IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

EDUARDO MARTINEZ,
*Petitioner*.

No. 2 CA-CR 2014-0429-PR
Filed March 12, 2015

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Petition for Review from the Superior Court in Pima County
No. CR20121612001
The Honorable Richard S. Fields, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
*Counsel for Respondent*

Harold L. Higgins, P.C., Tucson
By Harold Higgins
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

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

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E S P I N O S A, Judge:

**¶1** Eduardo Martinez seeks review from the trial court's dismissal of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., arguing he is entitled to an evidentiary hearing. 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 find no such abuse here.

**¶2** Martinez was convicted after a jury trial of robbery and two counts of endangerment. The trial court sentenced him to concurrent, presumptive sentences, the longest of which is ten years. We affirmed in part and vacated in part Martinez's convictions and sentences on appeal.[1] *State v. Martinez*, No. 2 CA-CR 2013-0043 (memorandum decision filed Oct. 29, 2013). Martinez then filed a notice of and petition for post-conviction relief claiming, inter alia, that trial counsel had been ineffective in failing to ask for a Spanish interpreter, thereby violating his "right to be present in the courtroom at every stage of the trial."

**¶3** In its ruling dismissing the petition below, the trial court noted it had read Martinez's affidavit, in which he had averred

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[1] We vacated the criminal restitution order entered at sentencing, but affirmed Martinez's convictions and sentences in all other regards. *Martinez*, No. 2 CA-CR 2013-0043, ¶¶ 15-16.

he "understand[s] Spanish much better" than English, and because he did not have an interpreter, he is "certain [he] did not fully understand what was happening in court." The court also noted it had read the affidavit of Martinez's brother, who had attested Martinez's English "is not as good" as his own and that he "was . . . concerned that [Martinez] did not have an interpreter, because even [the brother] could not always understand what was being said [at trial] and what it meant."

**¶4** Relying on *State v. Natividad*, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974), the Rule 32 judge, who also had presided over the trial in this matter, concluded he was "in the best position to determine whether a defendant 'possesses the requisite degree of fluency in the English language so that his right to confront witnesses, right to cross-examine those witnesses and right to competent counsel will not be abridged.'" The court listed the following reasons, among others, for dismissing the petition: although Martinez had been provided with interpreters in other state and federal cases "at varying times," he "did not appear to need one" in this case; Martinez had interacted with pre-trial services, two attorneys who apparently did not speak Spanish, two divisions of the superior court, and had "fully participated" with the probation department in the preparation of his presentence report, and no one had "at any time, ever indicated the need for an interpreter"; as attested to in Martinez's affidavit, his own attorney had opined he did not need an interpreter; and, despite having directly addressed the court at hearings, including two instances when he had rejected plea agreements,[2] Martinez had never asked the court to provide an interpreter.

[2]The trial court referred to "two *Donald* records," *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), specifically citing the transcript of the November 2012 *Donald* hearing during which Martinez had "fully discussed his case with his English speaking attorney and because of those discussions, insisted that his attorney make an additional record regarding his reasons for rejecting that particular plea." In the absence of those transcripts, which are not part of the record before us, we assume they support the court's

**¶5** Martinez also attached the affidavit of criminal defense attorney Alicia Cata, who attested she is "fluent in Spanish" and it is her practice to request an interpreter for a client "whose first language was Spanish, or who indicated that he understood conversation[s] better in Spanish than in English," and that "it may be easier for a Spanish speaking attorney to make the judgment that the client needs an interpreter in court." The trial court noted that Cata "never mentions that Mr. Martinez was her client in 2006/2007 and concomitantly never comments on his proficiency" in English.

**¶6** The trial court ultimately concluded, "[c]onsidering [Martinez's] experience with the justice system and the procedural history of this case, this Court does not question [Martinez's] ability to understand the proceedings; he was present and a full participant." The court thus determined counsel was not ineffective "for not divining that [Martinez] might have benefitted from an interpreter when [Martinez], himself, did not request one[3] and appeared to have conducted himself, for all intents and purposes, with proficiency."

**¶7** On review, Martinez argues counsel was ineffective by failing to request an interpreter at trial, maintaining the trial court's

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ruling. *See State v. Vasko*, 193 Ariz. 142, ¶ 12, 971 P.2d 189, 192 (App. 1998).

[3]In his affidavit, Martinez states he "told the first lawyer that I needed an interpreter," and in his petition for review states, "[h]e asked his non-Spanish speaking attorney to request an interpreter for him." Even assuming Martinez made such a request, a fact the trial court may have overlooked, it is clear from the record that the court did not abuse its discretion by dismissing the petition. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will sustain trial court if "legally correct for any reason"); *cf. Natividad*, 111 Ariz. at 194, 526 P.2d at 733 ("defendant who passively observes in a state of complete incomprehension the complex wheels of justice grind on before him can hardly be said to have satisfied the classic definition of a waiver").

ruling "is contrary to all evidence presented in" his petition below and that it improperly relied on *Natividad*. *See id.* 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).

**¶8** Acknowledging that he did not always have an interpreter in his prior cases, Martinez nonetheless generally maintains that "he would have [had] a much better understanding of the proceedings" with an interpreter. We note that this case is readily distinguishable from *Natividad*, which Martinez relies on for the proposition that he is entitled to an evidentiary hearing. In *Natividad*, our supreme court remanded for such a hearing, in part, because the record was "barren of a reliable indication as to the defendant's ability to comprehend" or speak English. *See Natividad*, 111 Ariz. at 193, 526 P.2d at 732. In contrast, as the trial court noted, Martinez meaningfully participated in two *Donald* hearings.[4] *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). Importantly, the minute entry from the second of those hearings provides that not only did Martinez respond to questions about the plea, but he satisfied the court that he had "knowingly, intelligently and voluntarily reject[ed]" it. *See State v. Gourdin*, 156 Ariz. 337, 338-39, 751 P.2d 997, 998-99 (App. 1988) (appellant's contention he could not

[4]By way of further example of his proficiency in English, when the trial court asked Martinez at sentencing if he wanted to say anything, he responded as follows:

> Yeah, Your Honor. I just want to apologize to the victim here. That night I was on drugs that did bad stuff to me. I was, I know I was acting - - some parts I barely remember, but, since I've seen the video and everything, that wasn't really me. I[t] was some other person. I wouldn't act like that. I just want to apologize to the victim. That's it.

understand proceeding without interpreter undercut by participation in court and answering questions including whether he read, signed, and understood plea agreement).

**¶9** Moreover, the record before us does not suggest that at any point Martinez indicated in any way that he did not understand the proceedings. Additionally, having been provided or offered an interpreter in many of his prior cases, Martinez was aware of that option, yet he did not ask the trial court to appoint one when, according to him, his attorney had denied his request. And, also unlike *Natividad*, which was remanded for an evidentiary hearing in the absence of any "evidence in the record . . . to indicate the lower court made a finding" on Natividad's ability to understand English, the court did, in fact, make such a finding here. *Natividad*, 111 Ariz. at 194, 526 P.2d at 733.

**¶10** Accordingly, for all of the reasons set forth above, the trial court correctly concluded Martinez did not sustain a claim of ineffective assistance of counsel. *See State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983) (claimant bears burden of establishing ineffective assistance and "[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation"); *see also Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201 (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

**¶11** Although the petition for review is granted, relief is denied.