

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

DALE SCOTT CLEMENT, *Petitioner*.

No. 1 CA-CR 17-0510 PRPC
FILED 7-31-2018

Petition for Review from the Superior Court in Mohave County

No. S8015CR201400108

The Honorable Steven F. Conn, Judge *Retired*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mohave County Attorney's Office, Kingman
By Matthew J. Smith
Counsel for Respondent

Dale Scott Clement, Eloy
Petitioner

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MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge Michael J. Brown and Judge Jon W. Thompson joined.

J O N E S, Judge:

¶1 Dale Scott Clement 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 In 2014, Clement was indicted on four counts of sale of dangerous drugs (methamphetamine), class 2 felonies; one count of possession of dangerous drugs for sale, a class 2 felony; two counts of possession of drug paraphernalia, class 6 felonies; and one count of misconduct involving weapons, a class 4 felony. He pleaded guilty to two counts of sale of dangerous drugs with a stipulation for prison time between 5 and 20 years. The plea agreement was silent as to whether the sentence on each count was to run consecutively or concurrently. Clement was sentenced to a mitigated six-year sentence on each count, to run consecutively, and to run consecutive to another drug related felony for which he had already been sentenced.

¶3 Clement filed a timely Notice of Post-Conviction Relief raising claims of ineffective assistance of counsel related to the plea agreement. Clement claimed that his attorney told him the agreement required him to plead guilty to only one count of sale of dangerous drugs and that he was upset when he was told at the change of plea hearing that the plea required him to plead to two counts. Counsel was appointed, and after a review, found no colorable claims to raise in a petition for post-conviction relief. Clement then filed a *pro se* Petition for Post-Conviction Relief alleging that he was given erroneous advice by his attorney to plead to two counts, that he was denied a settlement conference and a *Donald* hearing, *see State v. Donald*, 198 Ariz. 406 (App. 2000), and that his attorney's performance was deficient. The superior court ordered an evidentiary hearing on the issue of whether Clement's attorney promised or guaranteed he would receive a concurrent sentence if he accepted the plea offer.

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¶4 Clement then retained private post-conviction relief counsel, who filed an Amended Petition for Post-Conviction Relief. The amended petition raised two claims: whether the guilty plea was involuntary because of ineffective assistance of counsel at the time of the plea; and whether Clement was entitled to re-instatement of the 10-year stipulated sentence offer. The amended petition did not include a *Donald* claim.

¶5 The evidentiary hearing addressed two issues: whether Clement's attorney promised him he would get concurrent sentences and urged him to lie to the trial court at the change of plea colloquy; and whether Clement was denied effective assistance of counsel during plea negotiations. The superior court heard testimony from Attorney Sipe, who represented Clement in his other felony case, and who attempted to negotiate a combined settlement of both cases; Attorney Chavez who represented Clement at the time of the plea agreement; and Clement.

¶6 Attorney Chavez testified that he communicated and explained all plea offers to Clement. Chavez did not assure Clement that there was only one count of sale of dangerous drugs in the plea agreement, nor did he promise Clement he would receive concurrent sentences, nor tell him to keep his mouth shut and not upset the judge. Chavez also testified that Clement expressed that he wanted to accept a plea offer with a sentencing range and not the stipulated 10-year flat time sentence.

¶7 Clement testified that he initially rejected the 10-year stipulated sentence because it was not a concurrent sentence and claimed Chavez told him the 5-20 year plea agreement would result in a mitigated sentence of no more than 6 years. Clement testified he believed the plea agreement was only to one count of sale of dangerous drugs. He told Chavez he wanted to take the 10-year offer and thought he was pleading to the 10-year offer at the change of plea hearing. Clement testified he was upset at the change of plea hearing about the two-count plea agreement but Chavez told him that if Clement kept his mouth shut and did not upset the trial court, he would get concurrent sentences. He also testified that the judge instructed Clement and Chavez to go outside and discuss the plea agreement, and that the judge was surprised the plea agreement contained two counts. Finally, Clement testified that the answers he gave during the plea colloquy were untrue and he was just trying to do as his attorney advised so he would get a concurrent sentence. Clement largely relied on his own affidavit and his testimony to support his amended petition for relief. Despite claims that his mother and step-father could corroborate his allegations, he did not produce any statements or affidavits from them, nor did they testify at the evidentiary hearing.

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¶8 The superior court found Chavez to be more credible than Clement and denied Clement relief. Clement seeks review of the denial, claiming that the superior court erred by misstating or misunderstanding the facts underlying his claims, erred in its finding that Chavez was more credible than Clement, and abused its discretion in determining his plea was knowing, intelligent, and voluntary. Clement also resurrects his claim that he was denied a settlement conference and a *Donald* hearing prior to his plea.

¶9 Absent an abuse of discretion, this Court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19 (2012). An abuse of discretion occurs "if the PCR court makes an error of law or fails to adequately investigate the facts necessary to support its decision." *State v. Pandeli*, 242 Ariz. 175, 180, ¶ 4 (2017) (citing *State v. Wall*, 212 Ariz. 1, 3, ¶ 12 (2006); *State v. Douglas*, 87 Ariz. 182, 187 (1960)). "We examine a trial court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous." *State v. Berryman*, 178 Ariz. 617, 620 (App. 1994) (citing *State v. Cuffle*, 171 Ariz. 49, 51 (1992)). "The trial court is the sole arbitrator of the credibility of witnesses." *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988). We may not reverse the decision of a superior court after an evidentiary hearing unless the record does not support the court's findings or demonstrates the court's findings are clearly wrong. *See Pandeli*, 242 Ariz. at 184-85, ¶¶ 28-30 (2017).

¶10 When a trial court accepts a guilty plea, the trial court must ensure that the defendant understands: "(1) the nature of the charges, (2) the nature and range of possible sentences, including any special conditions, (3) the constitutional rights waived by pleading guilty, (4) the right to plead not guilty, and (5) that the right to appeal is also waived if the defendant is not sentenced to death." *State v. Rose*, 231 Ariz. 500, 505, ¶ 13 (2013) (quoting *State v. Djerf*, 191 Ariz. 583, 594, ¶ 36 (1998)). A defendant's statements made to the court at change of plea regarding voluntariness are normally binding. *State v. Hamilton*, 142 Ariz. 91, 93 (1984). An honest, mistaken, subjective impression about the sentence to be received, absent substantial objective evidence showing the impression to be reasonably justified, is insufficient to support a claim of involuntary plea. *State v. Pritchett*, 27 Ariz. App. 701, 703 (App. 1976) (citations omitted). A plea will be found involuntary if a defendant lacks information of true importance in the decision-making process. *See State v. Pac*, 165 Ariz. 294, 295-96 (1990).

¶11 The superior court's decision to deny relief is supported by the record. During the change of plea hearing, Clement informed the trial

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judge that he was under the impression he was pleading to one class 2 felony. When the court inquired further and offered to continue the hearing to give Clement more time to talk with his attorney, he declined saying, "I've talked to him." The court continued to question Clement to see if he understood the terms of the plea agreement and if he wanted to proceed. Clement responded that he wanted to go forward. The court then continued with a thorough plea colloquy and reviewed the sentencing range if convicted at trial and the terms of the plea agreement. The court informed Clement that the sentences could run consecutively, and listed the various permutations of sentences under the plea agreement. The court also informed Clement he had the right to proceed to trial and that if he pleaded guilty, he would forfeit his right to appeal. Clement told the court he had read the plea agreement and it had been explained to him by his attorney. Clement indicated that no other promises, other than what was in the plea agreement, had been made to him and that, even considering what the court had said, he still wanted to plead guilty. The court found Clement had entered a knowing, intelligent, and voluntary plea. Because the record supports the superior court's findings, we find no abuse of discretion.

¶12 Clement did not raise the claim that he was denied a settlement conference and *Donald* advisement in his Amended Petition for Post-Conviction Relief, nor was the issue briefed. The evidentiary hearing was confined to the issue of ineffective assistance of counsel as it related to the plea. Thus, Clement abandoned this claim in his amended petition for relief. Even if the claim had not been abandoned, Clement failed to state a claim upon which relief could be granted. In *Donald*, this Court only held that if "the State engages in plea bargaining, the defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject the offer." *Donald*, 198 Ariz. at 413, ¶ 14 (App. 2000) (citations omitted). The record shows that Clement was adequately informed at the change of plea hearing and by his attorney.

¶13 Clement has failed to establish that the superior court abused its discretion or made an error of law. Accordingly, we grant review and deny relief.

