

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

RAMON MANUEL RIVERA, *Petitioner*.

No. 1 CA-CR 16-0766 PRPC
FILED 1-23-2018

Petition for Review from the Superior Court in Maricopa County
No. CR2012-009434-001
The Honorable Teresa A. Sanders, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Ramon Manuel Rivera, Florence
Petitioner

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court in which
Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

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C A T T A N I, Judge:

¶1 Ramon Manuel Rivera petitions this court for review from the summary dismissal of his first petition for post-conviction relief. For reasons that follow, we grant review but deny relief.

¶2 A jury convicted Rivera of six counts of kidnapping, six counts of sexual assault, two counts of sexual abuse, and one count each of aggravated assault and attempted sexual assault. The offenses involved several different victims. The superior court sentenced Rivera to an aggregate term of 115 years' imprisonment, and we affirmed the convictions and sentences on direct appeal. *State v. Rivera*, 1 CA-CR 14-0179, 2016 WL 314310 (Ariz. App. Jan. 26, 2016) (mem. decision).

¶3 The superior court appointed counsel to represent Rivera in post-conviction proceedings, but counsel found no colorable claims for relief. Rivera then filed a pro se petition for post-conviction relief, asserting ineffective assistance of trial counsel, ineffective assistance of post-conviction counsel, and that he was entitled to have DNA evidence offered at trial retested under Rule 32.12 of the Arizona Rules of Criminal Procedure. The superior court summarily dismissed the petition, and Rivera now raises the same claims in his petition for review.

¶4 To state a colorable claim of ineffective assistance of counsel, a defendant must show deficient performance by counsel and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985). To show prejudice, a defendant must establish 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.*

¶5 The superior court properly denied relief on Rivera's claim of ineffective assistance of trial counsel. Rivera alleged that counsel told him before trial that all of his prison sentences would be concurrent, thereby leading him to reject a plea offer. But during a settlement conference before trial, the court explained to Rivera that he faced consecutive sentences if he proceeded to trial and Rivera nevertheless rejected the State's plea offer. Accordingly, any allegedly incorrect advice did not mislead Rivera into rejecting a proffered plea.

¶6 Rivera's claim of ineffective assistance of post-conviction counsel also fails. Such a claim is available only against counsel in an of-

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right post-conviction proceeding following conviction based on a plea. *State v. Pruett*, 185 Ariz. 128, 131 (App. 1995). Because Rivera's convictions and sentences resulted from a jury trial, this is not an of-right proceeding, so his claim is not viable.

¶7 Finally, Rivera's claim that DNA evidence should have been retested is meritless because he admitted at trial that he had sex with the victims, although he claimed that the contact had been consensual. Because Rivera's contact with the victims was not in dispute, retesting DNA evidence would not have called into question the reliability of Rivera's convictions and sentences.

¶8 Accordingly, we grant review but deny relief.



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