NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
AUG 16 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent,

v.

KENNETH CHARLES SCOTT, Petitioner.

2 CA-CR 2012-0239-PR
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2009136589001DT

Honorable Maria Del Mar Verdin, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant — Phoenix
Attorneys for Respondent

Kenneth C. Scott — Kingman
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Kenneth Scott challenges the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, deny relief.

¶2 Pursuant to a plea agreement, Scott was convicted of possession or use of dangerous drugs, a class four felony, with one historical prior felony conviction. In accordance with a stipulated sentence in his plea agreement, the trial court sentenced him to a five-year prison term. Scott filed a timely notice of post-conviction relief, and appointed counsel notified the court she had reviewed the record and was "unable to find any claims . . . to raise in post-conviction relief proceedings." Scott then filed a pro se petition for post-conviction relief raising several claims. Finding Scott had failed to state any colorable claim, the court summarily dismissed the petition. This petition for review followed.

¶3 On review, Scott challenges the trial court's dismissal of two of his claims related to plea negotiations. Specifically, Scott reports that he had wanted to accept a more favorable plea agreement offered by the state at an October 2009 settlement conference, "but needed five more days liberty before being taken into custody." According to Scott, the court erred in concluding that Rule 7.2(c), Ariz. R. Crim. P., "prevented [him] from remaining out of custody once the plea was accepted by the trial court." Scott argues this "misapplication" of Rule 7.2 caused him to reject the plea in October 2009. He also claims that, because of this error, he "was ultimately left to agree to a five year prison term" in February 2010, and alleges that his sentence had been "vindictively increased" by the state and the court. We review the court's summary denial of post-conviction relief for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶4 Based on the transcript of the October 2009 settlement conference, it appears the state was prepared to reopen an offer that had previously expired, for that day only. Under the terms of that proposed agreement, Scott would have pleaded guilty to the amended charge of possession of drug paraphernalia, a class six felony, with one historical prior felony conviction, and would have been exposed to a prison sentence within the range of .75 to 2.75 years, with the state recommending the presumptive term of 1.75 years. But the state had informed Scott that, because a prison term would be mandatory, he would be taken into custody immediately if the court accepted the plea agreement. The court agreed that if it accepted the plea, immediate custody would be required pursuant to Rule 7.2. And, the court, the prosecutor, and Scott's attorney all informed him that if that day's deadline for accepting the plea offer expired, the state was under no obligation to extend any other offer and, if it did, the offer might well be less favorable to him. Scott did not accept the offer, and a jury trial was scheduled for February 4, 2010.

¶5 On January 11, Scott was taken into custody after violating his release conditions. He entered his plea agreement, stipulating to a five-year prison term on February 2; the trial court accepted his change of plea that day and sentenced him on March 9.

Presentence Release

¶6 In relevant part, Rule 7.2(c) provides,

> After a person has been convicted of any offense for which the person will in all reasonable probability suffer a sentence of imprisonment, the person shall not be released on bail or on the person's own recognizance unless it is established that there are reasonable grounds to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding.

Essentially, Scott maintains the court's acceptance of a defendant's guilty plea is not a conviction for the purpose of Rule 7.2(c) and argues the rule applies only after the judgment of conviction and sentence have been entered pursuant to Rule 26.16(a), Ariz. R. Crim. P. He contends "the state and the trial court dup[ed him] with a bogus interpretation of the Arizona release statute[, Rule 7.2(c),] which resulted in [his] having to agree to a sentence almost three times the 1.75 year term" he had expected to receive under the state's October 2009 offer.

¶7 Scott's claim is not colorable because the trial court's October 2009 interpretation of Rule 7.2 was correct. In *State v. Superior Court*, 138 Ariz. 4, 6, 672 P.2d 956, 958 (App. 1983), we explained that, for the purpose of release on bail, "the term conviction refers to the time when a person has been found guilty or has plead[ed] guilty even though there has been no sentence or judgment by the court." Accordingly, we held "Rule 7.2([c]) mandates that after a defendant has been determined to be guilty as defined in Rule 26.1(c), and where the court finds that the defendant may suffer a prison sentence, the defendant shall not be released on bail unless an exception contained in the rule has been established."[1] *Id.* at 7, 672 P.2d at 959. And Rule 26.1(c) defines "[d]etermination of guilt" to include "the acceptance by the court of a plea of guilty or no

[1]When we decided *Superior Court*, Rule 7.2(b) prohibited release of any convicted defendant who "may suffer a sentence of imprisonment." 138 Ariz. at 5, 672 P.2d at 957, *quoting* Ariz. R. Crim. P. 7.2(b). Rule 7.2(c) now prohibits release of those convicted defendants who "will in all reasonable probability suffer a sentence of imprisonment." Because a prison sentence was mandatory under the terms of the state's October 2009 plea offer, this change does not affect the continued validity of our holding as applied to this case. *But cf. State v. Kearney*, 206 Ariz. 547, ¶¶ 4, 17, 81 P.3d 338, 340, 343 (App. 2003) (under amended rule, no abuse of discretion to permit presentence release of probation-eligible defendant convicted of aggravated DUI and required to serve prison term prior to probation).

contest." Ariz. R. Crim. P. 26.1(c); *see also State v. Green*, 174 Ariz. 586, 587, 852 P.2d 401, 402 (1993) (citing *Superior Court* with approval; for purpose of unrelated sentencing statute, "guilty plea constituted a conviction when accepted by the court").

Vindictive Prosecution

¶8 Although Scott asserts the state "vindictively increased the sentence . . . simply as a matter of 'preference,'" he cites little factual or legal support for such a claim. A defendant has no right to a plea agreement, *State v. Martin*, 139 Ariz. 466, 481, 679 P.2d 489, 504 (1984), and the decision whether to offer a plea agreement is solely within the prosecutor's discretion. *See Rivera-Longoria v. Slayton*, 228 Ariz. 156, ¶ 13, 264 P.3d 866, 869 (2011). "A plea bargain standing alone is without constitutional significance," and, until the defendant actually pleads guilty, it "does not deprive an accused of liberty or any other constitutionally protected interest." *Mabry v. Johnson*, 467 U.S. 504, 507 (1984). And, even if a plea is offered by the state and accepted by a defendant, Rule 17.4(b), Ariz. R. Crim. P., permits either party to withdraw that plea "prior to its acceptance by the court."

¶9 We have suggested that courts "may intervene to reinstate a plea offer that the State has withdrawn for vindictive reasons." *State v. Donald*, 198 Ariz. 406, ¶ 39, 10 P.3d 1193, 1204 (App. 2000); *see also Martin*, 139 Ariz. at 481, 679 P.2d at 504 (because prosecution must not be "'tainted with invidious discrimination,'" state "may not refuse to plea bargain out of animus toward the defendant's attorney"), *quoting Murgia v. Mun. Court*, 124 Cal. Rptr. 204, 207 (Cal Ct. App. 1975). But, in *State v. Caperon*, 151 Ariz. 426, 427-28, 728 P.2d 296, 297-98 (App. 1986), we rejected an argument nearly identical to Scott's argument here. In that case, the defendant, like Scott, "did not timely accept" the state's first plea offer and argued "the prosecutor's insistence on a greater sentence in

the second offer," which the defendant accepted, "constitute[d] impermissible vindictiveness." *Caperon*, 151 Ariz. at 428, 728 P.2d at 298. We explained then that "[w]e find no evidence of prosecutorial punishment or retaliation in the plea-bargaining process so long as [the defendant] remained free to accept or reject the offer" he ultimately accepted. *Id.*. The same reasoning applies here. Scott was free to accept or reject the plea agreement he entered in February 2010, and he appears to have freely accepted that offer. *See id.* Thus, he did not raise a colorable claim for vindictive prosecution.

¶10 The trial court did not abuse its discretion in dismissing Scott's petition for post-conviction relief for his failure to state a colorable claim. *See* Ariz. R. Crim. P. 32.6(c) (governing summary dismissal of Rule 32 petition). Accordingly, although we grant review, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge