IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT FRANKLIN,
Petitioner.

No. 2 CA-CR 2014-0401-PR
Filed January 16, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2010007666001DT
The Honorable Roger E. Brodman, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

The Nolan Law Firm, P.L.L.C., Mesa
By Cari McConeghy Nolan
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Pursuant to a plea agreement, petitioner Robert Franklin was convicted of endangerment, aggravated assault, and two counts of depositing explosives arising from a series of arsons, explosions, and criminal damage in Franklin's neighborhood in 2008 and 2009. The trial court imposed consecutive prison terms totaling 10.5 years, to be followed by a four-year term of probation. Franklin filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming trial counsel had been ineffective and there was an insufficient factual basis to support the plea. The court summarily dismissed the petition and this petition for review, in which Franklin asks that his guilty plea be vacated or that we remand for an evidentiary hearing, followed. We will not disturb the court's ruling unless it clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).[1] We find no such abuse here.

¶2 Franklin appeared at a settlement conference with trial counsel in April 2011, during which the parties discussed the nature of the charges and the evidence supporting them, the pending plea agreement, and the potential sentencing range of seventy-three to

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[1]As part of the challenge to the validity of his guilty pleas in his Rule 32 petition, Franklin "incorporated . . . by . . . reference" his motion to withdraw his pleas asserting the trial court had erred in denying that motion. Like the ruling on a petition for post-conviction relief, we review the trial court's denial of a motion to withdraw a plea for an abuse of discretion. *State v. Anderson*, 147 Ariz. 346, 351, 710 P.2d 456, 461 (1985).

170 years in prison. Franklin initially agreed with trial counsel's recitation of the factual basis for the guilty pleas at the change-of-plea hearing in June 2011, but then stated "it didn't happen." After conferring with his attorney, Franklin again agreed with the factual basis for each of the four counts in the plea agreement, and specifically that the three dangerous offenses "involved the use of fireworks, which is a dangerous instrument." He also told the trial court he had read and understood the plea agreement; he had discussed it with his attorney, with whom he was satisfied; and, he had not been forced or threatened to accept the plea and understood he could not change his mind after doing so.

¶3 Two weeks after pleading guilty, however, Franklin retained a new attorney who subsequently filed a motion to withdraw from the plea agreement. In that motion, Franklin argued he had been pressured by the trial court and trial counsel to accept the plea agreement, his counsel had not provided a sufficient factual basis for the guilty pleas, and he should be allowed to withdraw from the plea agreement to correct a manifest injustice. *See* Ariz. R. Crim. P. 17.5 & cmt. (in its discretion, trial court "may allow withdrawal of a plea of guilty . . . when necessary to correct a manifest injustice," which includes denial of effective assistance of counsel). The court denied the motion and sentenced Franklin.

¶4 Franklin then filed his petition for post-conviction relief. In summarily denying relief, the trial court noted its prior ruling denying the motion to withdraw the plea, in which it had determined: Franklin had admitted he had used fireworks, "a deadly weapon or dangerous instrument, to place the victim in substantial risk of imminent death"; the record contained "ample evidence of the nature of the fireworks"; and, there was no evidence Franklin had been coerced to admit the factual basis or his guilt, but had instead experienced a "change of heart[, which] is not a basis to get out of a plea." *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) ("To mandate an evidentiary hearing, [a] defendant's challenge must consist of more than conclusory assertions and be supported by more than regret.").

¶5 In denying post-conviction relief, the trial court also found Franklin had failed to "specify what counsel failed to investigate [in regard to Franklin's claims of innocence] or how such an investigation would have been helpful to his defense," and characterized Franklin's argument in this regard as conclusory. *See id.* The court also characterized as speculative Franklin's claim that a polygraph test would have been helpful and rejected his contention that counsel had failed to create a defense strategy, noting that Franklin had failed to provide an affidavit[2] or other evidence supporting his arguments and concluding the evidence

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[2] The affidavit Franklin attached to his Rule 32 petition contained the following language:

> 6. Before and during my Change of Plea proceeding, I suffered from great anxiety concerning [trial counsel's] effort and performance on my behalf.
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> . . . .
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> 8. During the Change of Plea proceeding, I attempted to make clear my innocence to the underlying charges. However, [trial counsel] whispered to me words to the effect that I would receive [150] years in prison if I did not proceed with admitting guilt.
>
> . . . .
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> 10. I would never have considered entering a plea agreement in this case except for: 1) [trial counsel's] refusal to conduct a comprehensive defense investigation; 2) concession in open court that she failed to develop a cognizable trial strategy; and 3) threatened [sic] that I would receive [150] years in prison in the absence of entering the plea agreement.

against him was "overwhelming." As previously noted, the court also found Franklin had stated at the change-of-plea hearing that he was satisfied with his attorney and that no one had forced or threatened him to plead guilty to the charges.

¶6 On review, Franklin asserts the trial court abused its discretion in rejecting his claim that trial counsel was ineffective for failing to adequately investigate his claims of innocence and develop a defense strategy, and for coercing him to accept the plea by telling him he would be sentenced to 150 years in prison if he did not. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash,* 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). As the trial court correctly found, Franklin did not specify in his petition what investigative efforts counsel should have taken or what she would have discovered had she done so. This finding is further illustrated by Franklin's general statements on review that more extensive investigation could have yielded "beneficial evidence" or "myriad explanations of the evidence against him."[3]

[3]Additionally, Franklin provides for the first time on review specific examples of the investigative efforts counsel should have undertaken, and also challenges her failure to request a "deviation" from the original plea offer or to provide sufficient mitigating evidence at sentencing. Because these arguments were not raised below, we do not address them. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review should contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review"). Moreover, although Franklin criticizes trial counsel Linda Tivorsak's "incompetence [] or laziness" at sentencing, we note that Tivorsak did not represent him at that point in the proceeding.

¶7 Similarly, to the extent Franklin has raised a claim of actual innocence under Rule 32.1(h) based on trial counsel's alleged failure to conduct sufficient investigation or permit him to take a polygraph test, for all of the reasons previously stated, he has not sustained his burden of establishing the trial court abused its discretion in rejecting such a claim.

¶8 At the settlement conference held two months before Franklin pled guilty to the charges, trial counsel told the trial court that in light of the circumstantial evidence against Franklin, "trying to formulate a defense, even though obviously I will do the best job I can, is going to be somewhat more difficult." Franklin characterizes this statement as counsel having "told the court on the record that she had no strategy," and offers it as another example of counsel's deficient performance. However, as the court correctly found, trial counsel "was simply acknowledging that defending the claim against her client would be difficult, and she affirmed that she would 'do the best job I can.'" Noting that "[t]he case was difficult because evidence against Mr. Franklin was overwhelming," the court properly concluded Franklin had not made a colorable claim that counsel's comment had caused him prejudice and thus denied this claim of ineffective assistance. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (defendant must prove both prongs of *Strickland* test).

¶9 Franklin also argues trial counsel coerced him to plead guilty by telling him he would receive a 150-year sentence if he did not do so. However, as the trial court noted, it too had informed Franklin of "essentially the same information" at the settlement conference. And, to the extent Franklin argues trial counsel failed to inform him of his options, spent only "five . . . minutes" reviewing the plea agreement with him, and "confronted [him] with the plea moments before the court proceeding" (presumably referring to the change-of-plea hearing), the record belies his arguments. At the April 2011 settlement conference, which occurred two months before the change-of-plea hearing, a different judge, the state, and trial counsel discussed the plea agreement with Franklin. Moreover, notably absent from Franklin's affidavit is any reference to counsel having reviewed the plea with him for only five minutes or his

having received the plea "moments" before he accepted it.[4] And in direct contravention of his claim that he "suffered from great anxiety" concerning counsel's performance, Franklin expressly told the court he had not been coerced to accept the plea agreement and he was satisfied with his attorney. *See State v. Hamilton*, 142 Ariz. 91, 93, 688 P.2d 983, 985 (1984) (trial court had right to rely on statements and representations or assurances made to it at time of guilty plea).

¶10 Franklin also contends the plea had an insufficient factual basis and the trial court thus erred in denying his motion to withdraw his guilty pleas and in denying post-conviction relief on this ground. The factual basis for a plea is "established by 'strong evidence' of guilt and does not require a finding of guilt beyond a reasonable doubt." *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994), *quoting State v. Wallace*, 151 Ariz. 362, 365, 728 P.2d 232, 235 (1986). Franklin contends there was insufficient evidence the "fireworks" were a deadly weapon or dangerous instrument capable of placing the victims at risk for death or physical injury, rendering his factual basis insufficient. However, he admitted at the change-of-plea hearing that the fireworks he had used in committing the pled offenses were a "dangerous instrument" and that he had placed the victims "in reasonable apprehension of imminent physical injury."

¶11 In its ruling denying Franklin's post-conviction petition, the trial court not only adopted its earlier ruling denying the motion to withdraw the pleas, in which it expressly had denied these same challenges to the factual basis, but it also found "[e]ven if [Franklin's] in-court statements are viewed as inconclusive or ambiguous . . . a review of the extended record provided the Court with strong evidence of defendant's guilt." Because Franklin has not

[4] Although the trial court stated Franklin had "signed and initialed the plea well before" the change-of-plea hearing, the record suggests this occurred on the day of the hearing. Despite this apparent misstatement by the court, we find no abuse of discretion in its ruling.

persuaded us the court abused its discretion in denying his motion to withdraw the pleas, we conclude it did not abuse its discretion in denying post-conviction relief on the same grounds raised in that motion. We thus also conclude the court correctly found "nothing defective in the factual basis" and determined the "in-court statements are virtually conclusive evidence of voluntariness." *See Hamilton*, 142 Ariz. at 93, 688 P.2d at 985.

¶12 Therefore, we grant the petition for review but deny relief.