

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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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0187-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LUIS BORREGO,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause No. CR2007-061

Honorable Monica Stauffer, Judge

REVIEW GRANTED; RELIEF DENIED

Derek D. Rapier, Greenlee County Attorney
By Michael W. McCarthy

Clifton
Attorneys for Respondent

Luis M. Borrego, Sr.

Globe
In Propria Persona

B R A M M E R, Judge.

¶1 In this petition for review, Luis M. Borrego, Sr., challenges the trial court's summary denial of his application for post-conviction relief pursuant to Rule 32, Ariz. R.

Crim. P. We will not disturb the court’s ruling unless it has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no such abuse.

¶2 After a bench trial, Borrego was convicted of both possessing and transporting 214 pounds of marijuana for sale. The trial court sentenced him to concurrent, presumptive, five-year terms of imprisonment and ordered him to pay \$270,000 in fines and surcharges. On appeal, this court affirmed the denial of Borrego’s pretrial motion to suppress evidence and his conviction for transporting marijuana for sale but vacated his conviction for possessing the same marijuana on double jeopardy grounds pursuant to *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 13, 21, 965 P.2d 94, 97, 99 (App. 1998). *State v. Borrego*, No. 2 CA-CR 2008-0141 (memorandum decision filed Nov. 17, 2008).

¶3 Borrego then filed a notice of post-conviction relief requesting the appointment of counsel to assist him in asserting a claim of ineffective assistance of counsel. Post-conviction counsel subsequently filed a “notice of no colorable claim” pursuant to Rule 32.4(c). The trial court denied Borrego’s request to appoint different Rule 32 counsel but granted him leave to “file his own claim to address any relief he believes he has.”

¶4 In Borrego’s pro se “supplemental briefing” in support of his request for relief, he asserted that trial and appellate counsel had been ineffective in failing to raise the double jeopardy issue that led this court, sua sponte, to vacate his conviction for possessing marijuana for sale. He requested “an evidentiary hearing to determine the extent of the ineffective assistance of counsel and[,] based thereon[,] how much more of a mitigator should be afforded defendant.” He also sought—and currently seeks—a resentencing,

“based upon 50% of his charges [having] evaporat[ed].” By implication, Borrego suggested that, absent the overlapping count of possessing the same marijuana he was convicted of transporting for sale, he would or should have received a mitigated sentence on the transportation count. Rejecting that contention, the trial court denied relief summarily.

¶5 To demonstrate a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 10, 153 P.3d 1040, 1042 (2007); *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Borrego made neither showing here. Moreover, even if we assumed counsel’s performance had been deficient, Borrego failed to show any prejudice that was not already rectified on appeal when we vacated his redundant conviction and sentence.

¶6 Had the vacated conviction been for an unrelated felony, wholly separate from the transportation charge, Borrego’s assertion of prejudice could theoretically have some merit. But the reason the two convictions offended double jeopardy was that they arose from exactly the same conduct comprising essentially a single transaction. *Borrego*, No. 2 CA-CR 2008-0141, ¶ 16. Consequently, vacating one of the two convictions did nothing to dispel what Borrego characterizes as a “cloud of guilt” occasioned by the second conviction.

¶7 Nor are we persuaded that the conviction for possession had any effect on Borrego’s original sentence for transportation. Borrego posited in his “supplemental briefing” below that the trial court had imposed his concurrent, presumptive sentences after

finding one aggravating and one mitigating factor that “cancelled out each other to result in a presumptive sentence.” The court had found in aggravation that “Defendant committed the offense for pecuniary gain” and, in mitigation, had found his “service to country.” Neither of these circumstances was in any way affected by the elimination of one of the two counts with which Borrego had been charged and convicted, making a resentencing both unnecessary and unwarranted.

¶8 By denying post-conviction relief, the trial court tacitly communicated its view that Borrego’s presumptive term remained the appropriate sentence for his having transported over two hundred pounds of marijuana for sale. If the trial court would have imposed the same sentence in any event, Borrego is unable to demonstrate any prejudice resulting from counsel’s failure to object to the possession charge before the conviction was reversed on appeal.

¶9 We find no abuse of the trial court’s discretion in summarily denying post-conviction relief. Although we grant the petition for review, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge