

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

RAFAEL MACHADO, *Petitioner*.

No. 1 CA-CR 17-0124 PRPC
FILED 1-25-2018

Petition for Review from the Superior Court in Maricopa County
No. CR2013-449964-002
The Honorable Alfred M Fenzel, Judge (Retired)

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By David R. Cole
Counsel for Respondent

Rafael Machado, Buckeye
Petitioner

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MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Peter B. Swann joined.

M O R S E, Judge:

¶1 Rafael Machado petitions this court for review from the dismissal of his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32. We have considered the petition for review and, for the reasons stated, grant review and deny relief.

¶2 Machado pleaded guilty to second-degree murder and aggravated assault. The charges arose from two home invasions, which occurred in September and October of 2013.¹ The plea was contingent on Machado pleading guilty in a marijuana sale case and on his providing truthful testimony at the trial of one of the co-defendants in the October home invasion. The agreement called for a stipulated sentence of no less than the presumptive term of 16 years on the second-degree murder charge and 7.5 years on the aggravated assault charge, which were to run concurrently. Machado was sentenced to an aggravated term of 19.5 years on the second-degree murder and the presumptive term on the aggravated assault. He was also sentenced to 3.5 years on the drug offense. All sentences were concurrent.

¶3 Machado filed a timely notice of post-conviction relief and counsel was appointed. Counsel filed a notice of completion stating that after reviewing the record he had found no basis in fact or law for post-conviction relief. Machado filed a pro per petition claiming ineffective assistance of counsel, improper charging of the second-degree murder offense, illegal sentence, and selective prosecution. After full briefing, the

¹ Machado and three co-defendants were charged in a 25-count indictment, which included a first-degree murder count, two burglary counts, ten kidnapping counts, three of which were dangerous crimes against children, misconduct involving weapons, two robbery counts, five counts of aggravated assault, and one count of disorderly conduct. Machado was the only defendant facing charges in both home invasions.

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superior court dismissed the petition finding that Machado had failed to state any colorable claim for which he was entitled to relief.

¶4 Machado now seeks review of the denial of his petition. 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, 577, ¶ 19 (2012). On review, Machado bears the burden of establishing error. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011). Machado has failed to carry his burden.

¶5 Machado does not seek to set aside the plea agreement, but argues that he should be resentenced to the presumptive term of 16 years on the second-degree murder charge. He claims that his sentence is cruel and unusual punishment, as his sentence is longer than that of his co-defendants. The prosecutor explained during the settlement conference why Machado was not offered an open range sentence. He was the only defendant charged in both home invasions, he had an outstanding drug offense, and he was pleading much closer to trial than the other defendants who entered guilty pleas. A disparity in sentences between codefendants and/or accomplices can be a mitigating factor for purposes of sentencing if there is no reasonable explanation for the disparity. *State v. Bearup*, 221 Ariz. 163, 174, ¶ 59 (2009). However, only an unexplained disparity is of significance for sentencing purposes. *Id.* Because there was a reasonable explanation for the sentencing range stipulated in the plea agreement, any disparity is without significance.

¶6 The State alleged six aggravating circumstances before Machado entered a guilty plea. The fact that Machado had no prior felony convictions was accounted for in the sentencing range. *See* Ariz. Rev. Stat. ("A.R.S.") § 13-710(A). The court weighed the mitigating factors of Machado's age, his mental health issues, remorse, difficult childhood, and the fact that he had three young children, against the aggravating circumstances of the use of a weapon, presence of an accomplice, motive of pecuniary gain, and physical, emotional, and financial harm to the victims. By accepting the plea agreement, Machado waived his right to have a jury find the existence of any aggravating factors.

¶7 An honest, mistaken impression about the sentence to be received, absent substantial objective evidence showing that the mistake was reasonably justified, is insufficient to support a claim of an involuntary plea. *State v. Pritchett*, 27 Ariz. App. 701, 703 (1976). Machado may have expected to receive the presumptive sentence of 16 years on the second-degree murder charge, but that impression was not reasonably justified.

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The State had alleged aggravating factors. At the settlement conference, the prosecutor stated that she believed that 16 years was not enough time for taking a life and made no promises as to what sentence the State would seek.

¶8 Machado properly pled to an amended charge of second-degree murder. The plea agreement specifically stated he was pleading to second-degree murder, although the statutory cite of A.R.S. § 13-1105, first degree-murder, is incorrect and should read A.R.S. § 13-1104. All other statutory cites were correct, including A.R.S. § 13-303, which indicated accomplice liability. The sentencing range for second-degree murder was correctly stated. *See* A.R.S. § 13-710(A). The transcript of the settlement conference clearly set forth the plea offer to second-degree murder on the theory of accomplice liability. Machado answered affirmatively each time he was asked if he understood the terms of the plea and was given the opportunity to ask questions and consult with his attorney before accepting the plea. The court found that his guilty plea was knowingly, intelligently, and voluntarily entered as to the charges of second-degree murder and aggravated assault.

¶9 Machado also claims that the charging instrument was invalid and that the counts related to the September home invasion should have been severed from the October home invasion. These claims are waived. A plea agreement waives all non-jurisdictional defenses, errors, and defects which occurred prior to the plea. *State v. Moreno*, 134 Ariz. 199, 200 (App. 1982). The waiver of non-jurisdictional defects includes deprivations of constitutional rights. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.").

¶10 The superior court correctly found that Machado had failed to state a colorable claim of ineffective assistance of counsel. He alleges trial counsel was ineffective for failing to challenge the aggravating circumstances at sentencing, failing to visit him more often, failing to provide him with all discovery, and failing to notice and correct a statutory cite in the plea agreement. He also claims that she provided inaccurate advice as to the sentence he faced and improperly advised him to plead guilty. He claims he would have rejected the plea agreement had he been properly advised.

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¶11 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 show 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).

¶12 The burden is on the petitioner seeking post-conviction relief to show ineffective assistance of counsel and "the showing must be that of a provable reality, not mere speculation." *State v. Rosario*, 195 Ariz. 264, 268, ¶ 23 (App. 1999). A trial court need not conduct an evidentiary hearing based on mere generalizations and unsubstantiated claims of ineffective assistance. *State v. Borbon*, 146 Ariz. 392, 399 (1985).

¶13 Machado does not meet his burden because he offers nothing in support of his claims of ineffective assistance of counsel beyond speculation and his own conclusions. Defense counsel secured a favorable plea offer that allowed Machado to avoid potential life imprisonment. As the State remarked: "he should be very happy he is essentially getting three crimes for the price of one." Although counsel may not have noticed an incorrect statutory cite in the plea agreement, there is no prejudice, as Machado was sentenced within the range for second-degree murder. Machado knew that he was not pleading to first-degree murder, as only second-degree murder and aggravated assault were discussed during the settlement conference and change of plea. Machado was informed of the requirement of community supervision, and he has identified no way in which defense counsel could have removed this requirement. Counsel's alleged failure to provide discovery did not prejudice Machado, and he does not indicate what information in discovery would have led him to reject the plea. In short, Machado has not demonstrated any deficient performance by counsel nor any prejudice, and his claim therefore fails.

¶14 Machado requests that this court conduct a fundamental error review. There is no fundamental error review in a post-conviction relief proceeding. *State v. Smith*, 184 Ariz. 456, 460 (1996).

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¶15 Based upon the foregoing, the superior court did not abuse its discretion or make an error of law in dismissing the petition for post-conviction relief.

¶16 We grant review and deny relief.



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