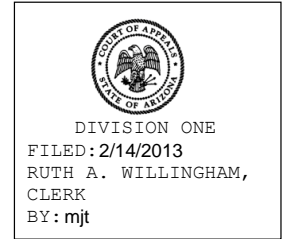


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE  
COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 11-0277 PRPC  
)  
Respondent, ) DEPARTMENT C  
)  
v. ) Maricopa County  
) Superior Court  
XAVIER GARCIA ESCOBEDO, ) No. CR2007-121767-001DT  
)  
Petitioner. ) **D E C I S I O N**  
) **O R D E R**  
)  
\_\_\_\_\_)

Petitioner Xavier Garcia Escobedo petitions this court for review from the summary dismissal of his petition for post-conviction relief. Presiding Judge Samuel A. Thumma, and Judges Michael J. Brown and Diane M. Johnsen have considered this petition for review and, for the reasons stated, grant review and relief.

Attorney "Keller" initially represented Escobedo in the proceedings below. An associate of Keller appeared on Keller's behalf at a June 28, 2007 pretrial conference. At that conference, Escobedo, who was out of custody, sought to have Keller removed from the case, primarily because Keller would not return Escobedo's calls nor meet with him. The court denied

Escobedo's request. The court and counsel then discussed the pending plea offer. Escobedo could plead guilty to one count of forgery with one historical prior felony conviction and receive a stipulated sentence of 4.5 years' imprisonment. While the offer would expire in two days, because of Escobedo's inability to communicate with Keller, the State extended the deadline to accept or reject the plea by two weeks. The trial court in turn set a conference for July 12 to hear Escobedo's final decision and ordered Keller to personally meet with Escobedo within five days to discuss the offer.

Keller did not meet with Escobedo as ordered. Regardless, at the July 12 conference, Keller told the court that Escobedo was aware of the terms of the offer but had decided to reject it. For unknown reasons, however, Keller also told the court the offer expired two weeks earlier. Keller told the court his "intention is just to affirm trial dates at this point." The court and the State then informed Keller that the plea offer actually expired at the end of that day. Escobedo told the court that Keller had discussed the plea with him for only a few minutes before the conference. The court took a recess to allow Keller and Escobedo to discuss the State's offer further. When they returned, Keller informed the court that Escobedo would

reject "this particular plea." Neither the court nor counsel nor Escobedo ever mentioned the terms of the plea offer they believed was pending at that time.

Two months later, the trial court removed Keller from the case. The State Bar subsequently suspended Keller from the practice of law for three months and placed him on probation for two years as a result of his actions and/or inactions in this and five other cases. Escobedo proceeded to trial with a new attorney after which a jury convicted him of taking the identity of another, possession of burglary tools and two counts of forgery. The trial court sentenced him to an aggregate term of ten years' imprisonment and this court affirmed his convictions on direct appeal.

Escobedo filed a petition for post-conviction relief in which he alleged ineffective assistance of counsel. Escobedo conceded that he knew of the State's plea offer as discussed at the June 28 hearing - one count of forgery with one prior and a stipulated sentence of 4.5 years' imprisonment. Escobedo claimed, however, that when Keller explained the offer to him two weeks later on July 12, Keller told him a different offer was the only offer available. Escobedo claimed that Keller told him the pending offer was still for one count of forgery with

one prior, but that the stipulated sentence of 4.5 years' imprisonment was now to be served as "flat time" and would be followed by a stipulated term of five years' intensive probation. Escobedo claimed this was the offer he believed he had rejected. Escobedo argued it was only after the court appointed new counsel that Escobedo learned the State's offer had, in fact, never changed and there was never an offer that required flat time followed by probation. Escobedo argued that had he known the original offer was still in place on July 12 rather than the non-existent, significantly less favorable offer Keller described, he would have accepted the original offer on July 12.

The trial court summarily dismissed Escobedo's petition. The court found "the plea was explained to the defendant in open court" and that Escobedo rejected the plea in open court after additional discussion with his counsel. Escobedo now seeks review.

To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must

show that there is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The defendant's rejection of a favorable plea offer due to counsel's misinformation can constitute ineffective assistance of counsel. *State v. Donald*, 198 Ariz. 406, 413, ¶ 14, 10 P.3d 1193, 1200 (App. 2000).

We grant review and relief. Escobedo presented a colorable claim that Keller incorrectly told him that the plea offer discussed at the June 28 conference was no longer available, and that the only offer as of July 12 was for 4.5 years' flat time followed by five years' probation - an offer which never existed. Escobedo also presented a colorable claim that he rejected a more favorable plea based on this alleged misinformation. The flaw in the trial court's determination that "the plea was explained to the defendant in open court" is that the last time the court and/or counsel discussed the actual terms of the offer on the record was June 28. From that point forward, all references to a plea offer were generic and made no mention of the terms of the offer or anything else that would limit any such reference to the June 28 offer. Therefore, the

record does not establish that the plea offer discussed in detail in open court on June 28 was the same offer Keller allegedly told Escobedo about two weeks later on July 12 and which Escobedo allegedly rejected.

A defendant who presents a colorable claim for post-conviction relief is entitled to an evidentiary hearing. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). We grant review and relief and remand for proceedings consistent with this decision order.

/s/ \_\_\_\_\_  
SAMUEL A. THUMMA, Presiding Judge