IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BENJAMIN THOMAS HANSEN,
Petitioner.

No. 2 CA-CR 2016-0334-PR
Filed December 21, 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NOT FOR PUBLICATION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. CR20130282001
The Honorable Brenden J. Griffin, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harold L. Higgins, P.C., Tucson
By Harold Higgins
Counsel for Petitioner

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Benjamin Hansen seeks review of the trial court's order denying, after an evidentiary hearing, his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Hansen has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Hansen was convicted of driving under the influence (DUI) while impaired to the slightest degree and aggravated driving with an illegal drug or its metabolite in his body while his license was suspended, revoked, or restricted. The trial court sentenced him to an eight-year prison term for the aggravated driving conviction and time-served for the DUI conviction. We affirmed his convictions and sentences on appeal. *State v. Hansen*, No. 2 CA-CR 2014-0064 (Ariz. App. Dec. 9, 2014) (mem. decision).

¶3 Hansen sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no colorable claims to raise. Hansen then filed a pro se petition arguing his trial counsel had been ineffective for advising him to reject a plea offer from the state and by promising he would be acquitted. He additionally alleged counsel had not met with him to review his case and the evidence against him and had failed to advise him that accepting the plea offer would result in a shorter prison term. *See generally State v. Donald*, 198 Ariz. 406, ¶ 9, 10 P.3d 1193, 1198 (App. 2000) (recognizing defense counsel's duty to communicate terms and relative merits of plea offer). The trial court set an evidentiary hearing "to determine issues of material fact."

¶4 At that hearing, Hansen testified he had never received any letters from counsel, he had little interaction with counsel despite making efforts to do so, counsel had shown him only an incomplete plea offer from the state and told him to "ignore" it, and counsel had told him the jury would acquit him. Counsel testified that he would have confirmed whether Hansen was receiving correspondence but that Hansen had never told him he was not receiving mail. He explained he had sent a complete copy of the state's plea offer to Hansen, had urged Hansen to accept the state's offer, and had not promised Hansen would be acquitted. Counsel also testified that he had scheduled a change-of-plea hearing for Hansen to accept the plea and informed Hansen of that hearing, and that Hansen had agreed to accept the plea but failed to appear at the scheduled hearing.

¶5 The trial court denied relief. It found that "trial counsel is credible and that Hansen isn't," noting counsel's testimony "made sense, and was internally consistent," as well as consistent with introduced exhibits, including a letter in which counsel had urged Hansen to accept the state's plea offer. The court also found incredible Hansen's claim that he had received no correspondence from counsel. This petition for review followed.[1]

¶6 On review, Hansen asserts the trial court erred by finding his testimony less credible than that of trial counsel and, thus, he is entitled to have the state's plea offer reinstated pursuant to *Donald*. "To prove ineffective assistance of trial counsel, a petitioner must show both deficient performance and prejudice." *Donald*, 198 Ariz. 406, ¶ 15, 10 P.3d at 1200; *accord Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant may show deficient performance during plea negotiations by proving counsel gave him erroneous advice or "failed to give information necessary to allow the [defendant] to make an informed decision whether to accept the plea." *Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d at 1200.

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[1]Although Hansen largely represented himself in the post-conviction proceedings in the trial court, appointed counsel filed the petition for review on Hansen's behalf.

¶7 Our review of the trial court's factual findings on the claim addressed at the hearing "is limited to a determination of whether those findings are clearly erroneous"; 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." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* And, "[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.* The trial court is the sole arbiter of witness credibility. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988).

¶8 Hansen's argument, as we understand it, is that the trial court erred by finding credible counsel's claim that he had advised Hansen to accept the plea, because some of counsel's communications with Hansen had identified potential weaknesses in the state's case and it was reasonable for Hansen to view that as "a call to reject a plea." It is not clear how Hansen's misapprehension reflects on counsel's credibility. Counsel's identification of weaknesses in the state's case is not inconsistent with ultimately advising Hansen to accept the state's plea offer, particularly in light of test results showing the active substance in marijuana in Hansen's blood sample. In any event, this argument amounts to nothing more than a request that we reweigh the evidence. We will not do so. *See Fritz*, 157 Ariz. at 141, 755 P.2d at 446.

¶9 Although we grant review, we deny relief.