

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

ROY OLSEN, JR., *Petitioner*.

No. 1 CA-CR 16-0111 PRPC
FILED 1-25-2018

Petition for Review from the Superior Court in Maricopa County
No. CR2013-112244-001
The Honorable Margaret R. Mahoney, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Gerald R. Grant
Counsel for Respondent

Roy Olsen, Jr., Eloy
Petitioner

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MEMORANDUM DECISION

Presiding Judge Michael J. Brown delivered the decision of the Court, in which Judge Jennifer B. Campbell and Chief Judge Samuel A. Thumma joined.

B R O W N, Judge:

¶1 Roy Olsen, Jr., petitions this court for review from the dismissal of his petition for post-conviction relief. We have considered the petition for review, and for the reasons stated, grant review but deny relief.

¶2 Before trial, attorney Michael Freeman represented Olsen when the State extended a plea offer, and Freeman was counsel of record for the final case management conference held on July 9, 2013, the same day the plea offer expired. Kenneth Bemis appeared for Freeman at that conference, during which a *Donald* advisement was given explaining the offer. *See State v. Donald*, 198 Ariz. 406 (App. 2000). The State explained that its offer was for Olsen to plead to “conspiracy to possess dangerous drugs for sale, a Class 2 felony with one prior felony conviction with a stipulation to the presumptive term of nine and a quarter years in the Department of Corrections.” The State also explained that Olsen had nine prior felony convictions and that seven were “allegeable.” Finally, the State informed Olsen that if he lost at trial he would be facing a range of 10.5 to 35 years in prison with 15.75 years as the presumptive sentence. The court asked Olsen if he understood that the plea expired that day and that he may not get another plea offer “as favorable as this.” Olsen, with counsel present, answered “[y]es.” Olsen rejected the offer and the case proceeded to a jury trial.

¶3 Freeman withdrew as counsel prior to trial, and Kelli Sanford was appointed to represent Olsen. On the first day of trial, the superior court inquired into the possibility of a plea offer, given that a defense witness had recently surfaced. Sanford indicated she would “take a few minutes and talk to [Olsen],” but the State made no indication that a plea offer was obtainable or what terms such an offer might include. Olsen was then found guilty of possession of dangerous drugs for sale, (methamphetamine) nine grams or more, and possession of drug paraphernalia. He was sentenced to a mitigated term of 13 years. This court affirmed the convictions and sentences on direct appeal. *State v. Olsen*,

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1 CA-CR 14-0550, 2015 WL 4538807, at *1, ¶ 1 (Ariz. App. July 28, 2015) (mem. decision).

¶4 In November 2015, Olsen filed a petition for post-conviction relief in *propria persona* asserting that his attorney, Sanford, was ineffective for advising him to reject a plea offer and to proceed to trial. He further asserted that “[i]t is reasonably probable that absent his attorney’s deficient advice, he would have accepted the plea offer and declined to go forward to trial.” The superior court dismissed the petition, reasoning in part as follows:

[I]t is wholly unreasonable for Defendant to claim that Ms. Sanford, or any attorney, should have made him aware that he had “no chance of winning at trial” . . . that his case was “a slam dunk for conviction” . . . Defendant’s contention that any attorney should have been able to foresee a jury’s verdict is unavailing.

The court also found it significant that Olsen “was not even represented by Ms. Sanford at the time he rejected the plea.”

¶5 We review the grant or denial of post-conviction relief for an abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441 (1986). “However, a defendant is entitled to an evidentiary hearing if the petition presents a colorable claim—a claim which, if defendant’s allegations are true, might have changed the outcome. In such a case, summary dismissal of the petition is impermissible.” *State v. Jenkins*, 193 Ariz. 115, 118, ¶ 5 (App. 1998) (internal citation and quotation omitted). Although “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) (internal quotation omitted), a defendant’s rejection of a favorable plea agreement due to trial counsel’s failure to give accurate advice about the relative merits and risks of the agreement compared to going to trial is a cognizable claim of ineffective assistance, *id.* at ¶ 4 (citing *Donald*, 198 Ariz. at 406).

¶6 In his petition for review, Olsen argues the superior court abused its discretion by failing to hold an evidentiary hearing on his ineffective assistance of counsel claim. As recognized by the superior court, however, there is a glaring problem with Olsen’s allegations—the plea offer from the State expired in July 2013, and Sanford, the attorney whom Olsen alleges was ineffective, was not appointed until September 2013. Thus, because Olsen did not allege in his initial petition or affidavit that other counsel who represented him were ineffective regarding the State’s plea

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offer and Olsen's rejection thereof, an evidentiary hearing was not warranted.

¶7 Additionally, Olsen has not made any assertion that the State reinstated the expired plea offer or was even interested in engaging in plea negotiations after commencement of the trial. We therefore reject Olsen's "attempt to extend the *Donald* rationale to potential plea agreements that were never actually offered and the terms of which are unknown." *Jackson*, 209 Ariz. at 16, ¶ 9. "Absent a colorable allegation that a specific plea agreement would have been extended," and that Olsen "would have entered into such an agreement," he "could not have established he had been prejudiced." *Id.* at 17. As such, Olsen has not raised a colorable claim of ineffective assistance of counsel.

¶8 Accordingly, we grant review and deny relief.



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