

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RICHARD ALLAN ROTHAN,
Petitioner.

No. 2 CA-CR 2015-0103-PR
Filed May 7, 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NOT FOR PUBLICATION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. CR2009030736001SE

The Honorable Jeffrey Rueter, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Susan L. Luder, Deputy County Attorney, Phoenix
Counsel for Respondent

Janelle A. Mc Eachern, Chandler
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.

ESPINOSA, Judge:

¶1 Petitioner Richard Rothan 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). Rothan has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Rothan was convicted of failure to register as a sex offender. The trial court suspended the imposition of sentence and placed Rothan on a lifetime term of probation.

¶3 Rothan initiated a proceeding for post-conviction relief, arguing in his petition (1) his plea "was improperly accepted and sentence illegally imposed," (2) he had received ineffective assistance of counsel, (3) lifetime probation was unconstitutionally disproportionate, and (4) the sex offender registration requirement in his case was a violation of the rule against ex post facto laws. The trial court summarily denied relief.

¶4 On review, Rothan reasserts his claims and argues the trial court abused its discretion in dismissing them. He first contends there was an insufficient factual basis for his guilty plea, based on his statements that he did not understand he needed to register every ninety days as a transient. *See* A.R.S. § 13-3821(I).

¶5 At Rothan's change-of-plea hearing, his attorney provided the factual basis for his plea, which Rothan agreed was

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accurate. He explained that Rothan had been required to register as a sex offender, had registered in June 2009, at which time he was homeless, and failed to register within ninety days as was required of him based on his homeless status. Later at sentencing Rothan stated he had not understood the ninety-day requirement.

¶6 Rothan acknowledges that nothing in § 13-3824 requires the state to prove specific intent to violate the registration requirements. But he contends, without citation to supporting authority, that “the defendant still must know that he is required to” register. But even assuming *arguendo* Rothan were correct on that point, he was informed in writing of the requirement to register every ninety days when he registered in June 2009, and he initialed that provision in the document.

¶7 Rothan further maintains he “may be factually innocent of the charge” because he “registered his address and his sex offender status with the [Department of Motor Vehicles (DMV)] prior to” the date he was required to register as a transient with the sheriff. In his affidavit Rothan averred he had so registered, but provided no documentation of that claim. Indeed, the DMV records submitted by the state show no change of address between July 2009 and December 2009. Nor does Rothan cite any authority to support the contention that changing address with the DMV is sufficient to meet the requirements of A.R.S. §§ 13-3821 and 13-3822.

¶8 In support of his claim of ineffective assistance, Rothan argues his attorneys failed to investigate whether a “mental breakdown” had “impacted his memory and his ability to know that he was required to register every 90 days.” By pleading guilty, however, Rothan waived claims of ineffective assistance of counsel except those related to entry of the plea or to errors in sentencing. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993); *cf. State v. Phillips*, 139 Ariz. 327, 329, 678 P.2d 512, 514 (App. 1983) (objection to validity of sentence imposed not waived by guilty plea).

¶9 To the extent a defendant claims counsel was incompetent in failing to investigate evidence, he must establish that

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counsel's advice to plead guilty without having first investigated "rendered that advice outside the 'range of competence demanded of attorneys in criminal cases.'" *Tollett v. Henderson*, 411 U.S. 258, 266, 268 (1973), quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970). And, "[t]o establish prejudice in the context of a plea agreement, a defendant must show a reasonable probability that except for his lawyer's error he would not have waived his right to trial and entered a plea." *State v. Ysea*, 191 Ariz. 372, ¶ 17, 956 P.2d 499, 504 (1998). When "the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence," prejudice will depend on "the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea," which, "in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Under the circumstances described above, we cannot say the trial court abused its discretion in concluding Rothan has not met that standard here.

¶10 Rothan next contends his being placed on lifetime probation with "sex offender terms and treatment" is disproportionate to his offense and violates the Eighth Amendment's prohibition of cruel and unusual punishments. We have held, however, that "[p]robation is not punishment," *In re J.G.*, 196 Ariz. 91, ¶ 13, 993 P.2d 1055, 1058 (App. 1999), but an aspect of the suspension of imposition of a sentence, *Coy v. Fields*, 200 Ariz. 442, n.2, 27 P.3d 799, 800 n.2 (App. 2001). If probation is not a sentence or punishment, it is not subject to the Eighth Amendment prohibition. See *State v. Davis*, 206 Ariz. 377, ¶ 13, 79 P.3d 64, 68 (2006) (prohibition against cruel and unusual punishment applied to sentences of incarceration).

¶11 Finally, Rothan contends the registration requirement violates the rule against ex post facto laws as applied to him, asserting he "was not required to register at the time of his offense." As Rothan acknowledges, however, this court has concluded, albeit with some reservations, that sex offender registration is "a nonpunitive civil regulation for purposes of the Ex Post Facto Clause" and it therefore "do[es] not constitute [an] impermissible ex

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post facto law[]." *State v. Henry*, 224 Ariz. 164, ¶¶ 24, 26, 228 P.3d 900, 907, 908 (App. 2010).

¶12 For these reasons, although the petition for review is granted, relief is denied.