IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT P. CORONADO,
Petitioner.

No. 2 CA-CR 2015-0138-PR
Filed August 4, 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NOT FOR PUBLICATION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 Pima County
No. CR20124652002
The Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Harley Kurlander, Tucson
By Harley Kurlander
Counsel for Petitioner

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly[1] concurred.

H O W A R D, Judge:

¶1 Pursuant to a plea agreement, petitioner Robert Coronado was convicted of attempted possession of a narcotic drug for sale, with one historical prior felony conviction, and sentenced to the presumptive prison term of 6.5 years. In this petition for review, he challenges the trial court's order denying, without an evidentiary hearing, his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he claimed trial counsel had been ineffective during plea negotiations.

¶2 Coronado was charged with possession of a narcotic drug (cocaine) for sale, possession of marijuana, and possession of drug paraphernalia. The state alleged he had two historical prior felony convictions and committed the offenses while on probation. In December 2012, before the case was referred to a trial prosecutor and during what is referred to as the Case Evaluation Unit phase of the Pima County Attorney's Case Evaluation System (CES), the CES prosecutor offered Coronado a plea agreement through his court-appointed counsel that would have required him to plead guilty to possession of a narcotic drug, a class two felony, with no historical prior felony convictions and a sentencing range of the presumptive prison term of five years up to 12.5 years. At the case management conference at the end of January 2013, appointed counsel requested more time to confer with Coronado and the court set a status conference for early February. At the subsequent conference, appointed counsel informed the court Coronado had retained attorney Bobbi Berry to represent him; the status conference was continued to the end of the month. At the status conference two weeks later, Berry informed the court she had been retained by Coronado, reviewed the plea agreement the state had proposed, and

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

needed additional time to confer with Coronado. At the subsequent status conference on March 8, Berry again requested more time to confer with Coronado.

¶3 At the March 18 status conference, which Coronado attended, the prosecutor stated that if the case were to be set for a pretrial conference and assigned to a trial prosecutor, the CES plea offer would no longer be available to Coronado. In response, Berry stated, "Judge, what I'm willing to put on the record right now is that I've discussed that the plea is likely not to be available at the pretrial conference, but that's the probability, and he understands that. He's willing to take his chances." Coronado did not contradict this statement and the trial court set the case for a pretrial conference and hearing pursuant to *State v. Donald,* 198 Ariz. 406, 10 P.3d 1193 (App. 2000). By the next hearing, the state had removed the case from CES and the plea had been withdrawn.

¶4 Based on the record before us, it appears that Berry advised Coronado against accepting the CES plea offer, or any offer for that matter, until she received additional discovery, primarily chain-of-custody evidence relating to the drugs that were seized. Ultimately, Berry was not successful in securing a more favorable plea offer. The plea agreement she secured and Coronado accepted included a guilty plea to an amended count of attempted possession of a narcotic drug for sale, a class three felony, with one historical prior felony conviction and a sentencing range of the presumptive, 6.5-year term to an aggravated term of 16.25 years.

¶5 In his Rule 32 petition, Coronado argued and avowed in his attached affidavit that he had retained Berry because he was dissatisfied with the CES plea offer and wanted her to pursue a more favorable plea offer. He argued Berry had been ineffective during plea negotiations in failing to pursue and obtain a more favorable offer, the very purpose for which he had retained her. He alleged she had failed to explain to him the Pima County Attorney's Office (PCAO) policy with respect to the CES plea offers and caused the offer to be lost while she delayed accepting the CES plea and requested additional discovery.

¶6 In its ruling on the petition, the trial court reviewed the history of the case and identified the standards for evaluating claims of ineffective assistance of counsel in this context. The court concluded Coronado had established neither of the requisite elements of a colorable claim of ineffective assistance of counsel: deficient performance and resulting prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984) (claim of ineffective assistance of counsel requires showing that "counsel's [performance] fell below an objective standard of reasonableness" and that this deficiency prejudiced the defendant; must show reasonable probability that but for deficient performance, result would have been different); *see also Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1409 (2012) (applying *Strickland* test to plea context); *Donald,* 198 Ariz. 406, ¶¶ 14-17, 10 P.3d at 1200 (same). The court specified the factual findings upon which that conclusion was based, including the fact Coronado did not want the CES plea offer and had hired Berry for the purpose of trying to negotiate one that was more favorable. That she failed, the court found, did not establish her performance was deficient. And, the court concluded, Coronado's own affidavit negated a finding of resulting prejudice.

¶7 In his petition for review, Coronado argues the trial court erred in a variety of respects. But we are not persuaded. Rather, the record before us supports the court's factual findings and the applicable law supports the court's conclusion that Coronado did not raise a colorable claim for relief and we see no purpose in restating the ruling here in its entirety. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We note in particular that Coronado asserts on review that Berry's performance was deficient because it had been unreasonable for her to have waited for additional discovery before advising Coronado to accept any plea offer, by which time the CES plea offer had been revoked. Yet he provided no support for that assertion, such as an affidavit from an experienced defense attorney. *See* Ariz. R. Crim. P. 32.5. That the prosecutor did not believe it was necessary for Berry to obtain this discovery in order to evaluate the CES or any plea did not establish Berry's performance fell below prevailing professional norms.

¶8 Additionally, the record belies Coronado's contention that Berry did not try to secure for him a more favorable plea. And

although Coronado insists Berry did not explain to him the PCAO policy of revoking a CES plea offer at a certain point and not offering a similar or more favorable plea thereafter, the record supports the trial court's finding that Coronado did not raise a material factual question in this regard that would have warranted an evidentiary hearing. As we noted above, Coronado attended the status conference during which Berry stated she had discussed with Coronado that the CES plea offer probably would no longer be available once the case was set for a pretrial conference. Additionally, even assuming as true certain of Coronado's criticisms of the trial court's ruling as inaccurate, such as its characterization of the CES as a "purported" rather than an established PCAO policy, any such flaws do not render the ultimate ruling incorrect.

¶9 Coronado has not sustained his burden of establishing the court abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007) (defendant bears burden of demonstrating trial court clearly abused its discretion). We therefore grant the petition for review but deny relief.