FILED BY CLERK
MAY 30 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LUIS C. RUIZ, Petitioner.	2 CA-CR 2013-0118-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR201000013

Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF GRANTED

Sheila Sullivan Polk, Yavapai County Attorney
By Dana E. Owens
Prescott
Attorneys for Respondent

C. Kenneth Ray II, P.C.
By C. Kenneth Ray II
Prescott
Attorney for Petitioner

M I L L E R, Judge.

¶1 Luis Ruiz petitions this court for review of the trial court's summary denial of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. 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). We grant review and, for the reasons stated below, grant relief.

¶2 After waiving his right to a jury trial, Ruiz was convicted of four counts of child molestation based on a stipulated record submitted to the trial court. The court sentenced him to consecutive prison terms totaling fifty-eight years. We affirmed his convictions and sentences on appeal. *State v. Ruiz*, No. 1 CA-CR 10-0780 (memorandum decision filed Jun. 28, 2011).

¶3 Ruiz sought post-conviction relief, arguing his trial counsel had been ineffective. He claimed counsel had advised him to waive his right to a jury trial and had informed him that, "upon a finding of guilt" he would only be incarcerated for "about six weeks" because counsel would "file an Appeal and secure [Ruiz's] release pending Appeal and which process would take . . . two to four years or more[] to conclude." Ruiz additionally claimed he had waived his right to a jury trial because of counsel's assurance he would be released. Thus, he concluded, due to his counsel's incorrect advice, his decision to waive his right to a jury trial was not knowing, voluntary, and intelligent.

¶4 Ruiz included with his petition his own affidavit and the affidavits of family members avowing that trial counsel had informed Ruiz that, after a brief period of incarceration, he would be released pending his appeal and that counsel would "continue to ask for extensions . . . that would keep [him] from going to prison." Ruiz also provided an affidavit by trial counsel stating he had advised Ruiz to waive his right to a jury trial because Ruiz wished to avoid "the drama and trauma of a trial," but counsel believed Ruiz should preserve his appellate rights to raise issues related to the trial

court's denial of a motion to suppress evidence. Counsel further stated that he had told Ruiz that he did "not do appeals" and that counsel appointed to represent Ruiz on appeal "could ask that he be released pending appeal," but that he "could not predict whether" Ruiz would be released and that "given his age, health, community ties and appearance history, he was as good a candidate as any for release pending appeal." Finally, Ruiz included affidavits by criminal defense attorneys stating they were unaware of any instance in which a defendant had been released pending appeal, and that to give a defendant any assurance of such a result would fall below prevailing professional norms.

¶5 The trial court summarily denied relief. It concluded Ruiz's claims regarding counsel's advice were belied by the record because Ruiz plainly knew he would be taken into custody when the verdict was announced, had avowed he had been made no promises in exchange for giving up his jury trial rights, and had informed the adult probation department that he wished to be incarcerated in a facility "as close to his Wife as possible." The court additionally concluded that, even had counsel informed Ruiz he would be released pending appeal, Ruiz had not proven "the Court would have done so." This petition for review followed the court's denial of Ruiz's motion for rehearing.

¶6 On review, Ruiz argues, as he did below, that he has presented a colorable claim and therefore is entitled to an evidentiary hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (defendant who makes a colorable post-conviction-relief claim entitled to evidentiary hearing); *see also* Ariz. R. Crim. P. 32.8(a) ("The defendant shall be entitled to a hearing to determine issues of material fact."). A

colorable claim is "one that, if the [defendant's] allegations are true, might have changed the outcome." *Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173. To some extent, the determination whether a claim is colorable rests in the discretion of the trial court. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). But, if there is doubt about whether a claim is colorable, the court should hold an evidentiary hearing "to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶7 To state a colorable claim of ineffective assistance of counsel, Ruiz must show "both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced" him. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). In this context, Ruiz must demonstrate he would not have waived his right to a jury trial absent counsel's deficient performance and must provide an "allegation of specific facts which would allow a court to meaningfully assess why that deficiency was material to [his] decision" to waive his rights. *State v. Bowers*, 192 Ariz. 419, ¶ 25, 966 P.2d 1023, 1029 (App. 1998).

¶8 Although the trial court is correct that Ruiz must do more than merely contradict what the record plainly shows, *see State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998), we cannot agree with the court that the record is wholly inconsistent with Ruiz's assertions. Ruiz assured the court during his waiver colloquy that he had not been promised anything to waive his right to a jury trial. But, whether Ruiz understood that question to encompass what his attorney had told him in general as

opposed to what he had been promised in exchange for waiving his jury trial right is the very type of factual development necessary to dispose of this issue.

¶9 Similarly, Ruiz's knowledge, made clear during his colloquy with the trial court, that he would face a prison term and immediate incarceration upon conviction is also consistent with the avowals he made in his affidavit. He claims to have believed that he would be incarcerated—albeit briefly—but that he would be released pending appeal and that process would continue for a period of years, effectively deferring the sentence imposed. His knowledge that he would be immediately incarcerated does not conclusively rebut that assertion. And, although Ruiz's statement to adult probation that he wished to be imprisoned in a facility near his spouse calls into question the credibility of his avowals, that statement standing alone is not entirely inconsistent with those avowals. It is entirely possible that Ruiz intended to inform adult probation that he wished to be incarcerated close to his wife during what he believed would be a brief incarceration or in the event his appeal was unsuccessful.

¶10 Finally, as we noted above, in rejecting Ruiz's claim the trial court relied in part on its conclusion that Ruiz had not demonstrated it would have granted a request for release. *See* A.R.S. § 13-3961.01 (permitting release pending appeal only when "the superior court or a judge thereof is satisfied upon investigation that the person in custody is in such physical condition that continued confinement would endanger his life"). But, whether the court would have granted that request is immaterial. Indeed, the apparent improbability of that outcome only further supports Ruiz's claim that, if counsel had advised him he would be released during the pendency of his appeal, such advice fell

below prevailing professional norms.[1] Instead, the relevant question is whether counsel made such assurances and, if so, whether those assurances drove Ruiz's decision to waive his right to a jury trial. *See Bowers*, 192 Ariz. at ¶ 25, 966 P.2d at 1029.

¶11 If Ruiz's factual assertions prove true, he is entitled to relief; accordingly, he has raised a colorable claim and is entitled to an evidentiary hearing pursuant to Rule 32.8(a). *See Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173. Therefore, review is granted and relief is granted.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

[1]Based on the affidavits presented below, it is plain that Ruiz has presented a colorable claim that counsel's conduct, if it was as described by Ruiz—fell below prevailing professional norms. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.