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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. FRANK MARTINEZ, Petitioner.	)	2 CA-CR 2011-0096-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20091281002, CR20091353001

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Frank Martinez
San Luis
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Frank Martinez seeks review of the trial court's order summarily denying his 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. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Martinez pled guilty in CR20091281002 to robbery and attempted fraudulent scheme and in CR20091353001 to armed robbery. As part of the plea agreement, he admitted he had been convicted in California of possession of narcotics. The trial court sentenced Martinez to enhanced, presumptive prison terms for each offense: 4.5 years for robbery, 6.5 years for attempted fraudulent scheme, and 9.25 years for armed robbery. The first two sentences are to be served concurrently, with the sentence for armed robbery to be consecutive to Martinez's sentence for robbery.

¶3 Martinez filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had found "no tenable issue for review." *See* Ariz. R. Crim. P. 32.4(c). Martinez then filed a supplemental petition,[1] arguing his trial and Rule 32 counsel had been ineffective. He first asserted trial counsel should have investigated the prior convictions alleged by the state, claiming his counsel would have discovered there was no record proving his California charge had resulted in conviction.[2] He also asserted his trial counsel had not objected to the state's assertion at sentencing that he had five previous felony convictions and had failed to present certain mitigation evidence at

[1]Martinez characterized his petition as a petition for writ of habeas corpus, which the trial court properly treated as a Rule 32 petition. *See* Ariz. R. Crim. P. 32.1 cmt.

[2]In support of this assertion, Martinez included information from the California Superior Court stating the file associated with that case number had been "purged and destroyed."

sentencing. Martinez further contended his Rule 32 counsel was ineffective for failing to raise these claims.

¶4 The trial court summarily denied relief. It concluded there had been no reason for trial counsel to have investigated the validity of the California conviction alleged by the state because counsel had reviewed the plea agreement with Martinez and Martinez had not given counsel any reason to believe that allegation might be false. Thus, the court concluded, Martinez had not made a colorable claim that his counsel's representation fell below prevailing professional norms. And, the court noted, even if the "conviction had been complained about and discovered to be invalid prior to sentencing," several of Martinez's other previous convictions could have served to enhance his sentences. *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.").

¶5 As to Martinez's other claims, the trial court observed the evidence Martinez claimed his attorney should have presented at sentencing would have been cumulative to other evidence and would not have changed Martinez's sentence. And the court concluded counsel had no reason to investigate the state's other allegations of prior felonies, nor to object to the state's argument that those felonies supported an aggravated sentence, because Martinez had given no indication those allegations were incorrect. In any event, the court stated, Martinez could not establish prejudice because "the convictions existed as stated in the pre-sentence report and may properly have been used

as sentence aggravators." Finally, the court rejected Martinez's claim of ineffective Rule 32 counsel because Martinez had not identified a colorable Rule 32 claim.

¶6 On review, Martinez reurges his claims that trial counsel was ineffective in failing to investigate the validity of the alleged prior convictions and at sentencing and that his Rule 32 counsel was ineffective.[3] We conclude the trial court correctly resolved these claims in a thorough and well-reasoned minute entry, and we therefore adopt the court's order summarily denying Martinez's petition for post-conviction relief. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has identified and ruled correctly on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶7 We write further, however, to amplify the trial court's ruling in one respect. The presentence report stated the disposition of the California charge was "[u]nknown." Thus, upon receiving the presentence report following Martinez's guilty plea, trial counsel arguably would have had cause to investigate the validity of Martinez's California conviction. Assuming that conviction was, in fact, nonexistent, Martinez's

[3]Martinez also asserts several claims not raised below, including that he was denied his right to a jury trial "on the aggravating factors found by the trial judge beyond the enhancements," that his trial counsel was ineffective for failing to determine if his California conviction was a historical prior felony pursuant to A.R.S. § 13-105(22), that the trial court improperly relied on "duplicative aggravating circumstances," and that the state "never proved the alleged prior was in fact a prior under § 13-105(22)." We do not address claims raised for the first time on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review limited to "issues which were decided by the trial court"); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider claims in petition for review not first presented to trial court).

only avenue for relief would have been to seek to withdraw from the plea pursuant to Rule 17.5, Ariz. R. Crim. P. We agree with the trial court's implicit determination such a motion would not have been granted in light of Martinez's extensive criminal history.

¶8 Rule 17.5 gives a trial court discretion to permit a party to withdraw from a plea agreement "when necessary to correct a manifest injustice." Martinez was sentenced as a category two repetitive offender pursuant to A.R.S. § 13-703(B) and (I).[4] Several of the previous felony convictions listed in Martinez's presentence report similarly could have served to enhance his sentence. *See* A.R.S. § 13-105(22) (defining historical prior felony conviction).[5] Martinez does not assert any of those convictions are invalid, and, based on those convictions, he undoubtedly would have faced an enhanced sentence upon conviction after a trial or pursuant to a new guilty plea. Nor can Martinez reasonably assert his purported misapprehension regarding the California conviction rendered his plea involuntary. The plea agreements plainly provided for enhanced sentences, and we find no material difference between an enhanced sentence based on one historical prior felony conviction rather than another. *See* § 13-703(I). Accordingly, there would have been no "manifest injustice" to correct by permitting Martinez to withdraw from the plea. Ariz. R. Crim. P. 17.5; *cf. State v. Stevens*, 154 Ariz. 510, 515, 744 P.2d 37, 42 (App. 1987) (manifest injustice when "parties and the trial court

[4]The version of the statute in effect at the time Martinez committed the offenses is the same in relevant part as the current version. *See* 2008 Ariz. Sess. Laws, ch. 301, § 28.

[5]We cite the current version of the statute, as the relevant provision has not changed. *See* 2008 Ariz. Sess. Laws, ch. 301, § 10.

erroneously believed" defendant subject to enhanced sentence and mistake "directly impacted defendant's calculation of the acceptability of the plea bargain").

¶9 For the reasons stated, although we grant review, we deny relief.

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

CONCURRING:

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

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