IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

FEDERICO RODRIGUEZ, *Petitioner*.

No. 1 CA-CR 16-0306 PRPC
FILED 6-22-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2012-165742-003
The Honorable Pamela S. Gates, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Federico Rodriguez, Eloy
Petitioner

MEMORANDUM DECISION

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

S W A N N, Judge:

¶1 Federico Rodriguez petitions for review of the dismissal of his petition for post-conviction relief. For the reasons that follow, we grant review and deny relief.

¶2 Rodriguez was indicted for one count of burglary in the first degree, a class 2 felony; four counts of kidnapping, class 2 felonies (two of them dangerous crimes against children ("DCAC")); four counts of aggravated assault, class 2 dangerous felonies (two of them DCAC); one count of attempted armed robbery, a class 2 dangerous felony; one count of bail/bond agent violation, a class 5 felony; and one count of misconduct involving weapons, a class 4 felony. A jury found Rodriguez guilty of one count of aggravated assault, a class 2 dangerous felony and DCAC; two counts of aggravated assault, class 3 dangerous felonies; and four counts of unlawful imprisonment, class 6 felonies. He was sentenced to 10 years' imprisonment on the DCAC class 2 dangerous felony and to .5 to 5 years on each of the remaining counts, all running concurrently with each other but consecutive to the 10-year term. Rodriguez appealed, and we affirmed. *State v. Rodriguez*, 1 CA-CR 14-0057, 2015 WL 71683 (Ariz. App. Jan. 6, 2015) (mem. decision).

¶3 In October 2015, Rodriguez filed a notice and petition for post-conviction relief, claiming ineffective assistance of counsel. The superior court denied the petition as untimely and for failing to state a colorable claim or raise an issue relating to change of law under Ariz. R. Crim. P. ("Rule") 32.1(g). Rodriguez then filed this petition for review. He contends that he went to trial under advice of counsel who stated he had a good chance of winning, was not advised that he could "plead directly to the court" (depriving him of a mitigated sentence), that a hearing pursuant to *State v. Donald*, 198 Ariz. 406 (App. 2000), was not requested or given, and that his attorney did not attempt to negotiate a settlement or provide mitigating information to the state that might result in a favorable plea.

¶4 Assuming Rodriguez is claiming his notice and petition are appropriate under Rule 32.1(g), the superior court correctly found no issue raised that warrants review. Rodriguez's claims are untimely and precluded under Rule 32.2 (b). Even if they were timely, the superior court correctly found that no colorable claim has been raised. To prove a claim of ineffective assistance of counsel, a defendant must show 1) that counsel's performance fell below an objective standard of reasonableness as defined by prevailing professional norms; and 2) that but for counsel's performance, there is a reasonable probability that the outcome of the case

would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Rosario*, 195 Ariz. 264, 268, ¶ 23 (App. 1999). If an ineffectiveness claim can be rejected on either prong, the court need not inquire into the other. *Strickland*, 466 U.S. at 697.

¶5 Rodriguez has not shown a colorable claim on either prong. First, "[c]riminal defendants have no constitutional right to a plea agreement, and the state is not required to offer one." *State v. Jackson*, 209 Ariz. 13, 15, ¶ 6 (App. 2004) (citation omitted). A review of the record shows that no offer was made and no settlement conference was held. And Rodriguez has not shown that his attorney's failure to negotiate a plea falls below the standard of reasonable professional conduct. His reliance on *State v. Donald*, 198 Ariz. at 406, is misplaced. The purpose of a *Donald* hearing is to ensure that a defendant is apprised of the relative risks and merits of an agreement compared to standing trial, and it does not apply to a case in which defense counsel is claimed to have failed to investigate the speculative possibilities of a potential plea offer. 198 Ariz. at 411, ¶ 9. Without an offer, there is no basis for a *Donald* hearing.

¶6 Second, even assuming his counsel's assistance was inadequate, Rodriguez suffered no prejudice. The state dropped one count. Rodriguez was acquitted of two counts. He was convicted only of the lesser included offenses in 5 other counts. And he received the minimum total term of 15 years (the 10-year minimum term on the DCAC class 2 felony with a total 5 years on the concurrent sentences of the other counts). *See* A.R.S. § 13-705 (D), (M) (requiring consecutive sentencing of DCAC with non-DCAC charges). We see nothing to suggest he would have received a more favorable sentence had a plea agreement been offered, and he therefore suffered no prejudice.

¶7 For the foregoing reasons, we grant review and deny relief.

AMY M. WOOD • Clerk of the Court
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