

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

MARK ALLEN MOSS, *Petitioner*.

No. 1 CA-CR 16-0042 PRPC
FILED 1-11-2018

Petition for Review from the Superior Court in Maricopa County
No. CR2011-165254-001
The Honorable Roger E. Brodman, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Mark Allen Moss, San Luis
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.

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S W A N N, Judge:

¶1 Mark Allen Moss petitions this court for review from the dismissal of his petition for post-conviction relief. For reasons that follow, we grant review but deny relief.

¶2 Moss pled guilty to one count of possession and to three counts of sale and transportation of dangerous drugs. The superior court sentenced Moss to an aggregate term of 12 years' imprisonment. This is Moss's third, and untimely, petition for post-conviction relief.

¶3 Moss's arguments appear to assert that trial counsel was deficient in her representation because she failed to prevent him from rejecting a seven-year plea offer. Below, Moss attempted to support this claim by stating that he was never "given or offered a *Donald* hearing." *State v. Donald*, 198 Ariz. 406 (App. 2000). The record indicates that Moss was aware of the initial plea offer and that a motion to continue was filed for Moss to consider the offer. The record also shows that a plea offer existed at a comprehensive pre-trial conference and that the state intended to revoke it on a certain date. Moss was present at a settlement conference, at which the court advised him of the sentencing ranges he was facing and the latest plea agreement offer. Moreover, the court gave Moss a *Donald* advisement. Approximately one month later, the state extended a ten-year flat-time offer, which Moss did not accept. Moss then entered into the underlying plea agreement.

¶4 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); *State v. Nash*, 143 Ariz. 392, 397 (1985). To show prejudice, a defendant must demonstrate that there is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the trial court need not determine whether the defendant satisfied the other prong. *State v. Salazar*, 146 Ariz. 540, 541 (1985). Moss fails on both prongs of the *Strickland* test. Moss neither demonstrates that counsel's representation was deficient nor that he was prejudiced in any way.

¶5 Notwithstanding the fact that Moss's claim fails on the merits, Moss's post-conviction relief claim is precluded under Ariz. R. Crim. P.

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(“Rule”) 32.2(a)(3) and is untimely pursuant to Rule 32.4(a). Arizona Revised Statute § 13-4234(G) provides that the time limits for filing a notice and petition “are jurisdictional, and an untimely filed notice or petition shall be dismissed with prejudice.”

¶6 Accordingly, we grant review but deny relief.



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