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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JONES JIM, Petitioner.	2 CA-CR 2013-0047-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCONINO COUNTY

Cause No. CR20090175

Honorable Dan Slayton, Judge

REVIEW GRANTED; RELIEF DENIED

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E S P I N O S A, Judge.

¶1 Jones Jim petitions this court for review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., after an evidentiary hearing. We will not disturb that ruling unless the court clearly has abused its

discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the following reasons, we grant review but deny relief.

¶2 In 2009, pursuant to a plea agreement and a plea of no contest under *North Carolina v. Alford*, 400 U.S. 25 (1970), Jim was convicted of two counts of attempted child molestation. The plea agreement provided that only the first of those counts was a dangerous crime against children (DCAC) and stipulated that Jim would be sentenced to a five-year prison term for that count but, for the second count, would be placed on a term of probation "between 7 years and the period of his natural life." The trial court sentenced Jim in accordance with the plea agreement and placed him on lifetime probation. Jim immediately advised the court that he wished to reject probation and be sentenced to prison on the second count. After briefing by the state and Jim's counsel, the court rejected the request, concluding Jim voluntarily, knowingly, and intelligently had entered the plea.

¶3 Jim filed a notice of and petition for post-conviction relief arguing his plea was not voluntary. He first asserted the agreement described the incorrect sentencing range that would apply if his probation were revoked. Jim explained the range in the agreement was incorrect because it described the sentencing range for a non-DCAC offense, but child molestation is a DCAC "as a matter of law" and a plea agreement "cannot modify mandatory sentencing provisions." He additionally argued his attorney had "coerced" him into entering the plea. Jim later amended his petition to claim trial counsel had been ineffective in failing to investigate his alibi defense.

¶4 After an evidentiary hearing, the trial court rejected Jim's claims. It determined trial counsel had represented Jim competently and, although the plea contained "an error in the calculation of time," determined the defect was merely technical and Jim had received "the benefit of the agreement," relying on *State v. Rushton*, 172 Ariz. 454, 837 P.2d 1189 (App. 1992). The court further found Jim had not been induced to enter the plea by the incorrect sentencing range, but instead the critical question was whether he would receive probation and the length of that term.

¶5 On review, Jim reurges his claim that, because the plea agreement did not correctly characterize the second count of child molestation as a DCAC, he received incorrect information regarding the potential sentence for that offense, rendering his plea involuntary. We agree with Jim that the plea agreement is incorrect—attempted child molestation is, by definition, a DCAC. A.R.S. §§ 13-705(O), (P)(1)(d); 13-1410(B).[1] Thus, the plea agreement incorrectly stated Jim could face a prison term between two and 8.75 years when it should have stated he could face a prison term between five and fifteen years. *See* § 13-705(D), (J).

¶6 Jim is correct that a sentence is illegal if it fails to comply with mandatory sentencing statutes. *State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995). But we will not invalidate a plea agreement merely because it calls for an illegally

[1]Significant portions of Arizona's criminal sentencing code have been renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, effective "from and after December 31, 2008." *Id.* § 120. For ease of reference and because no changes in the statutes are material to the issues in this case, *see id.* § 119, we refer in this decision to the current section numbers rather than those in effect at the time of Jim's offenses.

lenient sentence. *See Rushton*, 172 Ariz. at 457-58, 837 P.2d at 1192-93. In *Rushton*, the defendant pled guilty to attempted child molestation but the agreement did not provide that he would be sentenced under the DCAC statute and instead incorrectly provided for a more lenient sentence. 172 Ariz. at 457, 837 P.2d at 1192. We first noted the sentencing error was merely "technical" in nature because "the state could have offered virtually the same sentence" by stipulation. *Id.* at 458, 837 P.2d at 1193. We additionally observed the state was "willing to enter the plea agreement . . . to preclude the necessity of the young victims' having to testify again at trial and relive the acts they were attempting to overcome." *Id.* Thus, we concluded, "public policy militates against our simply vacating the illegal agreement." *Id.*[2]

¶7 The situation here is similar. The state avowed at the change-of-plea hearing that it agreed to an *Alford* plea because "the family [wa]s hopeful of avoiding a trial, because of the trauma that the victims would need to go through." And there is little question the state could have constructed a plea agreement nearly identical to the one Jim accepted, either by offering a stipulated minimum sentence or by offering that he plead no contest to sexual abuse, which would prescribe a term between 2.5 and 7.5 years. *See* A.R.S. §§ 13-705(F), (J); 13-902(E); 13-1404.

¶8 As we understand his argument, however, Jim asserts *Rushton* is inapplicable here because he "has not, and cannot" receive the benefit of the illegal sentence prescribed in the agreement. We do not find that distinction meaningful.

[2]*But see Coy v. Fields*, 200 Ariz. 442, 444-45, 27 P.3d 799, 801-02 (App. 2001) (noting "courts generally either vacate the plea or give the defendant the option of withdrawing" when plea provides for "illegally lenient sentence").

Whether Jim will receive a prison sentence for the second child molestation count is, at this point, purely speculative—as is whether that sentence would exceed the sentencing range described in the plea or would constitute an illegal sentence.[3] Thus, to invalidate the plea on this basis would be premature, even assuming it was necessary in any event. Accordingly, we find no error in the trial court's determination that it was not required to invalidate the plea on the ground it permitted an illegal sentence.

¶9 Jim further asserts the plea agreement is involuntary as a matter of law because it incorrectly described the sentence he could face in the event his probation is revoked and a prison term is imposed.[4] Jim is correct that, to comply with Rule 17.2(b), Ariz. R. Crim. P., the plea colloquy must describe "[t]he nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute." But, when a plea agreement stipulates that a defendant be placed on probation, Rule 17.2(b) does not require that the defendant be advised of the sentence he or she could face if probation is revoked. *Cf. State v. Muldoon*, 159 Ariz. 295, 298, 767 P.2d 16, 19 (1988) ("potential results of violations" of probationary terms "need not be included within the warnings required to be given under Rule 17.2(b)"); *State v. Gil*, 27 Ariz. App. 190, 191, 552 P.2d

[3]Jim does not assert, and we therefore do not address, whether the plea agreement is unenforceable under contract law. *See Coy*, 200 Ariz. 442, ¶ 9, 27 P.3d at 802 (although plea agreements "subject to contract interpretation," court "not always obligated to apply a contract analysis to plea agreements").

[4]*Rushton* expressly declined to reach the question whether the incorrect information could render involuntary the defendant's decision to enter the plea. 172 Ariz. at 458, 837 P.2d at 1193.

1205, 1206 (1976) (Rule 17.2(b) requires court to inform defendant of minimum sentence "in the event probation was not given").

¶10 In any event, even assuming the sentencing range described in the plea agreement and during the plea colloquy violated Rule 17.2(b), that alone does not render Jim's plea involuntary. For a guilty plea to be valid, it must be knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); *see also* Ariz. R. Crim. P. 17.1(b). But "[a] plea will be found involuntary only where a defendant lacks information of 'true importance in the decision-making process.'" *State v. Pac*, 165 Ariz. 294, 295-96, 798 P.2d 1303, 1304-05 (1990), *quoting State v. Crowder*, 155 Ariz. 477, 482, 747 P.2d 1176, 1181 (1987). That is, a plea will be enforced unless the missing information "'go[es] to [the] defendant's essential objective in making the agreement.'" *Id.* at 296, 798 P.2d at 1305, *quoting Crowder*, 155 Ariz. at 481, 747 P.2d at 1180; *see also State v. Rosario*, 195 Ariz. 264, ¶¶ 24-28 & 28, 987 P.2d 226, 230 (App. 1999) (determining plea involuntary if defendant "based his decision to plead to the offenses based upon his [mistaken] belief that he could be paroled at one-half of his incarceration terms").

¶11 Thus, if the potential sentence Jim could face on revocation of probation was not material to his decision to plead guilty, the plea was not involuntary despite the incorrect information provided in the agreement and during the colloquy. The trial court found Jim had not been induced to enter the plea by the incorrect sentencing range, instead concluding he had pled guilty because the plea agreement made him eligible for probation. Jim does not argue on review that the court's finding was incorrect. Thus, he

has provided no reason for us to disturb the court's conclusion that his decision to plead guilty was voluntary and knowing.

¶12 For the reasons stated, although review is granted, relief is denied.

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

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.