

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

LUIZ FILHO DOS SANTOS, *Petitioner*.

No. 1 CA-CR 15-0271 PRPC
FILED 7-6-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2007-124233-001
The Honorable Warren J. Granville, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By E. Catherine Leisch
Counsel for Respondent

Castillo Law PLLC, Phoenix
By Cindy Castillo
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

C A T T A N I, Judge:

¶1 Luiz Filho Dos Santos petitions this court for review from the summary dismissal of his consolidated first and second petitions for post-conviction relief. For reasons that follow, we grant review but deny relief.

¶2 Dos Santos was receiving treatment in a California psychiatric hospital in 2007 when he told a health care provider that he had molested his stepdaughters while living in the Phoenix area. This led to an investigation by the Fresno, California police department, and Dos Santos made incriminating statements to a Fresno police officer while still in the psychiatric hospital. A preliminary investigation revealed that Dos Santos had a significant mental health history, including that he suffered from paranoid schizophrenia, had been hospitalized multiple times because of his mental health, and was not always compliant with directions regarding his medications. Dos Santos had undergone psychiatric treatment with medical providers in both California and Arizona, including court-ordered treatment in Arizona around the time of the offenses.

¶3 Dos Santos pleaded no contest to molestation of a child and two counts of attempted molestation of a child, all dangerous crimes against children. The superior court sentenced Dos Santos to a mitigated term of 13 years' imprisonment for molestation and placed him on lifetime probation for both counts of attempted molestation. Dos Santos subsequently raised several claims of ineffective assistance of counsel in two petitions for post-conviction relief that were consolidated in the superior court and summarily denied.

¶4 Dos Santos's petition for review reasserts his claims of ineffective assistance of counsel. He argues in particular that his trial counsel was ineffective by failing to obtain records regarding his psychiatric treatment in California and Arizona, and records from the Fresno police department investigation. Dos Santos further asserts that his trial counsel was ineffective because she failed to (1) provide these documents to the psychiatrist evaluating whether Dos Santos was guilty

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except insane, (2) use the records to demonstrate that his alleged confessions were unreliable due to serious mental illness, (3) use the Fresno police report to highlight inconsistencies in the victims' stories and call into question whether the incidents occurred, (4) consider the evidence in these records when weighing whether to advise Dos Santos to accept a plea or proceed to trial, (5) use the records and the issues they raised as leverage in plea negotiations, and (6) use the additional documents to show mitigating circumstances for sentencing purposes.

¶5 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.

¶6 By entering a plea of guilty or no contest, a defendant waives all non-jurisdictional defects, including ineffective assistance of counsel, except as they relate to his plea. *State v. Quick*, 177 Ariz. 314, 316 (App. 1993). To establish ineffective assistance relating to a plea, the defendant must demonstrate that counsel provided incorrect information on which the defendant relied in deciding to accept the plea. *See Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985); *State v. Anderson*, 147 Ariz. 346, 352 (1985).

¶7 Here, the asserted ineffectiveness did not relate to information counsel allegedly failed to provide Dos Santos, but rather to information counsel allegedly should have provided to an expert (Dr. Lucas) who examined Dos Santos prior to providing an opinion that Dos Santos's mental condition would not provide a basis for a guilty except insane determination. Because Dos Santos does not assert that he personally was not provided relevant information about his own mental health before deciding to accept the State's plea offer, his assertions regarding information that allegedly should have been provided to the expert do not go to his decision to accept a plea offer, and he has thus waived all conviction-related claims, including ineffective assistance of counsel.

¶8 Moreover, Dos Santos's assertion that counsel was unaware of important records fails because counsel submitted an affidavit in the plea proceedings detailing her knowledge of the types of records Dos Santos claims should have been obtained, and noting her decision not to use the records because they contained information unfavorable to Dos Santos.

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¶9 And to the extent Dos Santos’s claim suggests that counsel’s failure to provide information to Dr. Lucas affected Dr. Lucas’s opinion and thus counsel’s advice regarding the plea, the claim fails because Dr. Lucas was aware of at least some of the records Dos Santos now claims should have been reviewed as part of the guilty-except-insane evaluation, but nevertheless found them unnecessary to his case review. Dr. Lucas expressly stated in his report that he was aware of Dos Santos’s “reported psychiatric treatment in a Fresno hospital,” but that even without the report from that treatment, he had “sufficient information to complete my evaluation.” And although Dos Santos’s expert in his post-conviction proceedings (Dr. Potts) disagrees with Dr. Lucas’s methodology and opinion, that disagreement does not establish that counsel was ineffective in dealing with Dr. Lucas. Dos Santos did not submit an affidavit from Dr. Lucas or otherwise suggest that Dr. Lucas would have changed his opinion based on additional information. Thus, Dos Santos has not established ineffectiveness on counsel’s part for relying on Dr. Lucas’s analysis and in advising Dos Santos regarding the State’s plea offer.

¶10 To the extent Dos Santos asserts that counsel was ineffective for failing to develop mitigation to present at sentencing, his claim is not waived, because such a claim is independent of the decision to accept a guilty plea. Nevertheless, the superior court did not abuse its discretion by denying that aspect of the ineffective assistance claim.

¶11 Trial counsel’s affidavit detailed her investigation into Dos Santos’s mental health and noted that she obtained documents from the Fresno police department but made a tactical decision not to use them because they contained incriminating information. Strategic choices of counsel are “virtually unchallengeable” unless those choices are not based on adequate investigation of the law and facts. *Strickland*, 466 U.S. at 690-691.

¶12 And, to the extent Dos Santos’s sentencing claim relies on counsel’s failure to provide the information to Dr. Lucas, the claim fails for reasons set forth above because Dos Santos did not establish that Dr. Lucas would have reached a different conclusion had he been given additional information. Thus, the superior court did not abuse its discretion by rejecting the ineffective assistance claim after concluding that Dr. Potts’s disagreement “does not support Defendant’s assertion that his trial counsel was ineffective because she failed to obtain records Dr. Lucas decided he did not need to review.”

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Accordingly, we grant review, but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA