

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

MAY 18 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0114-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
MINH MY THAI,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause Nos. CR2008123399001DT, CR2010005636002DT, and CR2010102735001DT

Honorable Christopher T. Whitten, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney  
By Gerald R. Grant

Phoenix  
Attorneys for Respondent

Minh My Thai

Douglas  
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Minh My Thai seeks review of the trial court's order summarily dismissing his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz.

R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In 2010, Thai pled guilty to unlawful use of a means of transportation and, in a separate cause number, pled guilty to three counts of third-degree burglary and admitted a previous felony conviction. As a result of that consolidated plea agreement, the trial court also determined Thai was in violation of probation imposed following his first-degree burglary conviction in another cause number. The court sentenced Thai to concurrent enhanced, presumptive, 4.5-year prison terms for his third-degree burglary convictions and a concurrent, presumptive, 1.5-year prison term for unlawful use of a means of transportation. It imposed an aggravated, ten-year prison term for first-degree burglary pursuant to Thai's probation violation and ordered the concurrent prison terms imposed for his other convictions to run consecutively to that term.

¶3 Thai filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and was "unable to find any claims for relief to raise in post-conviction relief proceedings." Thai, who has limited English skills, filed a pro per petition for post-conviction relief arguing that the interpreter at his change-of-plea hearing told him he would receive a 4.5-year prison term, but that the interpreter at sentencing informed him the prison sentence was 14.5 years and, had he "understood the plea agreement" he would not have pled guilty. He also asserted the state had argued improperly at sentencing that a prior conviction "for a home invasion perpetrated in 2001" was an aggravating factor, reasoning that conviction was not a historical prior felony conviction. Thai further claimed his trial counsel had been ineffective for failing

to provide an accurate translation of the plea agreement and did not “effectively persuade the court to sentence [him] to the five[-]year presumptive [prison term] warranted.” Finally, Thai contended that his counsel and the trial court had failed to make him “aware of the time he would face on a plea [as opposed to a conviction following] a trial.” The court summarily dismissed his petition, finding his claims were not colorable.

¶4 On review, Thai reurges his claims that his plea was involuntary because he did not understand the plea agreement, that a prior conviction “used to aggravate the sentence was too old to be used” pursuant to A.R.S. § 13-105(22)(c) because it was more than five years old, and that his trial counsel had been ineffective because he did not provide an accurate translation of the plea agreement and did not make Thai aware of the time he would have faced had he rejected the plea agreement and been convicted after trial.

¶5 Thai has identified no basis for us to find error in the trial court’s summary rejection of his petition for post-conviction relief. In that petition, Thai provided no evidence supporting his claims that he did not understand the plea agreement, that its translation or the translation at his change-of-plea hearing was faulty, or that his counsel gave him incomplete or inadequate information regarding his potential sentences. *See* Ariz. R. Crim. P. 32.5 (petition for post-conviction relief must include “record citations” and all available “[a]ffidavits, records, or other evidence . . . supporting the allegations of the petition” must be attached). Unsworn statements do not take the place of the

affidavit<sup>1</sup> or other sworn statement required to establish a colorable post-conviction claim warranting an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements).

¶6 Moreover, the record completely belies Thai’s assertions. The transcript of the settlement conference and change-of-plea hearing demonstrates that Thai, through the use of an interpreter, understood the plea agreement and the sentences he would face by pleading guilty or going to trial. Thai gave no indication he did not understand the proceedings. And he responded appropriately to the trial court’s questions and engaged the court in a detailed discussion concerning his potential prison terms—clearly demonstrating he was aware his sentences could be consecutive if he accepted the plea agreement and he could face much lengthier sentences if he rejected it.

¶7 Accordingly, Thai has not presented a colorable claim that his plea was involuntary; he must do more than merely contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant’s claim he was unaware sentence “must be served without possibility of early release” not

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<sup>1</sup>Although Thai titled an exhibit to his petition for post-conviction relief as an “Affidavit,” that document was unsworn and unsigned and contained Thai’s argument, and thus cannot reasonably be construed as an affidavit as contemplated by Rule 32.5. *Cf. State v. McMann*, 3 Ariz. App. 111, 113, 412 P.2d 286, 288 (1966) (affidavit “sworn statement in writing under oath”).

colorable when “directly contradicted by the record”); *see also State v. Denning*, 155 Ariz. 459, 465, 747 P.2d 620, 626 (App. 1987) (“The defendant’s acknowledgment that he voluntarily, knowingly and intelligently entered into his plea and his representation by counsel during the change of plea . . . strongly militate against the conclusion that the plea was involuntary.”). And, even assuming his counsel did not adequately explain the consequences of accepting the plea as opposed to rejecting it, Thai has not shown resulting prejudice. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (“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.”).

¶8 Moreover, Thai’s claim that a conviction used to aggravate his sentence was too remote in time to be used as an aggravating factor is meritless. Thai appears to have asserted in his petition below that his first-degree burglary conviction was used to aggravate his sentence, although he does not specify which sentence. But the only aggravated sentence the trial court imposed was for that burglary, and the court plainly did not aggravate Thai’s sentence based on the offense of conviction. It instead aggravated his sentence based on Thai’s substantial criminal history—the existence of which Thai does not dispute. And, to the extent that Thai intended to argue he had been sentenced improperly as a repetitive offender pursuant to A.R.S. § 13-703 based on that conviction, he is incorrect. The record shows that Thai’s sentences for third-degree burglary were enhanced based on a 2002 conviction for forgery for which he served a

fifty-four month prison term, clearly bringing that conviction within the definition of a historical prior felony pursuant to § 13-105(22)(c).

¶ For the reasons stated, although review is granted, relief is denied.

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

CONCURRING:

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

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