

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RAMU BAKER,
Petitioner.

No. 2 CA-CR 2013-0332-PR
Filed November 15, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24

Petition for Review from the Superior Court in Yavapai County

No. P1300CR201100766

The Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Sheila Sullivan Polk, Yavapai County Attorney
By Bill R. Hughes, Deputy County Attorney, Prescott

Counsel for Respondent

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C. Kenneth Ray II, P.C., Prescott
By C. Kenneth Ray II

Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Ramu Baker 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). Baker has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Baker was convicted of aggravated driving under the influence (DUI) and possession of marijuana. The trial court imposed concurrent, aggravated prison terms, the longer of which was 3.75 years. Baker thereafter initiated a proceeding for post-conviction relief, arguing in his petition (1) the trial court failed to inform him of the correct range of sentence that he faced, (2) trial counsel was ineffective in failing to object to the improper range and subsequently imposed aggravated sentence, (3) his plea was involuntary as a result of the incorrect information, and (4) his sentence was unlawfully imposed. The trial court summarily denied relief, as well as Baker’s subsequent motion for rehearing.

¶3 On review, Baker again claims the trial court’s failure to properly advise him of the possible term of imprisonment rendered his plea involuntary and counsel was ineffective in failing to object to the aggravated sentence imposed. And he contends the court

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abused its discretion in denying relief without an evidentiary hearing.

¶4 At Baker's change-of-plea hearing, the trial court discussed the proposed plea agreement with him. Baker acknowledged he had read the agreement, initialed each page, and discussed the agreement with his attorney, who had explained it to him. The agreement specified the complete range of sentence, including the aggravated sentence. Baker also affirmed that no one had promised him "anything aside from what is written in the document itself" to induce his plea. The trial court then explained the sentences available on each count, but in doing so, she only gave the minimum and maximum sentences and did not include the mitigated or aggravated terms. At the end of the hearing, trial counsel pointed out to the trial court that the case had been in early disposition court (EDC) and that "[t]here was a preread at EDC for two and a half years" in prison. Counsel indicated Baker understood probation was not available and he had accepted the "plea with the understanding that [the preread] would be considered by the court." Counsel's log, which was included with Baker's petition for post-conviction relief, purportedly also shows he informed Baker that the EDC judge had indicated she intended to impose a 2.5-year presumptive term.

¶5 At sentencing before a different judge, the state recommended the presumptive term of 2.5 years on the greater charge, noting that "this is a prison mandatory plea." The trial court, however, imposed an aggravated sentence on each count, citing as aggravating factors Baker's prior felony convictions and that he was "a danger to the community." Baker did not object to the aggravated sentence.

¶6 As Baker correctly points out, Rule 17.2, Ariz. R. Crim. P., requires a trial court to advise a pleading defendant of "[t]he nature and range of possible sentence for the offense to which the plea is offered." Thus, the trial court erred in omitting the aggravated prison term during Baker's plea colloquy. But "if the record reveals that the defendant in fact was aware" of the information the court should have provided, "a failure to comply

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with Rule 17.2[] will be considered technical, non-reversible error.” *State v. Nieto*, 118 Ariz. 603, 608, 578 P.2d 1032, 1037 (App. 1978).

¶7 As the trial court determined, the record here shows Baker was aware of the entire range of sentence he faced when he entered his guilty plea. His plea agreement included the possible aggravated term of 3.75 years’ imprisonment, and as noted above, Baker indicated he had read, discussed with his attorney, and understood that agreement. And the trial court properly advised Baker of the rights he was giving up by pleading guilty, as required by *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

¶8 In its Rule 32 ruling, the trial court also acknowledged that it had failed to advise the parties that it intended to impose an aggravated sentence as required by A.R.S. § 13-702(E). But, as the trial court correctly noted, such notice is waived if a party fails to object at sentencing. *Id.* Baker did not object, and therefore waived notice.

¶9 Baker maintains, however, that counsel’s failure to object to the lack of notice constitutes ineffective assistance of counsel. To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998).

¶10 In this case, Baker provided no affidavits or other evidence in the trial court to suggest that counsel’s failure to object fell below prevailing professional norms. *See Ariz. R. Crim. P. 32.5.* Rather, he asserted that an objection must be made to meet the prevailing standards because the statute provides that any objections are waived if not made at sentencing. And he claimed that counsel’s failure to object deprived him of notice and an opportunity to be heard in opposition to the aggravated term. But Baker has not explained what objection to the aggravated term counsel should have made, nor how such an objection might have changed the term imposed. We therefore agree with the trial court

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that Baker has failed to establish he was prejudiced by counsel's failure to object, even accepting *arguendo* that such a failure constituted deficient performance. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant fails to make showing on either element of *Strickland* test, court need not determine whether other was satisfied). Therefore, although we grant the petition for review, we deny relief.