

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

v.

MCKINLEY TRUEIN BROWN, *Appellant*.

No. 1 CA-CR 18-0880
FILED 1-28-2020

Appeal from the Superior Court in Maricopa County
No. CR2014-146266-001
The Honorable Warren J. Granville, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jeffrey L. Force
Counsel for Appellant

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Chief Judge Peter B. Swann joined.

CATTANI, Judge:

¶1 McKinley Truein Brown appeals his convictions and sentences for one count of sexual assault, two counts of aggravated assault, and one count of kidnapping. Brown’s counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), certifying that, after a diligent search of the record, he found no arguable question of law that was not frivolous. Counsel asks this court to search the record for reversible error. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999). Brown filed a supplemental brief raising the following issues: (1) he was unable to adequately prepare a defense because his attorney did not communicate with him, (2) his waiver of counsel was involuntary because he was unconstitutionally required to choose between being represented by counsel with whom he had an irreconcilable conflict or representing himself, and (3) he did not have adequate access to the court. After reviewing the record, we affirm Brown’s convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶2 In the early morning hours of September 13, 2014, M.D. and her boyfriend were driving home from a bar when the two got into an argument. M.D. had her boyfriend pull the car over and left without her phone or purse to walk to a friend’s house nearby. As M.D. was walking, she noticed Brown walking behind her. M.D. began to speed up, but Brown caught up to her and put a gun to her back. M.D. screamed for help, at which point Brown struck her with his gun and demanded she be quiet.

¶3 M.D. attempted to speak with Brown, but he repeatedly struck her with his gun until she fell to the ground. Brown then pushed M.D. into a dirt area on the side of the street and had sexual intercourse with her while holding his gun to her abdomen.

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¶4 J.S., who lived nearby, heard a female voice in distress and went outside to see what was happening. She saw Brown on top of M.D., and told Brown to stop. Brown told J.S. to mind her own business and leave. When J.S. refused, Brown raised his gun and fired in J.S.'s direction. J.S. fled to her home and called the police.

¶5 M.D. got up and ran to nearby residences to ask someone to use their phone. A homeowner allowed M.D. to use his phone to call the police. After police arrived and interviewed M.D., a forensic nurse examined M.D. and collected DNA swabs from her body. M.D. later worked on a composite sketch of her attacker with a sketch artist. At the scene of the crime, detectives found a condom wrapper, an eyeglass lens, and a spent shell casing.

¶6 Later that day, an officer pulled Brown over for an unrelated offense and noticed that Brown matched the description M.D. had provided. Police then requested a comparison of DNA found on the condom wrapper with Brown's DNA, which was already in the DNA database. The test resulted in a preliminary match.

¶7 Based on this information, police arrested Brown and obtained a warrant to search the room he was renting. Detectives found condoms that were the same brand as the one at the scene of the crime, a loaded gun, and glasses with a missing lens. The State charged Brown with one count of sexual assault, two counts of aggravated assault, and one count of kidnapping.

¶8 At trial, a ballistics expert testified that the bullets found inside the gun had similar markings to the shell casing found at the crime scene and that based on subsequent ballistics testing, the shell casing found at the scene was determined to have come from the gun found in Brown's room. A DNA expert also testified that the DNA on the lens found at the scene matched Brown's DNA. The lens found at the scene also fit into the frame found in Brown's house. The DNA on the condom also matched Brown's, as did DNA collected from a swab of the victim's breast.

¶9 After a 12-day trial, the jury found Brown guilty as charged. The superior court sentenced Brown to concurrent and consecutive prison terms totaling 47 years with credit for 1530 days of presentence incarceration. Brown timely appealed.

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DISCUSSION

I. **Brown's Supplemental Brief.**

¶10 Brown first argues the superior court erroneously denied his motions for change of counsel. Brown notes that when presented with a motion for change of counsel, the superior court has a duty to inquire on the record as to the basis for the defendant's request. *See State v. Torres*, 208 Ariz. 340, 343, ¶ 7 (2004). Here, the superior court did so. At the hearing, "the defendant bears the burden of demonstrating that he has a genuine irreconcilable conflict with his counsel or that there has been a total breakdown in communications." *Id.* at ¶ 8. The superior court's decision will not be disturbed absent a clear abuse of discretion. *State v. Moody*, 192 Ariz. 505, 507, ¶ 11 (1998).

¶11 Brown's primary grievance regarding his first appointed attorney, Ronald Debrigida, was that Debrigida was not communicating with him. Specifically, Brown asserted that Debrigida failed to prepare him for his settlement conference and was not effectively negotiating an acceptable plea agreement. After hearing Brown's complaints, the court determined that because Debrigida participated in Brown's settlement conference, reviewed the case files, had spoken to Brown about his case, and remained in contact with the prosecutor regarding negotiations for a plea bargain (which the prosecutor confirmed), no change of counsel was required. On this record, we find no abuse of discretion.

¶12 Brown eventually waived counsel and argues on appeal that his waiver was involuntary. Citing *Moody*, he asserts that he was faced with the constitutionally impermissible choice of representing himself or being represented by counsel with whom he had a completely fractured relationship. Brown's reliance on *Moody* is unavailing. In that case, the trial record was "replete with examples of a deep and irreconcilable conflict." *Id.* at 507, ¶ 13. The attorney in *Moody* repeatedly asked to withdraw from representation and even stated, "if there is a thousand lawyers in Pima County, 999 will get along better with [the defendant] than me." *Id.* at 508, ¶ 20.

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¶13 Here, Debrigida represented Brown until Brown waived his right to counsel, at which point Debrigida was retained as advisory counsel. Debrigida expressed that he was willing to represent and work with Brown as advisory counsel until Brown filed a bar complaint against him, at which point Debrigida moved to withdraw. Accordingly, the record supports the conclusion that no irreconcilable conflict existed between Brown and Debrigida, at least until the bar complaint.

¶14 Noting the conflict between Brown and Debrigida following the bar complaint, the superior court appointed new advisory counsel, Burges McCowan. And there is no indication in the record that an irreconcilable conflict existed between Brown and McCowan. At any time, Brown could have withdrawn his waiver and had McCowan represent him, but he did not do so. Accordingly, though Brown was clearly not happy with his appointed counsel, his assertion that his relationship with his attorney was irreconcilably fractured is not supported by the record. *See State v. LaGrand*, 152 Ariz. 483, 487 (1987) (“No real conflict between the appellant and counsel is discernible from the record; it simply appears that appellant would have been happier with other counsel.”).

¶15 To the extent Brown’s supplemental brief argues that appointed counsel failed to provide him with effective assistance of counsel, such a claim may be raised only in a Rule 32 post-conviction proceeding, not on direct appeal, so we do not address it. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20 (2007).

¶16 Finally, Brown argues he was deprived of meaningful access to the court because advisory counsel did not assist him with legal research and he was unable to do research on his own given his confinement and lack of access to a law library. As Brown correctly points out, in *Bounds v. Smith*, the Supreme Court held that prisoner access to law libraries or alternative sources of legal knowledge is constitutionally required. 430 U.S. 817, 828 (1977). However, the Supreme Court subsequently clarified,

Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison’s law library or legal assistance program is subpar in some theoretical sense. . . . [T]he inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.

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Lewis v. Casey, 518 U.S. 343, 351 (1996). Here, Brown has failed to detail how any potential shortcomings hindered his efforts.

¶17 Brown's reliance on *Knight v. Superior Court*, 161 Ariz. 551 (App. 1989), to support his argument is misplaced. In addition to basing its decision on a pre-*Lewis* interpretation of *Bounds*, *Knight* noted that "[t]he effect of access to an appointed advisory counsel normally overcomes any research handicap that restrictions on access to a jail library impose on an inmate." *Id.* at 554. In *Knight*, the court appointed a paralegal after advisory counsel specifically indicated he was unable to provide the defendant adequate assistance. *Id.* at 553. Here, Debrigida indicated he was "perfectly willing" to assist Brown as advisory counsel. Debrigida also stated that he attempted to set up a regular weekly or bi-weekly call time to speak with Brown. And there is no indication McCowan was unable to assist Brown after taking over as advisory counsel. Accordingly, Brown has not demonstrated that any purported lack of assistance from advisory counsel meaningfully inhibited his access to the court.

II. Fundamental Error Review.

¶18 We have read and considered counsel's brief and Brown's supplemental brief and have reviewed the record for reversible error. *See Leon*, 104 Ariz. at 300. We find none.

¶19 Brown was present and represented by counsel at all stages of the proceedings against him until he waived his right to counsel, at which point he was appointed advisory counsel. The record reflects that the superior court afforded Brown all his constitutional and statutory rights and that the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The court conducted appropriate pretrial hearings, and the evidence presented at trial was sufficient to support the jury's verdicts. Brown's sentences fall within the range prescribed by law, with proper credit given for presentence incarceration.

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CONCLUSION

¶20 Brown's convictions and sentences are affirmed. After the filing of this decision, defense counsel's obligations pertaining to Brown's representation will end after informing Brown of the outcome of this appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). On the court's own motion, Brown has 30 days from the date of this decision to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.



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