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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STATE OF ARIZONA, Respondent, v. ARNOLD LESTER GEIB, Petitioner.	2 CA-CR 2011-0019-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064480

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF GRANTED

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena
Tucson
Attorneys for Petitioner

K E L L Y, Judge.

¶1 Petitioner Arnold Geib seeks review of the trial court's summary dismissal of his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Pursuant to a plea agreement, Geib was convicted of child molestation and attempted sexual assault. The agreement provided for a three-year minimum and 12.5-year maximum prison term for child molestation and a two-year minimum and 8.75-year maximum for attempted sexual assault. It also stated Geib "must serve approximately 85 percent of the sentence imposed before []he is eligible for release on any basis." *See* A.R.S. § 41-1604.7(A). At Geib's change-of-plea hearing, the trial court restated that Geib would be eligible for early release. The court sentenced Geib to a ten-year prison term for child molestation and a consecutive, seven-year prison term for attempted sexual assault. The court did not state at sentencing that Geib would be eligible for early release.

¶3 Geib filed a petition for post-conviction relief, arguing he should be permitted to withdraw from the plea agreement because "material sentencing terms were not explained." He asserted the Arizona Department of Corrections had designated his sentence for child molestation as a "flat-time" sentence and had therefore concluded he was not eligible for early release. Geib agreed with that assessment, stating in his petition for post-conviction relief that child molestation is a dangerous crime against children pursuant to former A.R.S. § 13-604.01[1] and that he therefore is not eligible for early release under that statute. He argued that, because he had been misinformed about the flat-time nature of his sentence, he did not knowingly, intelligently, and voluntarily

[1]This statute was renumbered and amended effective "from and after December 31, 2008" to A.R.S. § 13-705. 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29, 120. We refer in this decision to the statute in effect at the time Geib committed the crimes to which he pled guilty. 1994 Ariz. Sess. Laws, ch. 236, § 2 (§ 13-604.01).

plead guilty. He additionally asserted that, had he been informed his sentence would be a flat-time sentence, he would not have entered the plea, and that the trial court should either vacate his convictions and sentences or permit him to withdraw from the plea agreement.

¶4 The trial court rejected the state's argument that, because the plea agreement did not provide that child molestation was a dangerous crime against children and did not cite § 13-604.01, Geib was eligible for early release. But, relying on *State v. Pac*, 165 Ariz. 294, 798 P.2d 1303 (1990), the court determined that "[a] pleading defendant need not be informed of early release credit eligibility" as long as he is properly informed of the minimum and maximum sentence he could receive. Accordingly, because Geib had been advised of the minimum and maximum prison terms before pleading guilty, the court summarily dismissed his petition.

¶5 On review, Geib reurges his claims and additionally argues that *Pac* is distinguishable. First, we agree with the trial court that Geib's sentence must be served day-for-day. Irrespective of the plea agreement's language, child molestation is a first-degree dangerous crime against children.[2] § 13-604.01(J)(d); A.R.S. § 13-1410. A person convicted of a first-degree dangerous crime against children is not eligible for early release. § 13-604.01(E). Nor does the plea agreement permit the trial court to

[2]We observe that the sentencing range provided in the plea agreement did not correctly reflect the sentencing provisions of § 13-604.01. Pursuant to that statute, Geib faced a minimum prison sentence of ten years, with a maximum term of twenty-four years. *See* § 13-604.01(B), (D). And, although the trial court characterized the sentence imposed as an "aggravated" sentence, it actually imposed the minimum sentence permitted by law.

impose an illegally lenient sentence. *See State v. Rushton*, 172 Ariz. 454, 457, 837 P.2d 1189, 1192 (App. 1992). Accordingly, the plea agreement and the trial court improperly informed Geib that he would be eligible for early release.

¶6 A defendant's decision to plead guilty must be voluntary, knowing, and intelligent. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *State v. Brown*, 212 Ariz. 225, ¶ 15, 129 P.3d 947, 951 (2006); *see also* Ariz. R. Crim. P. 17.1(b). A plea may be rendered involuntary if the trial court fails to adequately explain the material consequences of a guilty plea or if the state materially breaches the plea agreement. *See Pac*, 165 Ariz. at 295-96, 798 P.2d at 1304-05 (plea involuntary if defendant "lacks information of 'true importance in the decision-making process'"), *quoting State v. Crowder*, 155 Ariz. 477, 481, 747 P.2d 1176, 1180 (1987); *State v. Chavez*, 130 Ariz. 438, 439, 636 P.2d 1220, 1221 (1981) (state's breach of plea agreement can render plea involuntary); *see also* Ariz. R. Crim. P. 17.2.

¶7 As we noted, the trial court rejected Geib's claim based on *Pac*, in which our supreme court determined that a defendant is not entitled to be informed whether he or she is eligible for early release and, thus, a trial court's failure to provide such information does not render a plea agreement involuntary. 165 Ariz. at 296, 798 P.2d at 1305. We agree with Geib that *Pac* is distinguishable. In *Pac*, the defendant was simply not informed whether he would be eligible for early release. *Id.* at 295, 798 P.2d at 1304. Here, Geib was misled concerning his eligibility by the plea agreement and the trial court. All *Pac* holds is that the trial court has no affirmative duty to inform a pleading defendant of his early-release eligibility when the defendant is aware of the minimum and

maximum potential prison terms. It does not suggest a plea is voluntary when a defendant is informed specifically that early release eligibility exists when it does not.

¶8 We instead find *State v. Rosario*, 195 Ariz. 264, 268, 987 P.2d 226, 230 (App. 1999), instructive. There, the defendant was incorrectly informed he would be eligible for parole after having served one-half of his sentence when he was not, in fact, eligible for parole. *Id.* ¶¶ 24, 26. Division One of this court determined he was entitled to an evidentiary hearing to determine if he had relied on that misinformation in deciding to plead guilty. *Id.* ¶¶ 24, 28. Geib's situation is not meaningfully distinguishable; like Rosario, and unlike Pac, Geib was unable to properly evaluate his minimum sentence.

¶9 But we disagree with Geib that he is necessarily permitted to withdraw from the plea agreement. To demonstrate that the plea was involuntary, he must show that he would not have entered the plea had the agreement reflected he would receive a flat-time sentence. *See State v. Jenkins*, 193 Ariz. 115, ¶ 19, 970 P.2d 947, 952-53 (App. 1998) (information defendant lacked "must have been relevant to the decision-making process" for plea to be involuntary); *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993) (defendant must show decision to plead induced by promise state failed to fulfill). Geib asserted in an affidavit that he would not have pled guilty had he known he would face a flat-time sentence. In assessing whether Geib has presented a colorable claim for post-conviction relief, we must assume that assertion is true. *See State v. Jackson*, 209 Ariz. 13, ¶¶ 2, 6, 97 P.3d 113, 114-16 (App. 2004) (claim colorable if outcome might change if allegations true; in evaluating whether claim colorable, trial court "obligated to treat [petitioner's] factual allegations as true"). However, before Geib

is entitled to withdraw from the plea agreement, the trial court must find by a preponderance of the evidence that his statement is credible and that his decision to plead guilty was not voluntary, knowing, and intelligent. *See* Ariz. R. Crim. P. 32.8(c); *Sasak*, 178 Ariz. at 186, 871 P.2d at 733.

¶10 Accordingly, because Geib has presented a colorable claim that his decision to plead guilty was not knowing, voluntary, and intelligent, we grant relief and remand the case to the trial court to conduct an evidentiary hearing.

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

CONCURRING:

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

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