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MAY 25 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>DEWEY LEE MCBRIDE,<br><br>Petitioner. | 2 CA-CR 2012-0001-PR<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20081861 and CR20081871

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

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

Natman Schaye
Tucson
Attorney for Petitioner

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K E L L Y, Judge.

**¶1** Pursuant to a plea agreement, petitioner Dewey McBride was convicted in May 2009 of one count of first-degree burglary and possession of a dangerous drug for sale, and three counts of second-degree burglary, all arising from events that occurred on

separate occasions. In August 2009, the trial court sentenced him to consecutive and concurrent, partially aggravated and presumptive terms of imprisonment totaling thirty-seven years. In this petition for review, McBride challenges the court's order dismissing the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P., and its order vacating its prior ruling that the sentence on one of the second-degree burglary counts (count ten) was illegal.

**¶2** McBride argues, as he did in his petition below, that his guilty pleas were not knowing, intelligent, and voluntary because he was not mentally competent when he entered the pleas and at sentencing. He also contends trial counsel was ineffective for failing to raise the issue of his competency, for failing to attend the presentence interview with him and advise him to invoke his right to remain silent, and for failing to fully develop and present mitigating evidence at sentencing. He claims he is entitled to an evidentiary hearing in front of a new judge and to be resentenced on count ten. We will not disturb the trial court's ruling unless it has clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

**¶3** McBride argues he was unable to understand the consequences of his guilty pleas and sentences due to his mental condition and the side-effects of Thorazine, a medication he was taking at the Pima County jail, and that his due process was denied by the trial court's failure to make a competency determination. He also argues his attorney, Mark Resnick, was ineffective for failing to raise his incompetence at the change-of-plea and sentencing hearings. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively

reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

**¶4** McBride attached as exhibits to his petition for post-conviction relief affidavits of his mother and Resnick, as well as medical records from the jail documenting his mental health issues and the medications he was taking near the time he pled guilty and was sentenced. In his affidavit, Resnick attested he was not provided with a complete set of these documents when he requested them before the plea and sentencing hearings, and asserted he would have raised McBride's competency and consulted with a mental health expert if he had "been aware of these diagnoses [substance induced psychotic disorder, post-traumatic stress disorder and depression] and the administration of . . . medications [other than Paxil]."[1] McBride also attached a report prepared by psychologist Robert Smith documenting his examination of McBride in January 2011, almost two years after McBride had pled guilty. Smith opined that he had "a reasonable doubt as to whether Mr. McBride was competent at the time of his plea." He explained that McBride may have experienced "psychotic symptoms" when he pled guilty, making it "questionable" if he was able to knowingly and intelligently enter a plea agreement or be sentenced, or, even if he did not have these symptoms, "it is very possible that he was impaired due to the side-effects caused by Thorazine." Smith further

[1]Notably, Resnick nonetheless raised concerns regarding McBride's mental health in the sentencing memorandum.

concluded, "[t]he evidence reviewed supports the opinion that [McBride] was incompetent at the time of his sentencing."

**¶5** As authorized by Rule 32.6(c), Ariz. R. Crim. P., the trial court dismissed McBride's petition without an evidentiary hearing but explained its reasoning in a careful and well-reasoned, thirteen-page minute entry ruling. In its ruling, the court explained in great detail McBride's arguments and Smith's opinions. Among the considerations the court cited in dismissing the petition were: Resnick did not state in his affidavit that he had noticed anything that lead him to believe McBride had difficulty understanding the plea or that he had had any similar concerns at the change-of-plea hearing; Smith did not seem to consider that the jail records in the month before McBride pled guilty showed his "mood and affect were of a normal intensity," he was alert with "perceptions [that] were reality based," and "he was rational but depressed, with no cognitive issues"; and, in its colloquy with McBride at the change-of-plea hearing, McBride told the court he had not consumed any drugs "within the past 24 hours that would make it difficult for [him] to understand the proceedings" and that he understood the terms of the plea agreement, including the sentencing range. In summary, the court found McBride had "failed to establish that reasonable grounds existed at the time he entered his plea and at the time he was sentenced to call for a competency hearing," and noted it would have held a competency hearing only "if there was sufficient evidence to indicate that the Petitioner was unable to understand the nature of the proceedings against him and that he was unable to assist in his own defense." The court then concluded McBride had failed to "meet this test."

**¶6** Notably, the trial court expressly relied on its own observations at the change-of-plea hearing and at sentencing to conclude that McBride "did not act in a way nor make any statements to suggest to this Court that he did not understand the proceedings taking place or the nature and consequences of the plea," he "was coherent when he addressed this Court at his sentencing, apologizing to the victims, [and] accepting responsibility for his actions," and "[a]t no point during his statements at the sentencing did this Court have any reason to suspect that Petitioner might be incompetent." Ultimately, the court concluded that, merely because McBride had been "diagnosed with mental illnesses and on medication to treat such illnesses is not sufficient to establish that there was an issue regarding [his] competency."

**¶7** McBride has failed to demonstrate the trial court abused its discretion, either in finding insufficient evidence that he was incompetent, or in concluding that counsel was not ineffective by failing to challenge McBride's competency at the change-of-plea and sentencing hearings. The court denied relief in a comprehensive minute entry order that identified and correctly ruled on McBride's arguments in a manner that will allow any future court to understand their resolution. We therefore approve and adopt the court's ruling on these claims and see no need to restate it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We further note that the court was not required to accept Smith's opinion regarding McBride's competency. *Cf. Bishop v. Superior Court*, 150 Ariz. 404, 409, 724 P.2d 23, 28 (1986) (trial court not bound by opinions of mental health expert and may rely on own observations of defendant at competency hearing). In addition, because we conclude the court properly found

McBride failed to assert any colorable claims meriting post-conviction relief, he was not entitled to an evidentiary hearing. A defendant is entitled to a hearing only if he raises a colorable claim for relief, which is one that, if taken as true, likely would have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

**¶8** McBride also argues Resnick was ineffective for failing to attend the presentence interview with him or to advise him to remain silent during the interview, and for failing to present "readily available" mitigating evidence at sentencing. We also approve of and adopt the trial court's ruling on these claims. *See Whipple*, 177 Ariz. at 274, 866 P.2d at 1360. Not only did the court note that McBride was not prejudiced by Resnick's conduct, but it added that "there was sufficient mitigation evidence presented . . . [and] Mr. Resnick did more to present mitigation evidence than the vast majority of defense attorneys do."

**¶9** Finally, in its post-conviction ruling, filed in July 2011, the trial court found, "upon its own review," that the thirteen-year sentence imposed for count ten was illegal because McBride had pled guilty to a nonrepetitive, rather than a repetitive offense on that count. The court thus set a hearing to resentence McBride on count ten. However, in a November 2011 ruling, the court granted the state's motion for reconsideration, and ruled that McBride had, in fact, been sentenced on count ten legally, and that the state had established good cause for excusable delay in not filing its motion earlier. On review, McBride contends the court's July 2011 order was correct, the state's motion for rehearing of that order was untimely, and he is entitled to be resentenced on count ten. In its November 2011 ruling, the court set forth the correct legal and factual

reasons for vacating its prior ruling, and for considering and granting the state's motion. We approve and adopt the court's ruling on this claim and see no need to restate it here. *See Whipple*, 177 Ariz. at 274, 866 P.2d at 1360.

**¶10** For all of the aforementioned reasons, we grant review and deny relief.

/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