IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

PABLO NIEVES-RODRIGUEZ,
Petitioner.

No. 2 CA-CR 2015-0014-PR
Filed March 2, 2015

Petition for Review from the Superior Court in Yuma County
No. S1400CR200900046
The Honorable Lisa W. Bleich, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Jon R. Smith, Yuma County Attorney
By Charles Platt, Deputy County Attorney, Yuma
Counsel for Respondent

Pablo Nieves-Rodriguez, Florence
In Propria Persona

MEMORANDUM DECISION

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

H O W A R D, Judge:

¶1 Pablo Nieves-Rodriguez petitions for review of the trial court's denial of his amended petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

Background

¶2 Nieves-Rodriguez originally was charged with three counts of sexual conduct with a minor and one count of sexual abuse, all involving a thirteen-year old victim. Pursuant to a plea agreement, he was convicted of two counts of attempted sexual conduct with a minor, a dangerous crime against children. The trial court sentenced him to a presumptive, ten-year prison term for one count, as stipulated in the plea agreement, to be followed by lifetime intensive probation for the second count.

¶3 In his notice of post-conviction relief, Nieves-Rodriguez asserted claims of ineffective assistance of counsel, newly discovered evidence, and actual innocence.[1] *See* Ariz. R. Crim. P. 32.1(a), (e), (h). After appointed counsel notified the trial court that she had reviewed the file and found no colorable claims for post-conviction

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[1] Nieves-Rodriguez also asserted he was without fault in failing to timely file a notice of appeal or an of-right notice of post-conviction relief. *See* Ariz. R. Crim. P. 32.1(f). As a pleading defendant, he is not entitled to an appeal, *see* A.R.S. § 13-4033(B), and if his of-right notice was untimely, the trial court implicitly granted him leave to proceed with his of-right petition.

relief, Nieves-Rodriguez filed a pro se petition in which he alleged he had been "coerce[d] into confessing to a crime that he did not commit" and had been sentenced erroneously, pursuant to the terms of his plea agreement, for a dangerous crime against children. The trial court summarily dismissed the petition, but later permitted Nieves-Rodriguez to file an "amended" petition to develop claims of ineffective assistance of counsel.

¶4 In his amended petition, Nieves-Rodriguez alleged counsel had been ineffective in failing "to try to get him a plea of no contest" and in failing to request a mitigation hearing in order to persuade the trial court to impose less than the presumptive, ten-year prison term. According to Nieves-Rodriguez, had his attorney presented mitigating circumstances at a mitigation hearing, "no rational judge" would have "abide[d] to the stipulated sentence" and he would have been sentenced to the minimum term of five years in prison for attempted sexual conduct with a minor.

¶5 The trial court summarily dismissed the amended petition and denied Nieves-Rodriguez's motion for rehearing, finding he had not established a colorable claim of ineffective assistance of counsel. This petition for review followed.

Discussion

¶6 "We review for abuse of discretion the superior court's denial of post-conviction relief based on lack of a colorable claim." *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶7 To prevail on a claim of ineffective assistance of counsel, "a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *Id.* ¶ 21, *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A defendant establishes prejudice if []he can show a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶ 25, *quoting Strickland*, 466 U.S. at 694. "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective

assistance of counsel claim." *Id.* ¶ 21. In order to state a colorable claim and avoid summary dismissal, a defendant "'must raise some factors that demonstrate that the attorney's representation fell below the prevailing objective standards'" and "must offer evidence of a reasonable probability that but for counsel's unprofessional errors" the outcome of the challenged proceeding would have been different. *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995), *quoting State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985).

¶8 On review, Nieves-Rodriguez again claims that his attorney provided constitutionally deficient assistance and that, had counsel presented mitigating evidence at sentencing, it "would unquestionably have entitled the defendant to receive the minimum sentence instead of the presumptive [term]." He asks that we vacate the presumptive prison sentence imposed and order that he be resentenced to the minimum, five-year term.

¶9 In its response, the state maintains counsel could not be found deficient for failing to urge leniency at sentencing because, under the terms of the plea agreement, the trial court had no discretion to impose anything but the presumptive, ten-year prison term. But Nieves-Rodriguez relies on excerpts from his plea agreement to assert the court could have rejected the stipulated sentence. He quotes the plea agreement as stating the stipulated sentence was "not binding on the court" and as providing, "If the court decides to reject the plea agreement provisions regarding sentencing . . . the court is bound only by the sentencing limits set forth in paragraph one [for attempted sexual conduct with a minor] and the applicable statutes."

¶10 In selectively quoting language from his plea agreement, Nieves-Rodriguez omits material provisions about the consequences he would have faced had the trial court rejected the stipulated sentence. The agreement actually states, "If the court decides to reject the plea agreement provisions regarding sentencing, it must give both the state and the defendant an opportunity to withdraw from the plea agreement," and, "In case this plea agreement is withdrawn, all original charges will

automatically be reinstated." The agreement further provides that the court could have sentenced Nieves-Rodriguez differently for the lesser, amended charges in his plea agreement only if (1) the court had "reject[ed] the plea agreement provisions regarding sentencing" and (2) "neither the state nor the defendant elect[ed] to withdraw the plea agreement."

¶11 Nieves-Rodriguez was originally charged with three counts of sexual conduct with a minor and one count of sexual abuse. He has acknowledged that, were he convicted of these originally charged offenses, he would face a total prison term of between 41.5 and 88.5 years. Under the plea agreement, the state agreed to reduce those charges to two counts of attempted sexual conduct, in exchange for Nieves-Rodriguez's agreement to be sentenced to a presumptive, ten-year prison term on one count, followed by a term of probation for the second. Despite the clear language in his plea agreement and his statements to the court at his change-of-plea hearing, Nieves-Rodriguez now appears to argue he was entitled to retain the benefit of this bargain—the reduction of the charges against him—without being bound to the agreement's stipulated sentence.

¶12 We conclude Nieves-Rodriguez fails to state a colorable claim of prejudice resulting from his attorney's acts or omissions during plea proceedings, and the trial court did not abuse its discretion in summarily denying relief. Notwithstanding his conclusory assertion that, had his attorney argued differently at sentencing the court would have rejected the plea agreement's stipulated sentence, he offers no basis for finding a reasonable probability that this would have occurred. *See Borbon*, 146 Ariz. at 399, 706 P.2d at 725 (court not required "to conduct evidentiary hearings based on mere generalizations and unsubstantiated claims"); *see also State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶13 Further, as explained above, even had the trial court rejected the stipulated sentence, it could not have imposed a lesser term for the agreement's amended, reduced charges without the

state's acquiescence. Nothing in Nieves-Rodriguez's petition suggests a reasonable probability that—had counsel argued differently and caused the court to reject the stipulated sentence—the state then would have declined to exercise its rights to withdraw from the agreement and to reinstate the original charges.[2] *Cf. Missouri v. Frye*, ___ U.S. ___, ___, 132 S. Ct. 1399, 1409 (2012) (to establish *Strickland* prejudice from counsel's failure to convey plea offer, defendant must show "reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it").

Disposition

¶14 Nieves-Rodriguez has failed to establish the trial court abused its discretion in denying his petition for post-conviction relief. Accordingly, although we grant review, we deny relief.

[2]Similarly, Nieves-Rodriguez failed to show any reasonable probability that the state would have extended a plea offer for a "no contest" plea had his counsel pursued that issue, particularly in light of the requirement in the plea agreement that he "fully allocute" facts supporting his convictions.