

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 27 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0093-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
KRAIG MATTHEW GILBERT,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201200390

Honorable John F. Kelliher Jr., Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt

Tucson
Attorney for Petitioner

K E L L Y, Presiding Judge.

¶1 Petitioner Kraig Gilbert seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Gilbert has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Gilbert was convicted of unlawful use of a means of transportation. The trial court suspended the imposition of sentence and placed Gilbert on a three-year term of probation. It also ordered him to pay \$2,986.17 in restitution.¹ Gilbert thereafter initiated a proceeding for post-conviction relief, arguing in his petition that he was entitled to a restitution hearing. The trial court summarily denied relief.

¶3 On review, Gilbert again contends he was entitled to a restitution hearing and argues the trial court abused its discretion in denying his petition. Gilbert’s plea agreement included a provision stating that he agreed to pay \$500 in restitution to the victim. After a change of plea hearing, the trial court accepted Gilbert’s guilty plea and set the matter for sentencing. A presentence report was prepared indicating the victim had received a damage estimate for his vehicle that “revealed the vehicle [had] incurred damages above what was originally known when a report was made to police.” The

¹The trial court ordered that Gilbert was jointly and severally liable for this amount with his codefendant, who is not a party to this matter.

victim submitted a restitution request for \$2,986.17, which included lost wages and the damage repair estimate.

¶4 At the sentencing hearing, Gilbert agreed to “increase the cap” in the plea agreement to \$3,000 “until” a restitution hearing could be held, but wanted a hearing because the estimate had been done “roughly a year after the fact” and Gilbert had received insufficient documentation. The prosecutor stated that Gilbert’s plea agreement had been offered as part of an early-resolution program and was beneficial to Gilbert because it provided a stipulated term of probation instead of a mandatory prison term. The prosecutor also stated that if Gilbert would not immediately agree “to pay the amount of restitution requested by the victim,” the state would “move to withdraw” from the plea agreement. The trial court indicated it would reject the plea “if the restitution is not sufficient.” Defense counsel and Gilbert discussed the matter and suggested to the court that it proceed with sentencing subject to a later “restitution review” hearing. Gilbert indicated he would agree to the “amended” amount “for purposes of sentencing” and “without prejudice to any solution that . . . may [be] take[n] later.” The court then stated it was rejecting the plea agreement “because of the cap on restitution.” The state explained it would not agree to a later restitution hearing because defense counsel had been “vexatious” in regard to such hearings in the past, and therefore it would elect to go forward with a trial instead. Gilbert then agreed to pay restitution in the amount of \$2,986.17.

¶5 After a trial court has accepted a plea agreement, jeopardy attaches and the state generally may not unilaterally withdraw from the agreement. *Aragon v. Wilkinson ex rel. Cnty. of Maricopa*, 209 Ariz. 61, ¶ 7, 97 P.3d 886, 889 (App. 2004). But “[e]ven after jeopardy has attached, the trial court retains discretion to reject the sentencing provisions proposed by the plea agreement.” *Id.* ¶ 8. In such a case, Rule 17.4(e), Ariz. R. Crim. P., “permits either party to withdraw from the agreement.” *Id.* Indeed, the plea agreement here expressly included a provision specifying that Gilbert had agreed that this would be the case. And we agree with the trial court that it would have been inappropriate to accept a plea agreement which failed to make the victim whole. “The legislature’s enactment of A.R.S. [§] 13-603(C) ‘reflects its sense of responsibility for victims.’ Thus, a trial court is required to determine the full amount of the victim’s loss to make the victim whole.” *State v. Reynolds*, 171 Ariz. 678, 681, 832 P.2d 695, 698 (App. 1992), *quoting State v. Howard*, 168 Ariz. 458, 459, 815 P.2d 5, 6 (App. 1991). The trial court therefore was correct in refusing to enter an insufficient restitution amount.

¶6 Likewise, we cannot say the trial court abused its discretion in concluding, in its ruling on Gilbert’s Rule 32 petition, that it had been presented with sufficient evidence to support the restitution order it eventually entered. Although the documentation does not appear in the record before us, the sentencing transcript indicates the court and parties had photographs and an estimate of damage. *See State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993) (stating presumption that “missing material supports the action of the trial court”). “[R]estitution may be based on

those factors which are established by a preponderance of the evidence,” *In re Stephanie B.*, 204 Ariz. 466, ¶ 15, 65 P.3d 114, 118 (App. 2003), quoting *Benton v. State*, 711 A.2d 792, 797 (Del. 1998), including information in a presentence report, *State v. Dixon*, 216 Ariz. 18, ¶ 13, 162 P.3d 657, 660-61 (App. 2007).

¶7 Due process, however, requires that “the procedure leading to a restitution award is such that defendant is given the opportunity to contest the information on which the restitution award is based, to present relevant evidence, and to be heard.” *State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. 1991); see also *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992). Gilbert had no such opportunity here. The record suggests the documentation in support of the victim’s restitution claim was available only shortly before the sentencing hearing, and counsel indicated he wanted to investigate further.

¶8 Gilbert’s right to a hearing was, however, subject to waiver. See *State v. Wilson*, 174 Ariz. 564, 566, 851 P.2d 863, 865 (App. 1993) (“[C]onstitutional rights may be waived . . .”). We cannot agree with the state’s position in its answer to Gilbert’s petition for post-conviction relief that Gilbert had waived his right to a restitution hearing as part of the plea agreement. The agreement provided that Gilbert waived his right to “all motions, defense objections, or requests” which could be asserted “to the Court’s entry of judgment . . . and imposition of a sentence upon him consistent with this agreement.” But the restitution award entered was not consistent with the agreement. And, as noted above, the agreement provided that either party could withdraw if the trial

court did not impose the agreed upon sentence. It further provided that if neither party withdrew, the court would be “bound only by the sentencing limits set forth in the applicable statutes.” Thus, under the agreement, the court could properly order restitution in an amount consistent with the victim’s claims, but that provision did not limit or waive Gilbert’s due process rights in relation to determining the correct amount.

¶9 At sentencing, however, Gilbert ultimately agreed to pay the higher amount of restitution without a hearing rather than lose the plea bargain altogether and go to trial. Because the trial court had rejected the plea agreement due to the \$500 restitution cap, the state was entitled to withdraw from the agreement. Gilbert cites no authority to suggest the court had authority to require the state to agree to a restitution hearing as a condition of an amended plea agreement. *See* Ariz. R. Crim. P. 32.9(c)(1). And, although the court clearly suggested it would be in Gilbert’s best interest to accept the amendment to a higher amount of restitution without a hearing, it did not improperly influence him or force him to do so. *Cf. State v. Taylor*, 158 Ariz. 561, 564-65, 764 P.2d 46, 49-50 (App. 1988) (no waiver of right to hearing when defendant “involuntarily relinquished” his request after court indicated it would allow state to withdraw from plea agreement and withdrawal not authorized by law). And, to the extent Gilbert’s argument suggests his waiver, and therefore his plea, was involuntary, he has made it clear he does not wish to withdraw from his plea. Indeed, on the record before us, his acceptance of the higher restitution amount suggests the amount was not a material factor in his decision to plead guilty. *See State v. Crowder*, 155 Ariz. 477, 481, 747 P.2d 1176, 1180 (1987) (“[A]

defendant should not be allowed to vacate a plea bargain unless the information he lacked was actually relevant to the decision making process.”). Because Gilbert waived his right to a restitution hearing by agreeing to amend the plea agreement to include the higher amount of restitution, we cannot say the trial court abused its discretion in dismissing his petition for post-conviction relief.² For the reasons stated above, although the petition for review is granted, relief is denied.

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

CONCURRING:

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

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

²This case illustrates the difficulty with obtaining accurate restitution amounts in early-resolution cases. However, at the hearing the prosecutor indicated the state was considering solutions to this problem. We encourage the state to do so in order to allow defendants to more fully understand the rights they will be giving up in pleading guilty and to better protect their due process rights.