FILED BY CLERK
JUN 28 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. COREY JOSEPH BRAXTON, Petitioner.	)	2 CA-CR 2012-0139-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007176447001DT

Honorable Kristin Hoffman, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Adam Susser — Phoenix
Attorneys for Respondent

Corey Joseph Braxton — Florence
In Propria Persona

E S P I N O S A, Judge.

¶1 Petitioner Corey Braxton seeks review of the trial court's order summarily dismissing his 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 Braxton was charged with aggravated assault and the state alleged he had four historical prior felony convictions. At two settlement conferences, Braxton rejected identical plea offers by the state—that Braxton would plead guilty to aggravated assault with one historical prior felony conviction and, in another cause number, plead guilty to possession of marijuana, also with one historical prior felony conviction. In each of those conferences, the settlement judges informed Braxton of his potential sentences under the plea agreement and that, if convicted at trial, because of his numerous previous felony convictions he faced a maximum 15-year prison term if convicted of aggravated assault and a maximum 5.75-year prison term if convicted of possession of marijuana. The settlement judges also explained those sentences could be consecutive. At the second settlement conference, the prosecutor stated that, if "this was [his] case and [he] tried both of" the charged offenses, he likely would seek a combined 16.5-year prison term upon Braxton's conviction of both counts. At a later pretrial conference, Braxton rejected an offer that he plead guilty to aggravated assault with a stipulated prison term of four years. The trial court also explained the maximum prison term Braxton could face upon conviction of aggravated assault.

¶3 Braxton was convicted after a jury trial of aggravated assault and sentenced to an eight-year prison term. His conviction and sentence were affirmed on appeal. *State v. Braxton*, No. 1 CA-CR 09-0119 (memorandum decision filed Jun. 15, 2010). Braxton filed a petition for post-conviction relief asserting, without elaboration, that his trial counsel had not provided him "adequate information to make a well informed decision whether to reject or accept a plea offer." The trial court appointed counsel, who then filed a notice stating he had "found no grounds for Rule 32 relief and has no basis upon which to file a petition."

¶4 The trial court granted Braxton leave to file a pro per petition for post-conviction relief, and Braxton did so, asserting his trial counsel[1] had been ineffective in failing to explain his "true sentencing exposure" upon accepting the plea in light of the prosecutor's allegedly incorrect statements concerning his potential sentence. He also asserted counsel had failed to explain "the relative merits of the offer compared to [his] chances at trial" or "give professional advice on [Braxton's] perception that he would receive a not guilty verdict" at trial because he believed he had acted in self-defense. The court dismissed Braxton's petition summarily, determining the record demonstrated that Braxton had been provided the correct sentencing ranges at each of his two settlement conferences and had stated he understood the offered pleas before rejecting them. Thus, the court concluded, Braxton had not demonstrated his counsel's performance had been

[1]Braxton's first attorney withdrew following the first settlement conference. His claims concern his second attorney.

deficient or that he had been prejudiced, noting there had been "no showing in the record that absent his attorney's deficient advice he would have accepted the proffered plea offer."

¶5 On review, Braxton repeats his claim of ineffective assistance of counsel and argues he is entitled to an evidentiary hearing. "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." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). In these circumstances, Braxton must "provide specific factual allegations" that his "counsel failed to adequately communicate the plea offer or the consequences of conviction" and that there was a reasonable probability he would not have rejected the state's plea offers had he received adequate advice from counsel. *State v. Donald*, 198 Ariz. 406, ¶¶ 16-17, 20, 10 P.3d 1193, 1200-01 (App. 2000).

¶6 We agree with the trial court that Braxton has not stated a colorable claim based on his purported misunderstanding of the sentences he could face whether he pled guilty or was convicted at trial. Braxton asserts he was "confused" by the prosecutor's description of the sentence the state would seek after a guilty verdict because it differed from the settlement judges' and trial court's description of his potential maximum sentence and his trial counsel was deficient in failing to rectify his confusion. But, in each instance, Braxton stated he understood the offered plea agreement and the potential sentences he could receive should he reject it—a range encompassing the prosecutor's

statement about Braxton's potential sentence. To state a colorable claim, Braxton must do more than simply 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 colorable when "directly contradicted by the record").

¶7 Braxton also claims, as he did below, that his trial counsel did not adequately explain the strength of the state's case against him—specifically why his apparent claim of self-defense might not be successful—and thus that he could not weigh the advantages of accepting the plea as opposed to going to trial. And he asserted his counsel's failure to do so caused him to reject an "advantageous" plea offer from the state.

¶8 We find this claim also belied by the record. Defense counsel's representation is deficient if he or she does not adequately explain to a defendant "'the relative merits of the offer compared to the defendant's chances at trial'" such that the defendant can make an informed decision whether to accept or reject an offered plea. *Donald*, 198 Ariz. 406, ¶ 9, 10 P.3d at 1198, *quoting Commonwealth v. Napper*, 385 A.2d 521, 524 (Pa. Super. Ct. 1978). But, during Braxton's second settlement conference, the settlement judge and defense counsel discussed the merits of Braxton's perceived self-defense claim, pointed out that his prior felony convictions would be admissible to impeach him if he testified, and advised Braxton that, even if the victim and witness recanted, their statements to police inculpating Braxton nonetheless would be admissible.

Braxton has not identified what additional information he required in order to evaluate the plea offer from the state, much less provided any evidence that counsel was deficient failing to provide that information. Accordingly, he has not presented a colorable claim of ineffective assistance of counsel. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *Donald*, 198 Ariz. 406, ¶ 9, 10 P.3d at 1198.

¶9 We grant review and, for the reasons stated, deny relief.

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

CONCURRING:

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

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