

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.

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AUG -5 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | |
| |) | |
| Respondent, |) | 2 CA-CR 2008-0367-PR |
| |) | DEPARTMENT B |
| v. |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| MANUEL FRANCISCO |) | Rule 111, Rules of |
| CASTELLANOS, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070816

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

The Hopkins Law Office, P.C.
By Cedric Hopkins

Tucson
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 After petitioner Manuel Francisco Castellanos pled guilty to possession of a dangerous drug and theft of a means of transportation, the trial court sentenced him to concurrent, aggravated terms of three and seven years' imprisonment, citing as aggravating factors Castellanos's "prior felony and prison record" and the fact that he had been

“previously deported and [had] returned to the United States illegally.” Castellanos filed a pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging he had been improperly sentenced based on an incorrect presentence report. Specifically, he claimed the report had included in its statement of his criminal history a conviction for the crime of “possession with intent to distribute marijuana,” although that charge against him had been dismissed. Castellanos also asserted he had received ineffective assistance from his trial counsel because, although he had told her about the inaccuracy in the presentence report, she had failed to object at sentencing.

¶2 In its response to the petition, the state acknowledged the error in the presentence report, but the trial court denied relief, stating the factors it had “considered in aggravating the prison terms in this case [had] been correct.” The court noted that Castellanos had a prior felony conviction for endangerment, that he “did have a prison record both on the endangerment charge and on the federal charges as well[,] and that he had returned to the United States illegally as reflected in the offense on the federal charge, illegal re-entry after deportation.” Castellanos now challenges that ruling.

¶3 Quoting *State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978), he contends on review that the trial court “abused its discretion . . . by failing to ‘conduct an adequate investigation into the facts’ regarding [his] criminal history” and that he is entitled to a resentencing before a different judge.¹ As our supreme court has stated:

¹Castellanos appears to have abandoned his ineffective assistance of counsel claim on review. To the extent he intended to assert it here, however, we note the trial court’s ruling clearly indicates it would have imposed the same sentences even had counsel successfully

Convicted defendants have a due process right to a fair sentencing procedure[,] which includes the right to be sentenced on the basis of accurate information. A sentence must be set aside where the defendant can demonstrate that false information formed part of the basis for the sentence. The defendant must show: (1) that the information before the sentencing court was false or misleading and, (2) that the court relied on the false information in passing sentence.

State v. Grier, 146 Ariz. 511, 515, 707 P.2d 309, 313 (1985) (citations omitted).

¶4 Although Castellanos clearly showed the presentence report had included false information, he did not show the trial court had relied on that information in imposing sentence. We will not second-guess the court's post-conviction determination that it had relied on correct information at sentencing, nor do we have any basis on which to do so. *Cf. Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992) ("If a court's decision is based upon 'a determination of disputed questions of fact or credibility, a balancing of competing interests, pursuit of recognized judicial policy, or any other basis to which we should give deference,' we will not second-guess or substitute our judgment for that of the trial court."), *quoting City of Phoenix v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985). Accordingly, Castellanos is not entitled to a resentencing, and we find no abuse of discretion in the court's denial of post-conviction relief. *See State v.*

objected to the error in the presentence report. Thus, assuming counsel performed deficiently by failing to object to one inaccurate item in the presentence report, Castellanos suffered no prejudice from that failure. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prevail on ineffective assistance claim, defendant must show both deficient performance and resulting prejudice).

Watton, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990) (appellate court reviews denial of Rule 32 relief for abuse of discretion).

¶5 To the extent Castellanos contends the hearing on the petition for relief below constituted a resentencing that should have been conducted by a different judge, we disagree. Castellanos’s original sentences were never vacated, and the record contains no support for his contention that the trial court considered evidence of aggravating factors at the Rule 32 hearing that it had not considered at sentencing. Castellanos asserts the court had not previously considered his endangerment conviction and had amended the presentence report “to reflect [that] conviction.” But the court’s minute entry from the hearing reflects no such amendment, and the endangerment conviction not only was included in the presentence report but also had appeared in the state’s allegation of prior convictions.

¶6 Although we grant Castellanos’s petition for review, we deny relief.²

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge

²After dismissing Castellanos’s petition for post-conviction relief, the trial court modified the criminal restitution order it had imposed at sentencing to be “effective upon defendant’s release from prison” and eliminated its imposition of a \$20 time-payment fee. We further modify that order to state that the amount of the criminal restitution order will be reduced, when it takes effect, by any amount Castellanos has paid toward it before his release.