IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSHUA MICHAEL LEON,
Petitioner.

No. 2 CA-CR 2015-0320-PR
Filed June 7, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20094042001
The Honorable Brenden J. Griffin, Judge

REVIEW GRANTED; RELIEF DENIED

Joshua M. Leon, Tucson
In Propria Persona

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Joshua Leon petitions for review of the trial court's denial, after an evidentiary hearing, of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review, but we deny relief.

¶2 After a jury trial, Leon was convicted of second-degree murder and sentenced to an aggravated, eighteen-year prison term. On appeal, this court vacated the trial court's criminal restitution order but otherwise affirmed Leon's conviction and sentence. *State v. Leon*, No. 2 CA-CR 2011-0395, ¶ 37 (memorandum decision filed Dec. 3, 2013). Leon then filed a petition for post-conviction relief alleging his trial counsel rendered ineffective assistance by advising him to reject a plea agreement offered by the state.

¶3 The trial court scheduled an evidentiary hearing, and Leon testified that when he had discussed the plea offer with counsel before rejecting it at a *Donald*[1] hearing, he asked counsel why the proposed agreement, which provided for a guilty plea to manslaughter with a sentence in the range of seven to 12.5 years, did not expressly state that he would be eligible for release after serving

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[1]*See State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). A *Donald* hearing is a pre-trial proceeding at which a "formal [plea] offer[]," and a defendant's rejection of it, "can be made part of the record" to "help ensure against late, frivolous, or fabricated claims" of ineffective assistance of counsel "after a trial leading to conviction with resulting harsh consequences." *Missouri v. Frye*, ___U.S. ___, ___, 132 S. Ct. 1399, 1408-09 (2012).

eighty-five percent of his sentence. According to Leon, counsel told him any sentence imposed for manslaughter, a class two felony, would be subject to early release credits and then said, "'Well, don't worry about that plea. . . . I think we should go to trial.'"

¶4 Trial counsel, in contrast, testified that when Leon had asked his opinion, he said, "'I believe, under all the circumstances here, you should take the plea,'" and he explained how, in his opinion, Leon's prospects at trial "kept getting worse" with developing evidence. With respect to the issue of release eligibility, counsel noted the plea agreement had referred to eligibility "for release pursuant to section 41-1604.07," the statute governing early release credits, and stated his belief that the availability of such credits would have been mandated by law.

¶5 At the close of the evidentiary hearing, the trial court denied relief and dismissed Leon's petition, finding trial counsel's testimony was credible and Leon's was not. This pro se petition for review followed.

¶6 On review, Leon appears to argue the trial court should have found trial counsel had rendered ineffective assistance because (1) he failed to investigate whether Leon would be eligible for early release credits under the plea agreement; (2) he did not request that the plea offer deadline be extended or the *Donald* hearing continued in order to further investigate a particular witness; and (3) he did not object, during the *Donald* hearing, when the trial court failed to make a "final determination" that Leon's rejection of the plea had been "informed, knowing and intelligent." He contends he "was prejudiced by counsel's advice to reject the plea offer and to go to trial" and "by counsel's failure to ensure he received a full and fair *Donald* hearing."

¶7 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the 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). "It is the

duty of the trial court to resolve any conflicts in the evidence," *id*., and that court is "the sole arbit[er] of the credibility of witnesses," *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). To the extent Leon asks us to reweigh the evidence, we will not do so. Substantial evidence supports the court's implicit finding that counsel had not advised Leon to reject the plea offer, but instead had advised him to accept it, and we defer to that finding. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733.

¶8 Moreover, Leon presents no evidence and develops no argument that counsel was mistaken or had misadvised him regarding release provisions under the plea offer. As the trial court pointed out, Leon "didn't research the 85 percent issue" and, at the *Donald* hearing, did not raise the issue or ask any questions of the judge. Instead, at the *Donald* hearing, Leon answered that he understood the sentencing range available under the plea as well as his potential sentence after trial, and he said he understood that day was his "final deadline" to accept the plea. When the judge asked if he had "taken into consideration everything and wish[ed] to reject the plea," Leon answered, "Yes."

¶9 Leon did not argue, in his petition below or at the evidentiary hearing, that his attorney was ineffective in failing to seek an extension of time to consider the offer or a continuance of the *Donald* hearing, and we therefore will not consider the claim on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issue not presented first to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (Rule 32 review limited to "issues . . . decided by the trial court").[2]

¶10 Similarly, Leon's petition did not allege his *Donald* hearing was impermissibly "incomplete." However, because the issue was argued at his evidentiary hearing and was considered and

[2] We note, however, that in any event, the claim is not supported by the record. *See also State v. Darelli*, 205 Ariz. 458, ¶ 18, 72 P.3d 1277, 1281 (App. 2003) (stating "[t]he decision to terminate plea bargaining lies with the prosecutor's office").

rejected by the court, we consider it on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii). We find no abuse of discretion.

¶11 Although Leon relies on *Johnson v. Zerbst*, 304 U.S. 458 (1938), to support his claim, that case is inapposite. In *Zerbst*, the Supreme Court held a defendant's waiver of his constitutional right to counsel must be "competent[] and intelligent[]" and commented that "whether there is a proper waiver should be clearly determined by the trial court." *Id.* at 465, 468. Similarly, a defendant's constitutional right to a jury trial is a fundamental constitutional right that may not be waived, by entering a guilty plea, "absent a voluntary and intelligent waiver" that "appears affirmatively in the record." *State v. Ward*, 211 Ariz. 158, ¶ 13, 118 P.3d 1122, 1126-27 (App. 2005), *citing Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

¶12 But these principles regarding waiver of a constitutional right do not apply to the rejection of a plea bargain. In contrast to the right to counsel addressed in *Zerbst* or the right to a jury trial considered in *Ward*, "a criminal defendant has no constitutional right to [a] plea bargain." *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000). In *Donald*, this court held only that if the state engages in plea bargaining, "the defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject the offer." *Id.* Accordingly, we concluded a post-conviction evidentiary hearing may be required when a Rule 32 petitioner "present[s] more than a conclusory assertion that counsel failed to adequately communicate the plea offer or the consequences of conviction." *Id.* ¶ 17.

¶13 Here, consistent with *Donald*, the trial court held an evidentiary hearing and found Leon failed to meet his burden of establishing ineffective assistance of counsel. Substantial evidence supports that determination, and we will not disturb it on review. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733.

¶14 Accordingly, although we grant review, we deny relief.