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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JUAN ALBERTO CRUZ, Petitioner.	2 CA-CR 2012-0322-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2008007096001DT

Honorable Paul J. McMurdie, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton — Phoenix
Attorneys for Respondent

Juan Alberto Cruz — Florence
In Propria Persona

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

¶1 Petitioner Juan Cruz seeks review of the trial court's summary denial of his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, remand the case to the superior court for an evidentiary hearing.

Background

¶2 Pursuant to a plea agreement, Cruz was convicted of an attempted first-degree murder committed while he was in the custody of the Arizona Department of Corrections (ADOC). The trial court sentenced him to an enhanced, aggravated, twelve-year prison term to be served consecutively to the term he was already serving, with no credit for presentence incarceration.

¶3 In his pro se petition for post-conviction relief, Cruz sought to withdraw his guilty plea on the ground that it "was the product of Ineffective Assistance of Counsel" and therefore involuntary. He also asserted he had stated a colorable claim and requested an evidentiary hearing "to allow him a full and fair opportunity to present his claim." According to Cruz, counsel had "assured him repeatedly" that, if he pleaded guilty, (1) the trial court would impose a concurrent, rather than consecutive, term of imprisonment, notwithstanding his plea agreement's provision that there were "no agreements as to whether the sentence shall be consecutive or concurrent to the sentence [Cruz] is currently serving"; (2) Cruz would receive credit for presentence incarceration time served from the time of his booking for the attempted murder; and (3) should the court "for whatever reason" sentence him to a consecutive term or deny him presentence incarceration credit, Cruz "could always withdraw[his] guilty plea at any time as a 'formality.'"

¶4 In an affidavit filed with his petition below, Cruz averred that, in assuring him a concurrent sentence would be imposed, counsel had told him, "'This is an "old-school" Judge who[] is knowledgeable [as] to what goes on in prison and will understand

that this is nothing more than a prison fight,'" which Cruz had understood to suggest counsel "had some sort of prior discussion with the court." Cruz also stated counsel had informed him he "'had nothing to loose [sic]'" by accepting the agreement because he could later withdraw his guilty plea. Cruz averred that, had it not been for counsel's assurances about a concurrent sentence, credit for presentence incarceration, and the ability to withdraw his plea, he "would never have accepted the State's plea offer and . . . would have elected for a jury trial." In a minute entry denying relief, the trial court ruled that Cruz had "failed to set forth a colorable claim," without further elaboration. This pro se petition for review followed.

¶5 On review, Cruz argues the trial court failed to address his claims that counsel had been ineffective in assuring him he would be sentenced to a concurrent term and granted credit for presentence incarceration.[1] He requests that he be permitted to withdraw from his guilty plea.

[1]Cruz also argues counsel was ineffective in failing to advise him of ADOC policies regarding eligibility for earned release credits. Although he had mentioned this issue in his affidavit below, he had not argued, in his petition for post-conviction relief, that counsel's failure to advise him about these policies was a basis for his claim of ineffective assistance of counsel. We do not address issues not "presented to the trial court for its consideration" and raised for the first time in a petition for review. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues "decided by the trial court . . . which the defendant wishes to present to the appellate court for review"). Similarly, because Cruz does not argue on review that counsel had misinformed him that his guilty plea could be withdrawn at any time, we do not address that issue. *See* Ariz. R. Crim. P. 32.9(c)(1) ("Failure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue.").

Discussion

¶6 "We review for abuse of discretion the superior court's denial of post-conviction relief based on lack of a colorable claim." *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). "A colorable claim is 'one that, if the allegations are true, might have changed the outcome.'" *Id.* ¶ 21, *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And, "[w]hen a defendant states a colorable claim, []he is entitled to a hearing on the merits of that claim." *Id.* ¶ 30. To obtain an evidentiary hearing on a claim of ineffective assistance of counsel, a defendant must state a colorable claim "that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *Id.* ¶ 21, *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶7 Here, Cruz has alleged he was induced to enter his guilty plea by counsel's "assurances" that he would receive a concurrent sentence and credit for presentence incarceration and, but for those assurances, he would not have pleaded guilty. In response, the state contends "[t]he record does not support Cruz's claims" because he had acknowledged, at his change-of-plea hearing, the plea agreement's stipulation that either a consecutive or concurrent sentence could be imposed.[2]

[2]In support of its argument, the state also noted, "Nothing in the plea agreement or in the change of plea colloquy advised Cruz that he had an option to withdraw from the plea if the trial court imposed a consecutive term or did not award presentence credit." Because Cruz has waived review of this issue, *see supra* n.1, we do not address it.

¶8 But this is a case in which Cruz's factual allegations "related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." *Machibroda v. United States*, 368 U.S. 487, 489-92, 494-95 (1962) (vacating summary dismissal of habeas claim asserting prosecutor's *sub rosa* promise regarding sentence); *see also* Ariz. R. Crim. P. 32.1 cmt. (Rule 32 "[p]rovides for a full-scale evidentiary hearing on the record in order to limit federal *habeas corpus* review to questions of law"); *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) (Rule 32 serves purpose of "'evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established of record'"), *quoting State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982).

¶9 Moreover, although the record in a change-of-plea hearing may pose a "formidable barrier" to a defendant's later challenge to the voluntariness of his plea, that barrier "is not invariably insurmountable." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). In *Blackledge*, the Supreme Court affirmed the Fourth Circuit's judgment reversing the summary dismissal of a defendant's post-conviction claim that he had relied on counsel's promise of a more lenient sentence, notwithstanding the defendant's representations, in entering his guilty plea, that he understood the range of sentences that might be imposed and that no other promises had been made. *Id.* at 65-66, 68-69, 70-71, 83. Stating that "[s]olemn declarations in open court carry a strong presumption of verity," and that "subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal," *id.* at 74, the Court nonetheless found the defendant entitled to proceed on his claim, based on the specificity of his allegations and

his contention that "he was advised by counsel to conceal" counsel's alleged promise during questioning by the trial court, *id.* at 75-76, 78. *See also United States v. Marzgliano*, 588 F.2d 395, 398, 400 (3d Cir. 1978) (evidentiary hearing required on federal habeas claim where attorney allegedly "may have led [defendant] to believe that [attorney] had a special relationship with the district court judge and had 'fixed' the sentence"); *State v. Jordan*, 137 Ariz. 504, 508-09, 672 P.2d 169, 173-74 (1983) (evidentiary hearing required on Rule 32 claim, supported by affidavit, that trial judge indicated death penalty would not be imposed after guilty plea); *State v. Hershberger*, 180 Ariz. 495, 497-98, 885 P.2d 183, 185-86 (App. 1994) (evidentiary hearing required on petitioner's claim of plea induced by attorney's misrepresentation that sex offender registration could be terminated). Similarly, here, although Cruz acknowledged in court that he understood the court would determine at sentencing whether to impose a consecutive or concurrent sentence, his acknowledgement is not wholly inconsistent with his allegations that, notwithstanding the plea agreement's terms, his counsel had told him the court would, in fact, impose a concurrent sentence.[3]

¶10 Rule 32.6(c) authorizes the summary disposition of a petition for post-conviction relief upon finding that none of the claims "presents a material issue of fact or

[3]Unlike the lower court in *Blackledge*, 431 U.S. at 65-66, the trial court here did not ask Cruz during his change-of-plea colloquy whether he had been made any promises to influence his decision to plead guilty. *See* Ariz. R. Crim. P. 17.3 ("Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court and determine that the defendant wishes to forego the constitutional rights of which he or she has been advised, [and] that the plea is voluntary and not the result of force, threats or promises (other than a plea agreement)."). Instead, the court inquired only whether "any of the lawyers ha[d] any concerns about the voluntariness" of the plea.

law which would entitle the defendant to relief . . . and that no purpose would be served by any further proceedings." As our supreme court has cautioned, the determination of whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). "The trial court must be mindful, however, that when doubt exists, 'a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.'" *Id.*, *quoting State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Our courts "recognize that a defendant may seek relief from a conviction on the basis that counsel's ineffective assistance induced a guilty plea," *State v. Donald*, 198 Ariz. 406, ¶ 10, 10 P.3d 1193, 1198 (App. 2000); we conclude Cruz's allegations here, taken as true, could entitle him to relief. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *see also Machibroda*, 368 U.S. at 493 ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void."). Cruz has thus stated a colorable claim and is "entitled to a hearing to determine issues of material fact." Ariz. R. Crim. P. 32.8(a); *see also Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d at 67.

¶11 We appreciate that "[a] defendant's mistaken subjective impressions gained from discussions with his lawyer, absent substantial objective evidence showing such impressions to be reasonably justified, do not constitute sufficient grounds upon which to set aside his guilty plea." *State v. Pritchett*, 27 Ariz. App. 701, 703, 558 P.2d 729, 731 (1976). But in *Pritchett*, this court approved the trial court's denial of Rule 32 relief after an evidentiary hearing. *Id.* at 702-03, 558 P.2d at 730-31. In contrast here, there has

been no evidentiary hearing to determine what Cruz's counsel told him about the sentence he would receive; whether, as Cruz alleges, he would not have pleaded guilty but for counsel's assurances; or whether his "subjective impressions" of counsel's statements were "reasonably justified." *Id.*; *see also Chizen v. Hunter*, 809 F.2d 560, 561-62 (9th Cir. 1986) (distinguishing allegations that counsel misrepresented what "sentence *in fact* would be," which, if true, would entitle defendant to relief, from allegations that counsel "merely. . . *predicted*" favorable outcome);[4] *State v. Bowers*, 192 Ariz. 419, ¶ 19, 966 P.2d 1023, 1028 (App. 1998) (to establish *Strickland* prejudice, pleading defendant must demonstrate "'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial'"), *quoting Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Disposition

¶12 Cruz is not entitled to have his plea vacated based on his petition and affidavit alone, the relief he requests on review. But, because his claims create issues of material fact regarding counsel's representations to him about the sentence he would receive, his reliance on those representations, and whether any such reliance was

[4]An attorney's erroneous but good faith prediction of a more favorable sentence, if it does not fall below prevailing professional norms, will not constitute ineffective assistance. *See Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) ("[A] mere inaccurate prediction, standing alone, would not constitute ineffective assistance."). But advice that misstates the law, if material to a defendant's decision to plead guilty, may render an attorney's performance ineffective. *See Hershberger*, 180 Ariz. at 497, 885 P.2d at 185; *see also* A.R.S. § 13-711(B) ("[I]f a person is subject to an undischarged term of imprisonment and is sentenced to an additional term of imprisonment for a felony offense that is committed while the person is under the jurisdiction of the state department of corrections, the sentence imposed by the court shall run consecutively to the undischarged term of imprisonment.").

reasonably justified, he is entitled to the evidentiary hearing he requested below, and the trial court abused its discretion in summarily denying relief.

¶13 Accordingly, we grant review and remand Cruz's case to the trial court for further proceedings consistent with this decision.

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

CONCURRING:

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

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