

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

JOHN EVERETT WHEELER, *Petitioner*.

No. 1 CA-CR 16-0098 PRPC
FILED 8-22-2017

Petition for Review from the Superior Court in Mohave County
No. S8015CR201201331
The Honorable Steven F. Conn, Judge (Retired)

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mohave County Attorney's Office, Kingman
By Matthew J. Smith
Counsel for Respondent

John Everett Wheeler, Tucson
Petitioner

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in
which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

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T H U M M A, Chief Judge:

¶1 Petitioner John Everett Wheeler seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1 (2017).¹ Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Because Wheeler has shown no such error, this court grants review of his petition as amended but denies relief.

¶2 In August 2013, Wheeler pled guilty to (1) first degree burglary, a Class 3 felony, and (2) theft, a Class 3 felony, both committed in October 2012, as set forth in a written plea agreement accepted after a proper colloquy. Wheeler also admitted to a May 2006 conviction for theft, a Class 3 felony, and to the aggravating factor of financial harm to the victim. The written plea agreement stipulated that Wheeler would receive concurrent 13-year prison terms.

¶3 Later in August 2013, Wheeler filed a pro se "MOTION TO CONSIDER OTHER ACT EVIDENCE AS PROOF OF BIAS, CONFLICT OF INTEREST AND LEGAL COERCION TO INDUCE AN INVOLUNTARY GUILTY PLEA/DISCOVERY MOTIONS," claiming his lawyer rejected an earlier – apparently more favorable – plea offer without Wheeler's "knowledge or consent." Wheeler also argued his attorney did not tell him about a counter-offer he made on Wheeler's behalf and that Wheeler's consent to a continuance of trial constituted rejections of the offer. Finally, Wheeler claimed "Counsel and the Prosecution Conspired to use Legal Coercion and Misrepresentation to Coerce and Induce Defendant to Change of Plea to a higher Sentence of 13yrs DOC."

¶4 After assigning new counsel to represent Wheeler, the court held an evidentiary hearing on Wheeler's motion, which it treated as a motion to withdraw from the plea agreement. *See* Ariz. R. Crim. P. 17.5. Wheeler and the lawyer who represented him during the plea negotiations testified. The court also received in evidence e-mails between the prosecutor and defense counsel negotiating a possible plea. The court denied Wheeler's motion to withdraw and sentenced him to concurrent 13-year prison terms, as stipulated in the written plea agreement.

¹ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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¶5 Wheeler timely filed a notice of post-conviction relief. Assigned counsel filed a petition, raising claims of ineffective assistance of counsel (IAC) and arguing Wheeler's guilty plea was not voluntary. After full briefing, the court denied the petition. In denying Wheeler's petition for post-conviction relief, the superior court found Wheeler failed to present a colorable claim of IAC regarding the attorney who represented Wheeler at the hearing on the motion to withdraw. Regarding the remaining claims, the court determined Wheeler was not entitled to another evidentiary hearing because the claims raised in the petition were resolved when the court denied Wheeler's motion to withdraw. Finding the evidence was sufficient to rule on the merits, the superior court "adopt[ed] and confirm[ed] its comments, determinations and analysis reflected in its ruling on the Defendant's request to withdraw his guilty plea." Wheeler timely sought review by this court.

¶6 Wheeler argues his counsel was ineffective by rejecting the State's earlier, more favorable plea offer without Wheeler's knowledge or consent, failing to advise Wheeler that a counter-offer effectively rejects an offer and failing to convey a counter-offer before the expiration of a plea offer, thereby precluding him from accepting the offer. Wheeler also argues he involuntarily accepted the 13-year plea offer because he was not advised that he could withdraw from the plea agreement only if he could prove a manifest injustice. Wheeler adds, as he did in his superior court petition, that the lawyer who represented him at the evidentiary hearing on the motion to withdraw was ineffective.

¶7 This court reviews a decision regarding whether to permit a defendant to withdraw from a guilty plea for an abuse of discretion. *State v. Cramer*, 192 Ariz. 150, 152 ¶ 8 (App. 1998). Wheeler does not provide, let alone apply, relevant supporting authority; instead, he merely repeats the arguments from his motion to withdraw and his petition for post-conviction relief. Wheeler also improperly attempts to incorporate by reference his petition for post-conviction relief. Moreover, Wheeler raises new arguments regarding the purported ineffective assistance of counsel who represented him at the hearing on the motion to withdraw. In the superior court Rule 32 proceeding, Wheeler argued counsel did not sufficiently prepare for the hearing, and failed to meet with and prepare him to testify. On review, Wheeler bases his claim on counsel's failure to conduct adequate cross-examination and failure to "elicit essential Facts at the hearing."

¶8 A petition for review must set forth specific claims, present sufficient argument supported by legal authority and include citation to the

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record. Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition must contain “[t]he reasons why the petition should be granted” and either an appendix or “specific references to the record,” but “shall not incorporate any document by reference, except the appendices”); Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition must state “the issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). “[C]ompliance with Rule 32 is not a mere formality;” a petitioner must “strictly comply” with Rule 32 to be entitled to relief. *Canion v. Cole*, 210 Ariz. 598, 600 ¶ 11 (2005). Wheeler has failed to do so for these claims.

¶9 Wheeler also makes factual assertions that are not supported by the record. For example, although Wheeler argues otherwise, his lawyer testified that Wheeler “categorically rejected” all plea offers made by the prosecutor, and that defense counsel conveyed counter-offers to the prosecutor. This testimony was consistent with the e-mails exchanged between defense counsel and the prosecutor. In addition, based on defense counsel’s “case log” memorializing his conversations with Wheeler, the court found counsel more credible than Wheeler. This court is bound by the superior court’s findings. *See State v. Fritz*, 157 Ariz. 139, 141 (App. 1988) (noting determination of witness credibility rests solely with trial judge).

¶10 Wheeler has not shown the superior court abused its discretion in dismissing his petition for post-conviction relief. Accordingly, this court grants review but denies relief.



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