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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THE STATE OF ARIZONA, Respondent, v. JOSE ARVIZU, Petitioner.	2 CA-CR 2011-0380-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20070221

Honorable Jan E. Kearney, Judge

REVIEW GRANTED; RELIEF DENIED

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins
Tucson
Attorney for Petitioner

B R A M M E R, Judge.

¶1 Jose Arvizu petitions this court for review of the trial court's denial of his 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). Moreover, when that court's ruling is based on findings of fact after an evidentiary hearing, we accept those findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). Thus, we view the evidence presented at that hearing in the light most favorable to sustaining the court's ruling and will uphold the court's factual determinations if they are based on substantial evidence. *Id.*

¶2 Arvizu was convicted after a jury trial of transportation of methamphetamine for sale and conspiracy. He was sentenced to concurrent, presumptive prison terms, the longer of which was ten years. He did not appeal. Arvizu filed a notice and petition seeking post-conviction relief, arguing his trial counsel had been ineffective because he had not requested a limiting instruction regarding evidence of prior acts and did not advise Arvizu properly "with respect to the offered plea agreement," specifically asserting that he did not understand the sentencing range contained in the second plea offer and would have accepted that plea had counsel informed him he would not call a certain defense witness at trial. Arvizu additionally argued his sentence was improper because it was "disproportionate to [his] co-defendant's prison sentence."

¶3 The trial court denied relief after an evidentiary hearing at which Arvizu's trial counsel and Arvizu testified. The court concluded that counsel's decision to not

seek a limiting instruction was a reasoned strategic decision that did not constitute deficient performance. As to Arvizu's second claim of ineffective assistance of counsel, the court determined that it was "clear from [Arvizu's] testimony at the hearing on this Petition, his statement at sentencing, and the discussion of plea negotiations at [a] pretrial hearing . . . that [he] understood the State's second and final plea offer" and rejected it because he believed a more favorable plea "should have been offered." The court additionally found that counsel's decision not to call a defense witness was a valid strategic decision and that it did not "improperly influence[]" Arvizu's decision to reject the state's plea. Finally, the court concluded that Arvizu's claim regarding his sentence was precluded because it could and should have been raised on appeal and, in any event, it was without merit.

¶4 On review, Arvizu first asserts the trial court erred in rejecting his claims of ineffective assistance of counsel. To prevail on these claims, Arvizu was required to establish counsel's performance had been deficient, based on prevailing professional norms, and that this deficiency was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). And "[d]isagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis." *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). Arvizu argues the court erred in finding that counsel had made a valid strategic decision to not seek a limiting instruction, asserting there was no reasoned basis for that decision. Counsel testified that he had decided not to request a limiting instruction to avoid calling attention to evidence

of Arvizu's prior acts—a decision the court found reasonable. Arvizu suggests that, because any limiting instruction would have been given well after the evidence had been admitted and would not have listed the evidence specifically, the failure to request the instruction was not a reasoned decision. But the court found otherwise, and Arvizu cites no authority or evidence supporting his assertion or suggesting the court was incorrect.

¶5 Arvizu next argues the trial court erred in determining he would not have accepted the state's plea offer despite his belief that counsel would call a particular witness to testify at trial, which counsel ultimately did not do. *See State v. Ysea*, 191 Ariz. 372, ¶¶ 15, 17, 956 P.2d 499, 504 (1998) (defendant may obtain post-conviction relief on basis that counsel's ineffective assistance led defendant to make uninformed decision to reject plea bargain). The court found Arvizu had rejected the state's plea offer because he believed he was entitled to a better offer and that his choice was not influenced by counsel's strategic decision to not call the witness. Although Arvizu points to contradicting evidence, it was the trial court's duty to resolve conflicts in the evidence, and we will not disturb its conclusions absent clear error. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733. Arvizu has identified none.

¶6 Finally, Arvizu contends his claim regarding sentencing is not precluded because he "did not have a direct appeal." *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from seeking post-conviction relief on any ground "[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding"). But Arvizu cites no authority, and we find none, suggesting the preclusive effect of Rule 32.2 does not apply to a

defendant who has not exercised his right to an appeal. The trial court did not err in finding this claim precluded.

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge