FILED BY CLERK
OCT 17 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. HEATHER ELIZABETH POLZIN, Petitioner.	2 CA-CR 2012-0245-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900726

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

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

E S P I N O S A, Judge.

¶1 Pursuant to a plea agreement, petitioner Heather Polzin was convicted in 2010 of attempted possession of a dangerous drug for sale in exchange for the dismissal of two additional counts in that matter and the entire indictment in a separate matter. The plea agreement contained a stipulated sentence for the aggravated prison term of 8.75 years, the same sentence the trial court imposed. Polzin filed a petition for post-

conviction relief pursuant to Rule 32, Ariz. R. Crim. P., raising various claims of ineffective assistance of counsel. The court conducted numerous status conferences and hearings, including an evidentiary hearing at which trial counsel testified, to address the claims in Polzin's petition, supplemental petition, and motions for rehearing.

¶2 Although the trial court ultimately found counsel may have been ineffective for having given Polzin erroneous advice that "she could get less than the stipulated term without running the risk of having the State withdraw from the plea agreement," it nonetheless dismissed Polzin's petition "for the reason that the only relief that could be granted [withdrawal of the plea agreement] is not being sought by defendant."[1] This petition for review followed.[2] "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶3 Polzin presents various claims of ineffective assistance of counsel and trial court error arising from those claims, briefly summarized as follows: (1) counsel failed to object to the aggravating factors the court relied upon at sentencing, which resulted in the illegal imposition of an aggravated sentence; (2) counsel failed to "understand, explore, explain or assert" Fourth Amendment challenges to the search warrant pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); and (3) the court erred by denying Polzin

[1]For ease of reference, we refer to the multiple rulings that constitute the trial court's dismissal of the petition for post-conviction relief as one ruling.

[2]Although attorney Creighton Cornell filed all of the post-conviction pleadings, including the petition for review, attorney John Lovell was appointed to replace Cornell on August 6, 2012.

the opportunity for further "evidentiary development" of the *Franks* claims, and by declining to consider additional evidence that "may lead to exculpatory evidence." Polzin additionally argues the remedy for the purportedly illegal sentence cannot be to permit the state to withdraw from the plea agreement.[3] As relief, Polzin asks: that we remand for resentencing under the terms of the plea agreement and order "the terms of the plea agreement require the sentence can be reduced without [Polzin] losing the benefit of the plea agreement"; that if we do not order a resentencing, we remand for an evidentiary hearing on the claims of ineffective assistance of counsel; and that we strike the original search warrant or remand for an evidentiary hearing permitting Polzin to pursue "evidentiary development" or to present the evidence "adduced in 2012."

¶4 In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish both that counsel's performance fell below an objectively reasonable standard and that the deficient performance caused prejudice 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). Establishing prejudice requires showing that, but for the ineffectiveness of counsel, the outcome of the trial or the sentence imposed would have been different. *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). "If no prejudice is shown, the court need not inquire into counsel's performance." *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992).

[3]In view of our resolution of Polzin's petition for review, we do not reach this issue.

¶5 At sentencing, the trial court found no mitigating circumstances and found the following aggravating factors: (1) the existence of the stipulated sentence; (2) that Polzin had acknowledged to the author of the presentence report that she previously had been in the business of selling methamphetamine; and (3) that the offenses charged in the other indictment were being dismissed in exchange for her guilty plea in this matter. In a subsequent ruling, relying on *State v. King*, 178 Ariz. 303, 304-05, 873 P.2d 641, 642-43 (App. 1993), the court acknowledged that although it had stated erroneously it was relying on the stipulated sentence as an aggravating factor, its "inartful expression does not invalidate the sentence."

¶6 In dismissing the petition, the trial court noted it was "familiar with the file, and in particular ha[d] read the transcripts of the change of plea and sentencing hearings, the petition, response, and reply, and other filings . . . [and it was] also familiar with its own rulings." The court articulated the correct standard for evaluating Polzin's claims of ineffective assistance of counsel and addressed her claims under this standard. Based on the record before us, we cannot say the court abused its discretion in denying Polzin's petition for post-conviction relief. It did so in a detailed and thorough ruling that clearly identified Polzin's arguments and correctly ruled on them in a manner that will allow any court in the future to understand their resolution. With the exception of our comments regarding the court's ruling on the imposition of the aggravating factors, discussed below, we approve and adopt the court's ruling and see no need to restate it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 Although we conclude the trial court properly dismissed Polzin's claim regarding counsel's failure to challenge the propriety of the aggravating factors, we write further to clarify our adoption of the court's ruling. The aggravated sentence imposed must be supported by two enumerated aggravating factors. A.R.S. § 13-702(C); *see* A.R.S. § 13-701(D) (enumerating aggravating factors); *State v. Schmidt*, 220 Ariz. 563, ¶¶ 9-10, 208 P.3d 214, 217 (2009) (maximum potential sentence cannot be increased based solely on catchall aggravator); *see also State v. Perrin*, 222 Ariz. 375, ¶ 9, 214 P.3d 1016, 1019 (App. 2009) (sentence imposed under A.R.S. § 13-702.01(A),[4] must be supported by minimum of two clearly enumerated aggravators). Notably, however, Polzin has raised claims of ineffective assistance of counsel here. As such, she must show she was prejudiced by counsel's allegedly improper conduct. *See Strickland*, 466 U.S. at 694. She has not done so because she has not demonstrated by a reasonable probability the outcome would have been different absent counsel's deficient performance. *See id.* Indeed, as the court correctly noted:

> Had the court voiced an intent to impose a sentence less than the stipulated aggravated maximum term, the State would undoubtedly have moved to withdraw from the plea agreement, a request that would have been granted, and [Polzin] would then have faced both original sets of charges in CR200900726 and CR200900866. . . . By acting as

[4]Significant portions of Arizona's criminal sentencing code have been renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 21, 2008." *Id.* ¶ 120. As part of those changes, § 13-702.01 was repealed, 2008 Ariz. Sess. Laws, ch. 301, § 25, and its substantive provisions were modified and moved to become parts of A.R.S. §§ 13-702 and 13-703. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 24, 28.

> [Polzin] now contends her lawyer should have acted, her lawyer could well have ended up subjecting her to a great deal more time in prison than she in fact received. Failure of defense counsel to subject his client to greater prison exposure did not result in prejudice to [Polzin].

¶8 As the trial court noted, Polzin failed to show she was prejudiced. She contends that, had defense counsel challenged the aggravating factors, the court would not have imposed the aggravated sentence to which she had stipulated.[5] However, as the court correctly noted, it appears highly unlikely Polzin would have been sentenced under the plea agreement had anything less than the stipulated, aggravated sentence been imposed. We can infer from the court's ruling, an inference the record supports, that it found disregarding the sentencing provision would have "materially altered" and thereby frustrated the plea agreement because that sentence was an "integral part" of the agreement. *State v. Szpyrka*, 223 Ariz. 390, ¶¶ 5, 7, 8, 224 P.3d 206, 208-09 (App. 2010). Accordingly, because Polzin did not allege the prejudice necessary to support a claim of ineffective assistance of counsel, the court did not abuse its discretion in denying relief on this claim.

[5]Acknowledging that "[t]he plea agreement and colloquy" refer to a stipulated sentence of 8.75 years, Polzin nonetheless contends there was no such stipulation, ostensibly on the ground that imposition of the sentence required the trial court's finding two aggravating factors under A.R.S. § 13-702(C), which she asserts it did not do.

¶9 We grant the petition for review, but relief is denied.

/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