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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/26/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0096 PRPC
)
Respondent,) DEPARTMENT C
)
v.) Maricopa County
) Superior Court
ANGELO MUNGIA,) No. CR 2007-005260-001 DT
)
Petitioner.)
) **DECISION ORDER**
)
)
)
_____)

Petitioner Angelo Mungia petitions this court for review from the dismissal of his petition for post-conviction relief. Presiding Judge Patricia K. Norris and Judges Philip Hall and Donn Kessler have considered this petition for review, the State's response, petitioner's reply, and the superior court record. Because the combination of Mungia's counsel's failure to interview possible exculpatory witnesses and the deterioration of Mungia's mental state before his guilty plea raises a colorable claim his plea was involuntary, we grant review and relief in part, and we deny review in part.

In December 2007, a grand jury indicted Mungia on four felony counts and one misdemeanor count stemming from a shooting

incident in which Mungia and/or his co-defendant allegedly shot at another person and a robbery incident that occurred several days later. In March 2008, Mungia declined offers from the State to plead guilty to these charges. Mungia told competency evaluators he would not plead to a crime he did not commit. In affidavits attached to his petition for post-conviction relief, Mungia and his mother stated they told counsel¹ to interview two witnesses who would testify Mungia was not the shooter.²

In his affidavit, Mungia stated his attorneys did not interview these witnesses and prepare for trial, and he became "depressed, confused and afraid." Mungia stated:

When I accepted the plea offer, I had been in the Maricopa County jail for over eleven months. I couldn't sleep. I was hearing voices in my head. I was depressed about my situation. When I asked for help I was given medications that made me feel terrible. I finally lost hope. I felt that I would do anything just to get away from the jail, so I gave up and accepted the plea

¹Mungia had one attorney until August 2008 and then a different attorney took over his case.

²The State did not provide an affidavit from defense counsel explaining the alleged failure to interview these witnesses. Instead, the State simply argued in the superior court the actions of Mungia's counsel did not fall below the objective standard for effective counsel. On appeal to this court, the State has asserted Mungia's "attorneys had specific information from police reports that the victim and another witness identified him from a photographic line-up as the shooter." The record, however, contains no factual support for this assertion.

agreement. I would not have given up my right to go to trial if I had been able to cope with my mental and emotional problems.

Mungia's mother's affidavit stated she had told the attorneys to interview the two witnesses and also explained that at the time of the plea Mungia was "severely depressed and despondent." The medical records, as we discuss below, support Mungia's and his mother's descriptions of his mental state.

Mungia pleaded guilty to aggravated assault, assisting a criminal street gang, and aggravated robbery. The superior court sentenced him to an aggravated term of six years in prison for aggravated assault and placed him on five years of probation for each remaining count.

Two months after Mungia pleaded guilty, his co-defendant was acquitted of aggravated-assault and assisting-a-criminal-street-gang charges stemming from the shooting. At the co-defendant's trial, the two witnesses Mungia and his mother had asked his counsel to interview testified neither Mungia nor his co-defendant fired a gun during the incident and someone else was the shooter.

Mungia filed a petition for post-conviction relief, which the superior court dismissed. Mungia now seeks review. When a petition for post-conviction relief presents a colorable claim,

the petitioner is entitled to an evidentiary hearing on the claim. *State v. D'Ambrosio*, 156 Ariz. 71, 73-, 750 P.2d 14, 16 (1988). A colorable claim "is a claim which, if defendant's allegations are true, might have changed the outcome." *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

Among the issues raised in his petition for post-conviction relief and in his petition from its dismissal, Mungia argued his plea was involuntary and his counsel was ineffective by failing to interview the two witnesses to the shooting incident. Mungia also combined these arguments so they relied, at least in part, on each other.³ Based on this combined argument and our review

³Mungia's petition for post-conviction relief stated:

[Mungia's] decision to accept the plea was involuntary. He wanted to go to trial on [the aggravated-assault and assisting-a-criminal-street-gang counts], but as the months passed he felt that his attorneys were not interested in defending him at trial. They rarely visited him and made no effort to locate the witnesses that [Mungia] knew would exonerate him.

The petition also stated counsel "failed to ascertain [Mungia's] current [mental] condition, including the critical information that he was taking, and struggling with the side effects of, psychotropic medications. [Mungia's] attorney permitted his severely depressed, sleep deprived, improperly medicated adolescent client to accept the plea." In his petition for review of the dismissal in this court, Mungia stated "[h]is plea was the result of his desperation, after eleven months of incarceration, ineffective treatment that physically compounded his mental misery, and utter indifference by his attorneys, to

of the record, we hold the combination of counsel's alleged failure to interview the witnesses and Mungia's deteriorating mental state raises a colorable claim his plea was involuntary.

A guilty plea must be "voluntarily and intelligently" made. *State v. Contreras*, 112 Ariz. 358, 360, 542 P.2d 17, 19 (1975). Whether a plea is voluntary depends on the circumstances, and the competence to plead guilty is only one factor. *Id.* A guilty plea waives all non-jurisdictional defects if the plea is voluntary. *State v. Toulouse*, 122 Ariz. 275, 277, 594 P.2d 529, 531 (1979). A defendant who pleads guilty, however, can seek relief based on ineffective assistance of counsel if that ineffective assistance induced the guilty plea. *State v. Donald*, 198 Ariz. 406, 411, ¶ 10, 10 P.3d 1193, 1198 (App. 2000).

Although the superior court found Mungia competent to stand trial, other factors suggest his plea was involuntary. Though he answered the superior court's questions appropriately during the plea colloquy and signed a plea agreement and plea addendum, these actions must be considered along with the evidence in the record of Mungia's deteriorating mental condition. Mungia's

escape from the jail and avoid what now appeared to be a certain conviction at trial."

medical records demonstrate his mental deterioration while in jail. After refusing to plead guilty in March 2008, the records show that on April 22 Mungia reported experiencing auditory and visual hallucinations and was diagnosed with depression; on April 28, Mungia was referred for psychiatric evaluation because of concerns he was thinking about hurting himself; on May 13, he was diagnosed as actively psychotic; during the summer, he continued to speak to jail psychological personnel about his difficulties and about how the medications he was prescribed, such as Wellbutrin and Haldol, made him feel poorly; on August 28, he told jail psychological personnel he was seeking medications "that will stop voices"; on October 1, he reported hearing voices; on October 7, he reported feeling more depressed; and on October 21, he pleaded guilty.

Further, although the acquittal of the co-defendant is no guarantee Mungia would have been acquitted if he had gone to trial, the transcripts from the co-defendant's trial clearly show the two witnesses testified Mungia was not the shooter. The transcripts prove the witnesses existed and provide support for Mungia's claims the failure of his counsel to interview these witnesses left him without "hope."

Under these circumstances, Mungia has sufficiently shown counsel's alleged failure to interview the witnesses combined

with his deteriorating mental state caused him to "give up" and plead guilty, and that but for these circumstances he would not have pleaded guilty and waived his right to a trial.

Because Mungia has raised a colorable claim, we grant review and relief on the issue of whether Mungia's plea was voluntary in light of the actions of counsel and Mungia's mental state. We deny review of all other issues presented in the petition for review and remand for proceedings consistent with this decision. If, after an evidentiary hearing, the superior court finds the plea was involuntary, it shall vacate the plea and the resulting conviction and sentence and set a trial date.

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge