

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

APR 26 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0010-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
TIMOTHY JAMES WARE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20071385

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Patrick C. Coppen

Tucson
Attorney for Petitioner

B R A M M E R, Presiding Judge.

¶1 Petitioner Timothy Ware seeks review of the trial court's summary denial of his 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 Ware was convicted after a jury trial of aggravated assault with a deadly weapon, disorderly conduct involving a firearm, and discharge of a firearm within city limits and sentenced to concurrent, mitigated prison terms, the longest of which is five years. We affirmed his convictions and sentences on appeal. *State v. Ware*, No. 2 CA-CR 2008-0293 (memorandum decision filed July 23, 2009).

¶3 Ware then filed a petition for post-conviction relief, claiming his trial counsel had been ineffective and “reasonable doubt exists as to [his] competence at the time of [trial].” Ware argued his trial counsel had been ineffective for failing to explain the state’s plea offer adequately. He asserted he suffers from “borderline” mental retardation and that, because counsel’s explanation “confused” him, he did not understand he could be found guilty of aggravated assault based on the facts of his case, and therefore did not comprehend that it would have been to his benefit to accept the state’s plea offer. Ware additionally alleged his counsel knew Ware did not understand he could be convicted of aggravated assault, had been told by Ware’s aunt that he needed to explain things to Ware “just [like] he was a child” so Ware could understand the benefits of the plea offer, and had failed to do so. The trial court determined Ware had failed to present a colorable claim that his counsel’s conduct fell below prevailing professional norms or had prejudiced him, concluding Ware had not “explain[ed] what kind of explanation would have been successful” and, in any event, twice had rejected plea offers after hearings held pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193

(App. 2000), and had not stated at either hearing that he did not understand the advantages or disadvantages of accepting the state’s plea offer. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (“To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.”); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶4 The trial court also rejected Ware’s claim that his counsel was ineffective for failing to timely investigate and move for a competency evaluation pursuant to Rule 11, Ariz. R. Crim. P. The court noted Ware’s counsel had moved for a Rule 11 evaluation, and it “d[id] not believe that the timing of the motion would have made any difference.” The court, however, did not address explicitly Ware’s third claim that there were doubts as to his competency at the time of trial.

¶5 Ware asserts on review that the trial court erred in finding his first ineffective assistance of counsel claim, based on his counsel’s failure to advise him adequately concerning the state’s plea offer, not colorable.¹ But he fails to address adequately the basis of the court’s ruling. As the court noted, Ware twice rejected plea offers from the state following a *Donald* hearing. The purpose of that hearing was to ensure, prior to trial, that Ware adequately understood the state’s plea offer and the consequences of conviction—essentially, to prevent the need for the claim Ware made in his petition for post-conviction relief. *See Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d at 1200.

¹Ware does not argue that the court erred in rejecting his claim that trial counsel had been ineffective in failing to request timely a Rule 11 evaluation.

Ware does not mention those hearings on review, much less explain why they were insufficient to ensure that he adequately understood the risks of rejecting the plea offer.

¶6 We further note that Ware’s petition for post-conviction relief also largely ignored the *Donald* hearings, and that he did not request or provide transcripts of those hearings for the trial court’s review. *See State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993) (petitioner’s “responsibility to see that the record contains the material to which he takes exception”); *see also* Ariz. R. Crim. P. 32.4 (defendant may request transcripts be prepared); Ariz. R. Crim. P. 32.5 (“records . . . supporting the allegations of the petition shall be attached to it”). Accordingly, Ware has not demonstrated he was prejudiced by his counsel’s purported failure to explain the benefits of the state’s plea offer adequately, and therefore has not met his burden of showing the court abused its discretion in rejecting his ineffective assistance of counsel claim.

¶7 The trial court did not address expressly Ware’s final claim that there was “[a] reasonable doubt” whether he was competent at the time of trial. Ware nonetheless is not entitled to relief because that claim is not colorable. As we understand his argument, Ware asserted in his petition for post-conviction relief that he was not competent to stand trial because his mental retardation caused him to be unable to understand the proceedings against him—specifically that he could be found guilty of aggravated assault based on the facts of the case.

¶8 A person is incompetent to stand trial if, “as a result of mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense.” Ariz. R. Crim. P. 11.1. But Ware stated in his

affidavit filed in support of his petition for post-conviction relief that he would have accepted the state's plea offer had his attorney properly explained that he could be found guilty of aggravated assault. This assertion, which we must presume is true in addressing whether Ware has presented a colorable claim, belies his claim of incompetence. *See State v. Jackson*, 209 Ariz. 13, ¶ 6, 97 P.3d 113, 115-16 (App. 2004) (in evaluating whether claim colorable, trial court "obligated to treat [petitioner's] factual allegations as true"). If Ware were not sufficiently competent to understand the proceedings against him, no explanation by his attorney could have been adequate for him to understand the consequences of rejecting the state's plea offer.

¶9 For the reasons stated, although we grant Ware's petition for review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

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

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