Ariz. Sess. Laws, ch. 236, § 2, but claimed he was entitled to withdraw his plea because the court and the plea agreement had lead him to believe incorrectly that he would be eligible for early release after serving a portion of any prison term imposed. And, he asserted, had he known he was not eligible, he would not have pled guilty. Although the court agreed with Geib about the flat-time term, it summarily denied the petition, concluding it had not been required to inform Geib about his release eligibility and that he had not raised a colorable claim for relief.

¶4 Granting relief on review, we directed the trial court to conduct an evidentiary hearing in order to assess Geib's credibility and determine whether he would have pled guilty had he known the prison term on the child molestation charge was a flat-time term. When questioned by the court at that hearing, Geib agreed the plea agreement itself had informed him he could be facing a combined, maximum prison term that exceeded twenty years. After an exchange between the court and defense counsel about the calculation of eighty-five percent of that combined, maximum prison term, Geib conceded he understood he could be required to serve approximately eighteen years'

imprisonment, even with the misunderstanding about early release, but he had entered the plea nevertheless. Further questioning of Geib by the court and the prosecutor also established the plea agreement provided and Geib understood he would be *eligible* for early release only after serving eighty-five percent of the prison term, not that he would be released after serving that portion of the sentences.

¶5 After the hearing, the trial court denied Geib relief in a thorough, well-reasoned minute entry, the relevant portions of which are as follows. The court found Geib's statement that he would not have pled guilty had he known about the flat-time term not credible. The court concluded Geib had entered the plea knowingly, voluntarily, and intelligently, and, disbelieving Geib's testimony to the contrary, that Geib would have plead guilty to child molestation even had he known he would not be eligible for early release. The court reasoned, inter alia, that the plea agreement made clear the combined, maximum prison term Geib faced was 21.25 years, 12.5 years for the child molestation conviction and 8.75 years for attempted sexual assault. The court found that, even assuming Geib had believed he would be eligible for early release after serving eighty-five percent of that term, he was aware he could be required to serve a term as long as 18.0625 years, which is eighty-five percent of 21.25. Geib entered the plea nevertheless, and ultimately received a ten-year, flat-time term, or a combined term of seventeen years.

¶6 In his petition for review, Geib appears to reiterate his claim that the plea was not knowing, voluntary, and intelligent because of the misunderstanding about the flat-time term. He characterizes the court's calculation of the maximum combined term, with the calculation of eighty-five percent of that term, as "ridiculous [because] an 18

plus year prison term is neither at issue or in question." Geib also raises a number of claims for the first time.

¶7 We will not address any claims raised for the first time on review. *See* Ariz. R. Crim. P. 32.9(c); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). And with respect to the claim the court did address, Geib has not sustained his burden of establishing it abused its discretion in denying relief after the evidentiary hearing. The trial court's ruling was based on its evaluation of Geib's credibility and we have no basis for interfering with that assessment. The court's factual findings are supported by the record and are not "clearly erroneous." *Berryman*, 178 Ariz. at 620, 875 P.2d at 853. We therefore adopt the court's ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶8 We grant the petition for review but deny relief.

/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