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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

AARON HJ BERRY, *Petitioner*.

No. 1 CA-CR 16-0184 PRPC
FILED 12-26-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2013-428745-001
The Honorable Brian Kaiser, Judge *Pro Tempore*

REVIEW GRANTED AND RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin
Counsel for Respondent

Aaron HJ Berry, Eloy
Petitioner

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Peter B. Swann and Judge Maria Elena Cruz joined.

H O W E, Judge:

¶1 Aaron HJ Berry petitions this Court for review from the dismissal of his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32. We have considered the petition for review and for the reasons stated, grant review but deny relief.

¶2 Berry pled guilty to one count of possession of narcotic drugs for sale, and he admitted he had a prior felony conviction. The trial court imposed a stipulated 9.25-year prison sentence to run concurrent with two one-year sentences for Berry's convictions in other matters.

¶3 Berry timely filed a notice of post-conviction relief and requested appointment of counsel. After appointed counsel informed the court of her inability to find any claims, Berry proceeded pro se. In his petition for post-conviction relief, Berry raised the following claims: (1) police obtained evidence as a result of illegal searches of Berry's home, car, and cell phone; (2) Berry involuntarily changed his plea because a motion to suppress challenging the evidence and filed by his lawyer three weeks before the change of plea hearing had merit; (3) trial counsel provided ineffective assistance because he failed to "litigate" the motion to suppress and purportedly "lied" to Berry about the motion's lack of merit; and (4) counsel was ineffective for failing to properly advise Berry of the possible sentence under the plea agreement. The trial court, finding Berry failed to present a colorable claim, summarily denied the petition, and Berry timely sought review. We review a trial court's denial of post-conviction relief for an abuse of discretion. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). We may affirm the lower court "on any basis supported by the record." *State v. Robinson*, 153 Ariz. 191, 199 (1987).

¶4 Berry argues that the court was required to accept as true the statements he included in his sworn affidavit that was attached to his petition for post-conviction relief. Therefore, according to Berry, the court erred in not conducting an evidentiary hearing on the petition for post-conviction relief. Berry's sworn statements included:

> - My Lawyer promised me the Motion to Suppress was guaranteed to fail, and I had no choice but to take the State's plea.
>
> . . .
>
> - [H]e also promised me that my family support and mitigation evidence would convince the Judge to give me

> a term of 4 to 6 years. I was totally blindsided when the Judge informed me at sentencing that 9[.25] was Locked in.
>
> . . .
>
> - If I had been Told the Truth: That the Motion To Suppress had Merit, and that the Court was Locked in on the 9[.25] year term, I would not have pleaded guilty.

¶5 A trial court is required to conduct an evidentiary hearing only if it finds a petitioner has raised a colorable claim. *State v. D'Ambrosio*, 156 Ariz. 71, 73 (1988). "Rule 32 does not require the trial court to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims[.]" *State v. Borbon*, 146 Ariz. 392, 399 (1985). "To be colorable, the claim must have the appearance of validity, a determination that the trial court is in a better position to make than this court." *State v. Boldrey*, 176 Ariz. 378, 380 (App. 1993). A petitioner's self-serving assertions in an affidavit are generally insufficient to establish a colorable claim. *State v. Wilson*, 179 Ariz. 17, 20 (App. 1993).

¶6 Although Berry correctly cites *State v. Jackson*, 209 Ariz. 13 (App. 2004), a case in which this Court found that the trial court erred in dismissing the petitioner's Rule 32 claims based on the trial court's finding that the petitioner's affidavit was "self-serving," this Court did so because the record otherwise supported the affidavit. *See Jackson*, 209 Ariz. at 15–16 ¶ 6. Here, on the other hand, the record does not support Berry's sworn statements. Instead, the record either directly contradicts Berry's statements, or it establishes that even if a statement is true, its substance would have had no effect on Berry's voluntariness in pleading guilty. For example, at a settlement conference, the trial court explained to Berry that a super-mitigated prison sentence of 3.5 years contemplated by an earlier plea offer that Berry rejected was not a "realistic possibility" considering the large amount of cocaine and two guns found on Berry's property while he was on probation for a previous drug sale conviction.[1] The court also explained that the current plea offer was to a stipulated presumptive prison term of 9.25 years from which the court could not lawfully deviate. The court specifically affirmed that, regardless what mitigating evidence "came up," the sentence under the plea offer would be 9.25 years' imprisonment.

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[1] We note that the statements in Berry's affidavit attributed to counsel could have been made in connection with this earlier plea offer, not the plea offer that Berry ultimately accepted.

And because the transcript from the change of plea proceeding is not in the record, we must presume the trial court, as it typically does, confirmed with Berry that he was not threatened or promised anything outside of the plea agreement that caused him to plead guilty. *See State v. Zuck*, 134 Ariz. 509, 513 (1982) ("Where matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court.").

¶7 Finally, Berry's counsel informed the court at sentencing:

> I made it very clear to my client before we went forward with the plea agreement that this was a stipulated term. . . . I further explained to my client he did not have to sign this plea agreement, that he had the absolute right to reject the plea and proceed to trial. . . . [M]y client made a conscious decision not to go to trial, and he accepted the . . . plea agreement . . . after the settlement conference.
>
> At the time of the plea agreement, I also made it very clear to my client that your hands, as a sentencing judge, would be to whether you felt the plea was reasonable, and that you couldn't lower the 9.25, it was a stipulated amount.

¶8 After hearing this, Berry expressly assented to proceeding to sentencing and stated that he had no further questions for the court. Accordingly, unlike in *Jackson*, the record conflicts with the affidavit attached to the petition for post-conviction relief. The trial court, therefore, was not required to accept Berry's sworn statements as true.[2]

¶9 As for the merits of his claims, Berry repeats the arguments he made in the trial court. The trial court dismissed the petition for post-conviction relief in an order that clearly identified and correctly ruled upon the issues raised. Further, the court did so in a thorough, well-reasoned manner that will allow any future court to understand the court's rulings. Under these circumstances, "[n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision." *State v. Whipple*, 177 Ariz. 272, 274 (App. 1993).

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[2] Because Berry cites no relevant supporting authority, we also reject his argument that the trial court erred by determining facts related to the merits of the motion to suppress without conducting an evidentiary hearing.

¶10 Accordingly, we grant review but deny relief.

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