FILED BY CLERK
MAY -3 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CHRISTOPHER PAUL PETERS, Petitioner.	)	2 CA-CR 2013-0087-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR2009007446004DT

Honorable Julie P. Newell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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

Christopher Paul Peters
Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Christopher Peters seeks review of the trial court's summary denial of his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but deny relief.

¶2 In June 2009, police officers conducting surveillance on a residence saw Peters leave the house and get into his vehicle while carrying a bag later determined to contain five pounds of marijuana. A grand jury issued a true bill and arrest warrants for Peters and six other defendants. Less than four months after his arraignment, Peters entered a plea agreement and was convicted of possession of marijuana for sale, a non-dangerous, repetitive offense. He was sentenced to an enhanced, slightly aggravated, seven-year prison term.

¶3 Peters then filed a notice of post-conviction relief. After appointed counsel notified the court that she had reviewed the record and found no claims to raise in post-conviction relief proceedings, Peters filed a pro se petition in which he alleged "the state presented false information to the grand jury" and, as a result, the indictment and warrant for his arrest were "wrongly issued." He also alleged his trial attorney had been ineffective in failing to compare police reports and the grand jury transcript with a record of Peters's pre-arrest interview by police. According to Peters, this comparison would have revealed that, when testifying before the grand jury, police officers misrepresented statements he had made to them and their accounts of the traffic stop that led to his arrest were inconsistent. Peters also asserted his attorney "chose to do nothing" when, on the

day of sentencing, another defendant told Peters he had been "set-up" by someone who owed him money.

¶4 The trial court found Peters had failed to state a colorable claim and denied relief. The court first observed Peters did not support his allegations of ineffective assistance of counsel "with affidavits, records [or] any other evidence," but had "simply alluded to a possibility of 'false information' being presented to the grand jury" by suggesting "his interview with the police was possibly misrepresented in the police reports and possibly to the grand jury." *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required."). The court noted "no grand jury transcript was attached and no specific evidence was presented concerning any malfeasance by his attorney." In addition, the court found Peters had "waived his ability to attack the grand jury proceedings and to challenge the seizure of evidence when he pleaded guilty." This petition for review followed.

¶5 On review, Peters argues he had "notified the [trial] court" that the state and his trial attorney had evidence that might support his claim, including police reports, the grand jury transcript, and a record of his police interview, and he implies the court abused its discretion in denying his claim based on his failure to present evidence. He asserts his former attorney "has refused to release" those documents and materials and asks this court to "order and obtain [them]."

¶6 We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here. Although Peters maintains he "made the trial court aware" that he did not have the grand jury transcript or other documents that might have supported his claim, he never sought an extension of time to obtain those documents or the court's assistance in doing so. This is a court of review; we do not grant relief that was not requested below. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (limiting review to "issues which were decided by the trial court"); *cf. State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issue not presented first to trial court).

¶7 To the extent Peters sought relief based on alleged errors in grand jury proceedings or during his arrest, the trial court correctly concluded such claims were waived. *See State v. Moreno*, 134 Ariz. 199, 200, 655 P.2d 23, 24 (App. 1982) (pleading defendant waives right to appeal "all nonjurisdictional defenses, errors and defects occurring prior to the plea proceedings"), *disapproved on other grounds by State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989); *see also Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.").

¶8 To the extent Peters asserted generally that, had counsel "attempted to do anything at all on [his] behalf, [he] would have gone to trial, rather than take a plea," the trial court did not abuse its discretion in finding Peters failed to state a colorable claim for

relief. "To state a colorable claim of ineffective assistance of counsel," Peters was required to "show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced [him]." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68, *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). But the allegations in Peters's petition were insufficient to show either constitutionally deficient performance by counsel or resulting prejudice.

¶9 When a defendant has pleaded guilty, a claim of ineffective assistance of counsel is limited "to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not 'within the range of competence demanded of attorneys in criminal cases.'" *Blackledge v. Perry*, 417 U.S. 21, 30 (1974), *quoting McMann v. Richardson*, 397 U.S. 759, 771 (1970). In other words, to show his attorney's performance was deficient, Peters was required to "establish that his attorney's advice to plead guilty without having made inquiry" into the grand jury testimony by police officers "rendered that advice outside the 'range of competence demanded of attorneys in criminal cases.'" *Tollett*, 411 U.S. at 268, *quoting McMann*, 397 U.S. at 771.

¶10 Peters maintains he had specifically asked counsel to conduct such a review and had provided a list of alleged "discrepancies" in grand jury testimony, which Peters submitted with his petition for post-conviction relief. But Peters fails to develop any argument that his attorney performed below prevailing professional norms in failing to investigate these alleged discrepancies, some of which seemed to pertain to minor details

in the context of other evidence against Peters, before advising Peters to accept the negotiated plea agreement.[1] As the Supreme Court explained in *Tollett*,

> Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution, or by contesting all guilt. A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement . . . might be factually supported.

Id. (citations omitted). *See also Premo v. Moore*, ___ U.S. ___, ___, 131 S. Ct. 733, 745-46 (2011) (noting pleading defendant bears "a most substantial burden . . . to show ineffective assistance" due to "uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial").

¶11 Similarly, to state a colorable claim of the prejudice required by *Strickland*, a defendant must do more than allege that he "would not have pleaded guilty but for counsel's deficient performance"; such an allegation "must be accompanied by an allegation of specific facts which would allow a court to meaningfully assess why [counsel's] deficiency was material to the plea decision." *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998). Thus, "a Rule 32 hearing is not required on a claim of ineffective assistance of counsel when the petition offers only mere generalizations and unsubstantiated claims." *Id.* In his petition below, Peters failed to

[1]For example, with respect to one page reference, Peters noted, "Told police took place in garage . . . and left in black truck"; apparently challenging testimony on page twenty-three of the transcript, he wrote, "No mention of drug deal by me—just crumbs[,] not considerable amount."

sustain his burden of showing, in the context of the evidence against him, how counsel's actions or omissions were material to his decision to plead guilty.

¶12 Accordingly, we cannot say the trial court abused its discretion in summarily denying relief. Although we grant the petition for review, we deny relief.

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

CONCURRING:

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

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