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
SEP 14 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>ERIC THORIN PEELER,<br><br>Petitioner. | 2 CA-CR 2012-0196-PR<br>DEPARTMENT A<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Not for Publication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 COCHISE COUNTY

Cause No. CR200900003

Honorable Donna Beumler, Judge

REVIEW GRANTED; RELIEF DENIED

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Edward G. Rheinheimer, Cochise County Attorney
By Roger H. Contreras
Bisbee
Attorneys for Respondent

Law Offices of John William Lovell, P.C.
By John William Lovell
Tucson
Attorney for Petitioner

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

**¶1** Petitioner Eric Peeler seeks review of the trial court's order, entered after an evidentiary hearing, partially denying 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). Peeler has not met his burden of establishing such abuse here.

**¶2** Peeler was convicted after a jury trial of possession of a dangerous drug for sale and possession of a deadly weapon by a prohibited possessor. The trial court sentenced Peeler to consecutive prison terms totaling twenty years, and we affirmed his convictions and sentences on appeal. *State v. Peeler*, No. 2 CA-CR 2009-0338 (memorandum decision filed Oct. 27, 2010). Peeler then sought post-conviction relief, arguing that trial counsel had been ineffective by failing to adequately explain a plea offer from the state,[1] and additionally that counsel had "opened the door" to precluded evidence and had failed to seek severance of the prohibited possessor count, request a lesser-included offense instruction on the possession for sale charge, and object to certain evidence.

**¶3** The trial court held an evidentiary hearing on Peeler's claims. It concluded that counsel had fallen below prevailing professional norms by failing to discuss the "availability and appropriateness" of the lesser-included-offense instruction, by failing "to consider the relevant merits" of seeking severance of the prohibited possessor count, and by opening the door to precluded testimony. Finding Peeler had been prejudiced by the errors, the court set aside Peeler's "conviction"[2] and ordered a new trial. The court,

[1]The state offered that Peeler plead guilty to attempted possession of methamphetamine for sale with a stipulated sentence of 7.5 years' imprisonment.

[2]The trial court did not specify which conviction was set aside. However, this does not affect our analysis on review.

however, rejected Peeler's claim that his counsel had not adequately explained the plea offer.

**¶4** On review, Peeler asserts the trial court erred in concluding counsel's performance had been adequate, claiming that counsel's statements and testimony were "inconsistent" and that it was "clear he had no memory of discussing the plea with Peeler."[3] To prevail on a claim of ineffective assistance of counsel, Peeler must demonstrate by a preponderance of the evidence, *see* Ariz. R. Crim. P. 32.8(c), that counsel's conduct fell below prevailing professional norms and that counsel's deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687, 688 (1984). In these circumstances, Peeler must show that his counsel failed to provide him information necessary to evaluate the state's plea offer and that he would have accepted the plea had he received adequate advice from counsel. *See State v. Donald*, 198 Ariz. 406, ¶¶ 16, 20, 10 P.3d 1193, 1200, 1201 (App. 2000).

**¶5** When, as here, the trial court has held an evidentiary hearing, we defer to the court's factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). In our review, we "view the facts in the light most favorable to sustaining the lower court's ruling, and we must resolve all reasonable inferences against the defendant." *Id.* And we will affirm if "the trial court's ruling is based on substantial evidence." *Id.* "Evidence is not insubstantial merely because

[3]Peeler's argument relies, in part, on evidence the trial court expressly excluded. We therefore disregard those portions of Peeler's argument.

testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.*

**¶6** Peeler's argument, at its core, asks us to reweigh the evidence on review. We will not do so. *See id.* As we noted above, it was for the trial court to make any credibility determinations and resolve any inconsistencies in counsel's testimony. *Id.*; *see also State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding). And the court's conclusions are amply supported by the record. Counsel testified that he had discussed with Peeler the "maximum exposure" he could face for each charge should he go to trial and had told Peeler those sentences could be consecutive. Counsel also recounted that Peeler nonetheless had rejected the state's plea offer because he did not want to return to prison and believed he might receive a more favorable plea offer in the future. The fact counsel could not remember the precise verbiage he had used or the exact time he had the conversation with Peeler did not require the court to find that his testimony was not credible.

**¶7** Peeler additionally points to a portion of counsel's testimony in which he stated he had told Peeler he faced a prison term "in excess of, I think, 20 years." Peeler suggests that, in light of this testimony, counsel gave erroneous advice because he instead faced a potential prison term of thirty years. But Peeler identifies nothing in the record suggesting he would have accepted the state's offered plea had he been informed the maximum prison term he could face would have been thirty years, but would have rejected if that maximum term had been only twenty years. Peeler instead insisted that

counsel informed him that his maximum sentence would be only ten years—an assertion the trial court rejected.

**¶8** 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