

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LUIS AVELINO CAMACHO,
Petitioner.

No. 2 CA-CR 2013-0348-PR
Filed November 29, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2006005509001DT
The Honorable Jeanne Garcia, Judge

**REVIEW GRANTED; REMANDED, IN PART, RELIEF DENIED,
IN PART**

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Diane Meloche, Deputy County Attorney, Phoenix
Counsel for Respondent

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Law Offices Michael P. Denea, PLC, Phoenix
By Michael P. Denea
Counsel for Petitioner

MEMORANDUM DECISION

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

H O W A R D, Chief Judge:

¶1 Petitioner Luis Avelino Camacho was convicted after a jury trial of kidnapping and conspiracy to commit first-degree murder. This court affirmed the convictions on appeal. *State v. Camacho*, No. 1 CA-CR 08-0074 (memorandum decision filed June 18, 2009). Camacho subsequently sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., based on claims of ineffective assistance of counsel, violation of his due process rights under the Fourteenth Amendment, and violation of his Sixth Amendment right to counsel. The trial court denied relief in June 2012 following an evidentiary hearing and this petition for review followed. For the reasons stated below, we grant the petition and remand this matter to the trial court for further findings pertaining to Camacho's claims of ineffective assistance of counsel in connection with plea negotiations, but deny relief on the remaining claims.

¶2 Camacho contended in his Rule 32 petition that the Maricopa County Sheriff's Office (MCSO) jail visitation policies resulted in a violation of his Fourteenth and Sixth Amendment rights, including his right to access to the court system, because it seriously limited his right to counsel by severely restricting the time he could spend with his lawyer. He additionally argued defense counsel, of which there were three, had been ineffective in a variety of ways. Camacho contended that attorney James Harris had a conflict of interest, which left Camacho with essentially no representation at a settlement conference. Camacho also claimed attorney Steve Koestner's performance fell below prevailing

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professional norms with respect to Koestner's purported failure to communicate to him "whatever plea agreement was presented to [Camacho] because he did not have the factual tools to make an informed decision about a possible plea." And attorney Candice Shoemaker did not spend sufficient time with him because of the MCSO policy that limited inmate visitation and thus curtailed Camacho's ability to communicate effectively with his counsel, resulting in a violation of his Sixth Amendment rights.

¶3 In rejecting Camacho's claim that he was denied the effective assistance of counsel during plea negotiations, the trial court found there had been "no deficient performance from counsel . . . because the State never offered a formal plea offer." The court rejected Camacho's other claims as well. In his petition for review, Camacho essentially reasserts the claims he raised in the trial court, asserting the court abused its discretion in denying relief.

¶4 We will not disturb a trial court's ruling on a petition for post-conviction relief unless it clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Although we defer to the trial court with respect to any findings of fact that are the bases for its ruling, *see State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997, 1019 (2000); *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988), we will not uphold the ruling if the factual findings "are clearly erroneous," *State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994). Based on the record before us, we conclude the state offered Camacho a plea that included a stipulated, twenty-one-year prison term and the trial court's finding to the contrary is clearly erroneous.

¶5 The record includes electronic mail ("email") exchanges between prosecutor Anthony Church and defense counsel Steve Koestner. Despite some equivocal language by Church in his April 19, 2007, email that he "may be able to offer" a plea, he stated that if Camacho were to accept the twenty-one-year prison term, "we're don[e]—if not it looks like trial." And although Church and Koestner testified no written plea agreement had been offered, and testified during portions of the evidentiary hearing that no actual offer was ever made, the email exchanges and other portions of their

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testimony belie that contention. In fact, it establishes a true offer was extended and rejected. Koestner stated in that email that despite the rejection, he would communicate the offer to Camacho even though Camacho previously had rejected the idea of any plea unless it included at the most a fifteen-year prison term.¹

¶6 In *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1408 (2012), the Supreme Court expressly held, “as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” The state’s offer here was sufficiently “formal” to trigger a duty by trial counsel to communicate to Camacho the offer the state had made. The court’s finding to the contrary that the state never made a formal offer and its legal conclusion that, consequently, counsel’s performance was not deficient, are not supported by the record. After considering the testimony at the evidentiary hearing and the record before it, the court must make additional factual findings and draw a legal conclusion in order to address Camacho’s claim of ineffective assistance of counsel. Those findings must include whether Koestner communicated the offer to Camacho and whether Camacho had rejected it. And if the court finds Koestner did not communicate this offer to Camacho, the court must determine whether Camacho was prejudiced by that failure. *See Frye*, 132 S. Ct. at 1410 (applying and determining the appropriate factors for

¹ Church testified, for example, “It looks like I extended – or I would have extended, if he had said he was interested, I would have extended a 21-year offer.” When the state asked, “So if Mr. Koestner would have said we’ll accept 21 years, you would have settled the case?” Church responded, “Based on this e-mail, yes, I believe that to be true.” Similarly, Koestner testified that, based on the email communications, other emails and notes in his file, his recollections of the case, and his common practice, Church had essentially offered a plea; Koestner conceded he had rejected this offer based on Camacho’s previous rejection of all but a fifteen-year-sentence, noting that according to the email he intended to communicate the offer to Camacho.

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determining prejudice portion of test established in *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel in plea negotiation context).

¶7 Camacho has not sustained his burden of establishing the trial court abused its discretion by denying relief on the other claims he raised in his petition for post-conviction relief. Based on the record before us, we have no basis for interfering with the court's rejection of those claims. The court stated at the beginning of the minute entry that it had considered the legal memoranda submitted in the post-conviction proceeding, oral argument, the record, and the applicable law in ruling on the petition. Because there is reasonable evidence in the record to support the court's findings of fact and conclusions of law on those claims, including the transcript from the evidentiary hearing, *see Berryman*, 178 Ariz. at 620, 875 P.2d at 853, we adopt the court's ruling on those claims, *see State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶8 For the reasons stated, we grant Camacho's petition for review and deny relief in part but remand this matter to the trial court for proceedings consistent with this decision.