IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

JOHN DENNIS MCCLUSKEY, *Petitioner*.

No. 1 CA-CR 15-0717 PRPC
FILED 5-2-2017

Petition for Review from the Superior Court in Yuma County
No. S1400CR200900342
The Honorable Lawrence C. Kenworthy, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Yuma County Attorney's Office, Yuma
By Jon R. Smith
Counsel for Respondent

John Dennis McCluskey, Tucson
Petitioner

MEMORANDUM DECISION

Judge Kenton D. Jones delivered the decision of the Court, in which Presiding Judge Margaret H. Downie and Judge Donn Kessler joined.

J O N E S, Judge:

¶1 John Dennis McCluskey petitions this Court for review from the denial of his petition for post-conviction relief. In 2009, a jury found McCluskey guilty of theft of means of transportation, a Class 3 felony. The trial court sentenced McCluskey as a non-dangerous, repetitive offender to a presumptive term of 11.25 years' imprisonment. This Court affirmed McCluskey's conviction and sentence on direct appeal. *State v. McCluskey*, 1 CA-CR 09-0885 (Ariz. App. Jul. 29, 2010) (mem. decision). McCluskey now petitions for review from the trial court's denial of his petition for post-conviction relief. We have considered the petition for review and, for the following reasons, grant review and deny relief.

¶2 McCluskey's petition for post-conviction relief[1] claimed trial counsel was ineffective when counsel failed to discuss a plea offer with McCluskey in sufficient detail for him to make an informed decision whether to accept the offer before it lapsed. The trial court found the claim

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[1] The petition at issue follows McCluskey's third notice of post-conviction relief. The trial court appointed McCluskey post-conviction relief counsel after receiving his second notice of post-conviction relief. The court dismissed McCluskey's first notice without prejudice for failure to state a ground for relief not raisable on direct appeal while his appeal was pending; the court dismissed McCluskey's second notice for failure to file a petition despite the court's granting numerous extensions. However, in light of the failure of McCluskey's counsel to timely file a petition, the court set aside the dismissal of the second notice. Because McCluskey filed his first notice before the disposition of his direct appeal and that notice did not state any ground for relief, the petition at issue is neither successive nor untimely and we consider this to be McCluskey's first petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.2(a) (precluding successive post-conviction relief if the ground defendant alleges has been adjudicated or waived in a previous collateral proceeding), 32.4(a) (precluding untimely post-conviction relief if the notice is filed after thirty days from the "issuance of the order and mandate in the direct appeal").

was colorable and ordered an evidentiary hearing. At the evidentiary hearing, testimony was provided by McCluskey, trial counsel, McCluskey's mother, and the trial prosecutor. The court denied McCluskey's petition, concluding McCluskey did not prove his trial counsel's performance was objectively unreasonable or he would have accepted the plea offer had he received sufficient advice. The court further concluded McCluskey did not prove trial counsel gave erroneous advice or failed to give information necessary to allow McCluskey to make an informed decision whether to accept the plea.

¶3 In his petition for review, McCluskey raises a claim of ineffective assistance of counsel (IAC) on three theories regarding his trial counsel's: (1) failure to effectively explain and provide a copy of the initial plea offered by the State; (2) deliberate indifference to McCluskey's wishes to take the appropriate action to secure the second plea offered by the State; and (3) deliberate indifference to McCluskey's best interests during plea negotiations by not securing a settlement conference or *Donald* hearing before allowing each plea offer to lapse or McCluskey's signature on plea offers memorializing his receipt, understanding, and rejection of them. "A petition for post-conviction relief is addressed to the sound discretion of the trial court," and this Court reviews "a trial court's factual findings for clear error." *State v. Herrera,* 183 Ariz. 642, 647-48 (App. 1995) (citing *State v. Schrock*, 149 Ariz. 433, 441 (1986), and then *State v. Cuffle*, 171 Ariz. 49, 51 (1992)). We view the facts in the light most favorable to sustaining the court's ruling and resolve all reasonable inferences against the defendant. *State v. Sasak*, 178 Ariz. 182, 186 (App. 1993) (citing *State v. Atwood*, 171 Ariz. 576, 596 (1992)). Furthermore, it is the trial court's duty to resolve evidentiary conflicts, and we will affirm the court's ruling if it is based on substantial evidence. *Id.* (citing *Atwood*, 171 Ariz. at 597).

¶4 The testimony elicited at the evidentiary hearing established that McCluskey was aware of the first plea offer extended in April 2009. Trial counsel testified he provided McCluskey with a physical copy of the plea offer. McCluskey rejected it because he believed "it was an excessive amount of time," and, based on his experience with the criminal court system, that he would receive two more offers. When discussing the terms of the first offer, McCluskey conceded trial counsel may have explained the exact terms of the plea offer, and McCluskey might have misunderstood. When asked why a deal for a minimum of 8.5 years would not seem like a good offer in comparison to the potential 11.25 years he would likely receive at trial, McCluskey responded: "Because [8.5 years] was just the minimum and, because of my priors, I felt I'd get more."

¶5 The testimony further demonstrates the State alleged McCluskey's prior convictions on August 24, 2009, but was willing to keep the initial offer open until the next hearing, which was to take place on August 27, 2009. Trial counsel communicated this to McCluskey, but McCluskey failed to appear at the August 27 hearing because he slept in after a drug relapse. The superior court issued a bench warrant. Later that day, McCluskey left Arizona and entered California, where he was arrested pursuant to the warrant. The State withdrew the first plea offer after discovering the facts and reason for McCluskey's failure to appear. Though trial counsel failed in his attempt to persuade the State to keep the initial plea offer open, he was successful in negotiating a new plea offer. The State orally communicated the second plea offer to trial counsel and wrote it up, but the written plea was never formally extended because McCluskey preemptively rejected the offer in his discussion with counsel.

¶6 To state a colorable IAC claim, a defendant must show counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Nash*, 143 Ariz. 392, 397-98 (1985). If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the court need not determine whether the other prong was satisfied. *State v. Salazar*, 146 Ariz. 540, 541 (1985) (citing *Strickland*, 466 U.S. at 684). Moreover, "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to reject a plea bargain and proceed to trial." *State v. Donald*, 198 Ariz. 406, 413, ¶ 14 (App. 2000). To sustain such a claim, the defendant must prove either his counsel did not promptly communicate a plea proposal or his counsel's explanation did not suffice to permit the defendant to make a reasonably informed decision. *Id.* at 411, ¶ 9 (citations omitted). Prejudice is established by showing a reasonable probability the defendant would have accepted the plea offer absent his attorney's deficient advice; such prejudice most often takes the form of a substantially harsher sentence than would have been imposed as a result of a plea. *Id.* at 414, ¶ 20 (citations omitted).

¶7 This Court finds no error in the trial court's dismissal of McCluskey's petition. McCluskey fails to satisfy the first prong of the *Strickland* test by demonstrating his trial counsel's performance fell below an objectively reasonable standard; McCluskey's trial counsel communicated the two relevant plea offers. McCluskey would have been able to accept the more favorable initial plea offer had he appeared for the August 2009 hearing. Furthermore, McCluskey did not receive a lengthier sentence than what his attorney was able to negotiate on his behalf within

the second plea offer. There is no evidence to support an assertion that a *Donald* hearing or settlement conference would have changed anything.

¶8 Based upon the foregoing, we grant review but deny relief.

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