

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JOSE DIAZ TORRES, *Petitioner*.

No. 1 CA-CR 18-0083 PRPC
FILED 7-31-2018

Petition for Review from the Superior Court in Maricopa County
No. CR2014-001176-001
The Honorable Bradley H. Astrowsky, Judge

REVIEW GRANTED; RELIEF DENIED

APPEARANCES

Maricopa County Attorney's Office, Phoenix
By Lisa Marie Martin
Counsel for Respondent

Jose Diaz Torres, Florence
Petitioner

MEMORANDUM DECISION

Presiding Judge James B. Morse Jr. delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Lawrence F. Winthrop joined.

STATE v. TORRES
Decision of the Court

M O R S E, Judge:

¶1 Petitioner, Jose Diaz Torres, 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 and deny relief.

¶2 Torres was indicted in 2014 based upon a DNA match to crimes that occurred in 1999. Torres pled guilty to aggravated assault, a class 3 (dangerous) felony, sexual assault, a class 2 (dangerous) felony, and two counts of attempted sexual assault, class 3 felonies. Pursuant to his plea, eight other counts were dismissed. Torres was sentenced to 10.5 years' imprisonment on the aggravated assault, and 11.4 years' imprisonment on the sexual assault, consecutive to the aggravated assault. The superior court indicated the sentence on the sexual assault was for "flat time," meaning Torres could not be released early on community supervision. He was also given two lifetime terms of probation on the attempted sexual assault charges, to be served upon release from prison.

¶3 Torres filed a notice of post-conviction relief. After appointed counsel filed a notice of completion of review, Torres filed a *pro se* petition for post-conviction relief in which he claimed the superior court lacked subject matter jurisdiction, due process statutory notice violations, an illegal sentence and ineffective assistance of plea counsel. His Rule 32 proceeding was summarily dismissed by the superior court. The superior court also amended the judgment to replace Arizona Revised Statutes ("A.R.S.") § 13-704 with § 13-604, the correct statute in effect at the time of the offense. Torres then filed his petition for review.

¶4 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). In this case, Torres appeared before the superior court, and during the colloquy, indicated that he understood the plea agreement, and that his plea was voluntary and knowing. He affirmed the elements of the offenses to which he pled, including the fact that he used a gun in aid of his commission of the offenses. In entering the plea, Torres agreed that "[t]he agreement serve[d] to amend the complaint, indictment, or information, to charge the offense to which [he pled.]" He also understood that he "[waived] and [gave] up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence consistent with this agreement."

STATE v. TORRES
Decision of the Court

¶5 Torres attempts to avoid the impact of his plea agreement by claiming that he was not adequately notified of being subject to a "flat time" sentence on the sexual assault charge under A.R.S. § 13-604(I) (1998). His claim is without merit.

¶6 At a settlement conference, the settlement judge clearly explained that Torres was charged with "dangerous" offenses and he had the nature of the "dangerous" allegation explained to him. He was also told that the sexual assault charges each carried a "flat time" sentence.

¶7 Moreover, just prior to sentencing, the parties amended the plea agreement on the record to reduce the sentencing range on the sexual assault charge and reflect the parties' agreement as to the total time to be served before Torres would be eligible for release. Torres affirmatively assented to the amendment after he was notified that his sentence on the sexual assault (Count 7) would be to "flat time." In explaining his sentencing structure on the sexual assault charge, the superior court stated, "Calendar years mean [sic] that you're not eligible for any type of release on parole of any kind, until you serve each day of the sentence imposed." Torres indicated he understood. His claim that the notice was defective is belied by the record.

¶8 Torres's jurisdictional claims are also without merit. Any technical error in citation does not defeat the subject matter jurisdiction of the superior court. "Jurisdiction" means "the courts' statutory or constitutional power to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998), emphasis in original). Defects in an indictment are not "jurisdictional" and do not deprive a court of its power to adjudicate a case. *Cotton*, 535 U.S. at 630-31. Because the indictment clearly stated the charges against him, the superior court had jurisdiction. See *State v. Buckley*, 153 Ariz. 91, 93-94 (App. 1987).

¶9 Torres also asserts that he was entitled to written notice that he was subject to consecutive sentences. This claim is without merit because his plea agreement specifically stipulated to consecutive sentences on counts 1 and 7, and he indicated that he understood this provision during his plea colloquy. He therefore had *actual* notice of the term in his plea, regardless of the statutory provision. Additionally, at his settlement conference there was discussion of the mandatory consecutive sentencing he faced on the sexual assault charges, and the possibility of consecutive sentencing on the other charges.

STATE v. TORRES
Decision of the Court

¶10 A basic principle of criminal law requires that an offender be sentenced under the laws in effect at the time he committed the offense for which he is being sentenced. *State v. Newton*, 200 Ariz. 1, 2, ¶ 3 (2001); A.R.S. § 1-246. We reject Torres's argument that because of a technical error, he is somehow entitled to a more lenient sentence under a former version of A.R.S. § 13-604. As the superior court correctly noted, *State v. Tarango*, 185 Ariz. 208 (1996), cited by Torres, was abrogated by statute before Torres committed his crimes, eliminating any potential conflict in the statutes under which he was convicted. Therefore, Torres does not establish a colorable claim under Rule 32.1(c).

¶11 It follows that Torres's claim of ineffective assistance of plea counsel fails. To show ineffective assistance of counsel, Torres must show deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Since he was correctly sentenced by the superior court in accordance with his agreement, it follows that he can show neither.¹ His claim of ineffective assistance of Rule 32 counsel is not cognizable at this stage. See Rule 32.4(a)(2)(C); see also *State v. Pruett*, 185 Ariz. 128, 131 (App. 1995).

¶12 We grant review and deny relief.



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

¹ Torres does not assert that his plea/sentencing counsel incorrectly advised him of the charges and the terms or consequences of his plea agreement.