

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

OCT 31 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0361-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FELIX UFRANO RAMIREZ-RAMOS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. V1300CR820070436

Honorable Warren R. Darrow, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Sheila Sullivan Polk, Yavapai County Attorney
By David B. Loder

Prescott
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Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Felix Ramirez-Ramos seeks review of the trial court's summary dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, but deny relief.

¶2 After a jury trial, Ramirez-Ramos was convicted of child molestation and sexual conduct with a minor under fifteen years of age. The trial court sentenced him to slightly mitigated, concurrent, seventeen-year prison terms, but later vacated his conviction and sentence for child molestation. His remaining conviction and sentence were affirmed on appeal. *See State v. Ramirez-Ramos*, No. 1 CA-CR 08-0036 (memorandum decision filed Dec. 3, 2009).

¶3 In his petition for post-conviction relief, Ramirez-Ramos alleged his trial counsel had been ineffective in failing to communicate a proposed plea agreement offered by the state before a scheduled hearing to review its terms. *See State v. Donald*, 198 Ariz. 406, ¶ 46, 10 P.3d 1193, 1205 (App. 2000). He also alleged the state had unreasonably withdrawn the offer before the commencement of the hearing.

¶4 The proposed plea agreement the state verbally extended to Ramirez-Ramos's counsel provided for a plea of guilty to amended charges of aggravated assault, a class six felony, and solicitation to commit sexual conduct with a minor over fifteen years of age, a class two misdemeanor. According to Ramirez-Ramos's counsel, the state had provided him with a written copy of the proposal on the day a plea negotiation conference was scheduled, but then withdrew it just before the hearing. Although the proposed agreement provided that probation was an available disposition, it also included

“[s]pecial conditions regarding sentence” and specifically required that Ramirez-Ramos “register as a sexual offender with the Sheriff of the county in which he resides” and state “a factual basis for the change of plea.” As Ramirez-Ramos noted in his post-conviction relief petition, the amended charges found in the proposed plea agreement were not among those crimes subject to the sex-offender registration statute. *See* A.R.S. § 13-3821.

¶5 The trial court dismissed the petition, finding Ramirez-Ramos had failed to state a colorable claim that would entitle him to relief. Specifically, the court found Ramirez-Ramos had failed to show any prejudice resulted from his attorney’s errors or omissions, as required to establish a colorable claim of ineffective assistance of counsel. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (colorable claim of ineffective assistance of counsel requires showing “both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant”), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Donald*, 198 Ariz. 406, ¶¶ 20-21, 10 P.3d at 1201 (*Strickland* prejudice based on rejection of plea requires showing of reasonable probability defendant would have accepted offer but for attorney’s conduct). The court noted Ramirez-Ramos had written in a letter to his Rule 32 counsel stating he would have accepted the proposed plea, “especially if no sex-offender/DNA/HIV/Monitoring Fund fee conditions were required. (Under No Contest or Alford).” The court observed, “Thus, to this day, [Ramirez-Ramos] concedes that he would have been unwilling to accept the plea agreement as written; therefore, he is

unable to show prejudice” In denying Ramirez-Ramos’s motion for reconsideration, the court wrote,

The portion of [Ramirez-Ramos]’s statement under oath mentioning a no contest or Alford plea is consistent with the assertions made by the State in this matter, i.e., [he] maintained his factual innocence throughout the case and would not have accepted a plea agreement that would require registration as a sex offender. [His] statement is not ambiguous, and he has offered no further factual support for his contention that it is.

Addressing Ramirez-Ramos’s claim that requiring sex-offender registration under the terms of the plea agreement would not have been authorized by statute, the court added, “If, in fact, this assertion is true and therefore the plea agreement was illegal and invalid, there is no indication that the State would have offered a different agreement,” rendering Ramirez-Ramos’s claim speculative. This petition for review followed.

¶6 On review, Ramirez-Ramos argues the merits of the claims raised below, and contends that, had he been presented with the agreement, he “would have accepted it rather than proceed to Trial notwithstanding the Plea Agreement containing ‘Special conditions regarding sentence . . .’ . . . as such ‘special conditions’ could not legally be imposed.” Relying on *Coy v. Fields*, Ramirez-Ramos suggests the special conditions would have been unenforceable because “the state bears the risk when . . . a sentencing or probation provision in one of its plea agreements proves to be illegal and

unenforceable.”¹ 200 Ariz. 442, ¶¶ 12-13, 27 P.3d 799, 803 (App. 2001). He maintains the trial court abused its discretion in denying relief without an evidentiary hearing. *See Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d at 67 (summary dismissal based on lack of colorable claim reviewed for abuse of discretion). We disagree.

¶7 The trial court’s findings supported its conclusion that Ramirez-Ramos had failed to state a colorable claim of prejudice resulting from counsel’s alleged error. In addition to the reasons cited by the court, we conclude Ramirez-Ramos also failed to show prejudice because he cannot establish a reasonable probability the court would have accepted the proposed agreement’s terms.

¶8 In *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1409 (2012), the United States Supreme Court explained,

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel[;] . . . a reasonable probability

¹The court in *Coy v. Fields* also cautioned that if a petitioner had entered into a plea agreement “in bad faith, never intending to comply with the terms of the agreement or knowing that a probationary term . . . was impossible, the state’s withdrawal from the plea would have been appropriate.” 200 Ariz. 442, ¶ 13, 27 P.3d at 803. Recognizing this principle, Ramirez-Ramos appears to argue, in the alternative, that he would have “advis[ed] the State of the legal defects in the ‘special conditions’ section of the proposed Plea Agreement” and the state might then have offered a different agreement. With respect to the court’s finding that this alternative claim was speculative, Ramirez-Ramos contends “there is no indication in the Record that the State *would not* have offered a different plea agreement.” To the contrary, because the state, in fact, made no further offers before trial after it withdrew the proposal discussed here, we agree with the trial court that any supposition about additional offers is mere speculation.

the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it[;] . . . [and] a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Here, Ramirez-Ramos correctly asserts that the sex-offender registration requirement in the proposed plea agreement was not authorized by statute. We presume a trial court knows and correctly applies the law, *State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008), and so must presume the trial court would not have approved a plea agreement that contained an illegal term.

¶9 We also reject Ramirez-Ramos’s assertion that he somehow was entitled to relief based on principles of contract. A defendant has no constitutional right to a plea bargain, *Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d at 1200, and, although a prosecutor may not withdraw a plea offer for vindictive reasons, *id.* ¶ 39, Ramirez-Ramos only characterizes the state’s withdrawal as “unreasonable” or “abrupt” and provides no basis to conclude it was “vindictive.” See *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992) (to show vindictive prosecution, defendant must present facts suggesting prosecutor motivated by desire to punish him for doing something law allowed); *State v. Webb*, 140 Ariz. 321, 323, 681 P.2d 473, 475 (App. 1984) (revocation of plea offer does not constitute vindictive prosecution); *cf.* *State v. Martin*, 139 Ariz. 466, 481, 679 P.2d 489, 504 (1984) (defendant “raise[d] strong claim” prosecutor improperly refused to plea bargain based on animus toward defense attorney chosen pursuant to Sixth Amendment right to counsel). Absent such evidence, a prosecutor has plenary authority to withdraw a

plea offer at any time before the court's acceptance of a plea agreement. *See* Ariz. R. Crim. P. 17.4(b).

¶10 Accordingly, we grant review but deny relief.

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

CONCURRING:

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

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