

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

MAY 18 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                       |   |                            |
|-----------------------|---|----------------------------|
| THE STATE OF ARIZONA, | ) | 2 CA-CR 2011-0040-PR       |
|                       | ) | DEPARTMENT A               |
| Respondent,           | ) |                            |
|                       | ) | <u>MEMORANDUM DECISION</u> |
| v.                    | ) | Not for Publication        |
|                       | ) | Rule 111, Rules of         |
| CRISTINA Z. COTA,     | ) | the Supreme Court          |
|                       | ) |                            |
| Petitioner.           | ) |                            |
| _____                 | ) |                            |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092624001

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender  
By Joy Athena

Tucson  
Attorneys for Petitioner

H O W A R D, Chief Judge.

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

¶2 Cota was charged with aggravated driving under the influence of an intoxicant, aggravated driving or actual physical control while having a blood alcohol concentration (BAC) of .08 or greater, and aggravated driving or actual physical control while having a BAC of .15 or greater, each while having a person under the age of fifteen in the vehicle. Pursuant to a plea agreement, Cota pled guilty to one count of endangerment as an undesignated class six felony and one count of misdemeanor driving under the influence of an intoxicant.

¶3 Before sentencing, the state moved to withdraw from the plea agreement because Cota had not disclosed that she previously had been convicted of a felony. The plea agreement stated Cota “avows that . . . (s)he has no other prior felony convictions other than those specifically referenced in any Allegation of Prior Conviction(s) and/or the string [c]ite of the original indictment.” The plea agreement additionally provided that, “[s]hould this representation be inaccurate, the State may, in its own discretion, withdraw from this Plea Agreement.” Cota, through counsel, conceded the state was entitled to withdraw, and the trial court granted the state’s motion.

¶4 The state then offered a second plea to Cota, which Cota accepted. Pursuant to that agreement, Cota was convicted of aggravated driving under the influence of an intoxicant while a person under the age of fifteen was in the vehicle as a designated class six felony. The trial court suspended the imposition of sentence and placed Cota on a two-year term of probation, including as a condition of probation that Cota serve a four-month jail term.

¶5 Cota filed a petition for post-conviction relief asserting her trial counsel had been ineffective in: (1) failing to advise her that she was required to disclose her previous felony conviction under the first plea agreement; (2) failing to object to the state's motion to withdraw from the plea agreement; and (3) recommending Cota accept the second plea offer rather than plead guilty to the charges in the indictment. She requested as relief that the trial court order the first plea agreement reinstated.

¶6 The trial court summarily dismissed Cota's petition. It concluded Cota had not demonstrated counsel's failure to advise her that she had to disclose her previous conviction was deficient performance in light of Cota's education and the lack of any indication she had not understood the plea agreement's clear requirement that she do so. The court also determined Cota had not demonstrated her counsel's decision to acquiesce to the state's motion to withdraw from the plea agreement was not a tactical decision. Similarly, the court determined counsel had made a reasoned tactical decision to recommend that Cota accept the state's second plea offer because, if the state alleged the prior conviction before trial, Cota would have faced a harsher sentence upon conviction than she faced under the plea agreement.

¶7 On review, Cota reurges the arguments she made below and asserts she was entitled to an evidentiary hearing. She contends the trial court had no basis on which to conclude trial counsel's decisions were reasonable and disagrees with the court that she would have faced a longer sentence had she pled guilty to the indictment. "A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim

which, if defendant's allegations are true, might have changed the outcome." *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). "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." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶8 As to Cota's first claim, even assuming counsel should have advised Cota, but did not, that she was required to disclose her previous felony conviction before agreeing to the plea, she has not made a colorable claim of resulting prejudice. Cota asserts that, had she disclosed her prior conviction, it is "unlikely" the state would have withdrawn the plea offer. She relies on an affidavit by the chief deputy of Pima County's Legal Defender's Office stating that, to his knowledge "no plea has ever been withdrawn based on a defendant's failure to state that he has a prior felony conviction in the State of Arizona." But, even if taken as true, *see Watton*, 164 Ariz. at 328, 793 P.2d at 85, that avowal is belied by the record in this case. The state moved to withdraw from the plea agreement upon learning Cota had failed to disclose her previous felony conviction. And the state, in its response below, declared that the original plea would not have been available had Cota notified the state of her previous felony conviction before accepting the plea agreement.

¶9 Cota further asserts, however, that had her trial counsel objected to the state's motion to withdraw from the plea and requested a hearing, the state would have

been required to demonstrate she had “willfully intended to deceive the state about her prior convictions to gain some legal advantage or otherwise acted in bad faith” and would have been unable to do so. Cota misstates the law. She relies on *Coy v. Fields*, 200 Ariz. 442, ¶¶ 6, 13, 27 P.3d 799, 801, 803 (App. 2001), in which we determined a defendant did not breach a plea agreement by objecting to an illegal probationary term imposed pursuant to that agreement because, inter alia, the state bears the risk that a provision in a plea agreement is illegal and unenforceable. We further noted in dicta that, had the defendant acted in bad faith by “never intending to comply with the terms of the agreement or knowing that [the proposed] probationary term . . . was impossible,” the state would have been permitted to withdraw. *Id.* ¶ 13.

¶10 *Coy* cannot reasonably be read to create a general rule that the state must demonstrate bad faith in order to withdraw from a plea agreement. As we noted in *Coy*, the state is permitted to withdraw from a plea agreement and reinstate the original charges when a defendant materially breaches the agreement. *Id.* ¶ 5. Indeed, the agreement here expressly gave the state the discretion to withdraw if Cota did not disclose her prior convictions. According to the agreement’s terms, Cota, not the state, bore the risk that the state’s allegation of prior convictions did not reflect the facts accurately. And, rather than correct the state’s misapprehension that she had no previous convictions, Cota avowed it was correct. Although Cota contends that provision is not binding on her because the state is in a superior position to determine whether she has a prior felony conviction, she cites no authority in support of this argument and therefore

has waived it on review. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument).

¶11 Cota further asserts the plea agreement's requirement that she inform the state of her prior convictions was "hopelessly ambiguous," and thus, had her trial counsel raised that argument below, the state would not have been permitted to withdraw. She asserts, without elaboration or citation to authority, that the provision's use of the term "prior convictions" is unclear because it does not specify if those convictions are "historical, felony, misdemeanor, or petty." But, even assuming the term "prior convictions" is not entirely clear, Cota does not explain how that term reasonably could be construed to not include her previous felony conviction. Her claim that the provision is ambiguous because it suggests she need not disclose prior convictions encompassed by a "string cite" in the indictment is equally unavailing. She asserts only that, had the state listed A.R.S. § 13-703 in her indictment, which addresses sentencing for repetitive offenders, that she arguably would not have been required to disclose her previous felony conviction. But Cota's indictment did not cite § 13-703. Thus, Cota has not explained how the plea agreement's reference to a "string cite" was ambiguous in these circumstances.

¶12 Cota also asserts her trial counsel was ineffective because he did not advise her to plead guilty to the indictment instead of accepting the state's second plea offer, which, Cota contends, would have placed her in a better legal position. But she ignores the possibility that the state would have alleged the prior conviction. And, more

importantly, the sole relief Cota sought in her petition for post-conviction relief was reinstatement of the first plea agreement. As we have explained, that agreement was not available to Cota due to her previous felony conviction. Therefore, irrespective of counsel's conduct concerning the state's second plea offer, under no circumstances was Cota entitled to the terms of the first plea agreement. In light of the relief she requested, Cota cannot show prejudice.

¶13 For the reasons stated, the trial court did not abuse its discretion in summarily dismissing Cota's petition for post-conviction relief. Therefore, although we grant review, we deny relief.

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

CONCURRING:

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

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