

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

CARLTON LEROY BROWN, *Petitioner*.

No. 1 CA-CR 16-0714 PRPC
FILED 1-30-2018

Petition for Review from the Superior Court in Maricopa County
No. CR2015-111214-001
The Honorable M. Scott McCoy, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Amanda M. Parker
Counsel for Respondent

Carlton Leroy Brown, Douglas
Petitioner

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Randall M. Howe joined.

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C A T T A N I, Judge:

¶1 Carlton Leroy Brown petitions for review of the superior court's dismissal of his of-right petition for post-conviction relief. For reasons that follow, we grant review but deny relief.

¶2 In June 2015, Brown pleaded guilty to one count of possession or use of a dangerous drug (methamphetamine), with one prior felony conviction, and with an open sentencing range to allow him to argue for a mitigated sentence. He was sentenced to the minimum term of three years in prison. He was originally charged with one count of possession or use of methamphetamine, one count of possession of marijuana, and one count of possession of drug paraphernalia. The State revoked its initial plea offer when it discovered that Brown had six prior convictions and was on community supervision at the time of the offense. Brown rejected the State's amended March 2015 offer before ultimately accepting a subsequent offer.

¶3 Brown filed a timely notice of post-conviction relief. His appointed counsel filed a notice of completion stating he had reviewed the record and found no colorable claims. In his pro per petition, Brown claimed that his trial counsel was ineffective for failing to convey to him the terms of an earlier, more favorable plea offer. After full briefing, the superior court summarily dismissed the petition, finding that Brown failed to establish a colorable claim of ineffective assistance of counsel.

¶4 In his petition for review, Brown argues that the superior court erred by dismissing his petition without an evidentiary hearing. Absent an abuse of discretion or error of law, this court will not disturb the superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 576-77, ¶ 19 (2012). On review, Brown bears the burden of establishing error. See *State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011).

¶5 To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance fell below objectively reasonable standards and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985). To be entitled to an evidentiary hearing to develop an ineffective assistance of counsel claim, a petitioner must present a colorable claim. *State v. Krum*, 183 Ariz. 288, 292 (1995). A colorable claim is one that, if the allegations are true, would probably have changed the outcome. *State v. Amaral*, 239 Ariz. 217, 220, ¶ 10 (2016).

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¶6 Brown alleges that the State offered to allow him to plead to a probation violation and a 10-month jail sentence, and that his attorney did not communicate the offer to him. But Brown offers nothing, other than his own unsupported assertion, to establish that any such plea offer existed. The State admits that it offered Brown a plea of one count of possession of a dangerous drug with a stipulated prison sentence. That offer, however, did not specifically include a 10-month sentence. Furthermore, once the State learned that Brown had six prior convictions and was on community supervision at the time of the offense, it amended the offer to require a sentence of “no less than [the] presumptive” prison term, which was 4.5 years. Brown rejected that amended offer. Then, in June 2015, Brown agreed to plead guilty to one count of possession of a dangerous drug, with one prior felony conviction, but dismissing the allegation that the offense had been committed while on community supervision. He was sentenced to the minimum term of 3 years’ imprisonment.

¶7 Brown attached to his petition for post-conviction relief the first page of several plea offers, but none of them contain an offer of a sentence of 10 months or an offer more favorable than the one he ultimately accepted. He therefore did not demonstrate prejudice, and his unsubstantiated assertion of ineffective assistance of counsel did not constitute a colorable claim sufficient to warrant an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399 (1985). Accordingly, the superior court did not abuse its discretion or make an error of law by summarily denying Brown’s petition for post-conviction relief.

¶8 We grant review but deny relief.



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