

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CLIFF ST. BRICE,
Petitioner.

No. 2 CA-CR 2015-0192-PR
Filed July 8, 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NOT FOR PUBLICATION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. CR2009030268001SE

The Honorable Warren J. Granville, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Karen Kemper, Deputy County Attorney, Phoenix
Counsel for Respondent

Cliff St. Brice, Kingman
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly¹ concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Cliff St. Brice seeks review of the trial court’s order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged he had received ineffective assistance of trial counsel. “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). We find no such abuse here.

¶2 After a jury trial, St. Brice was convicted of conspiracy to commit sale or transportation of marijuana, six counts of sale or transportation of marijuana, possession of marijuana for sale, misconduct involving weapons, and possession of drug paraphernalia. The trial court imposed concurrent, presumptive sentences on all but the weapons-misconduct count, for which it imposed a consecutive, mitigated sentence, totaling 9.25 years. We affirmed St. Brice’s convictions and sentences on appeal. *State v. St. Brice*, No. 1 CA-CR 11-0183 (memorandum decision filed May 8, 2012).

¶3 In his Rule 32 petition, St. Brice asserted trial counsel had been ineffective in failing to: (1) render accurate advice during plea negotiations by suggesting he reject the state’s 3.5-year plea offer and telling him the maximum sentence he could receive at trial was five years, advice he relied upon; (2) object to the admission of evidence regarding his codefendant; (3) move to suppress evidence

¹The 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.

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of weapons discovered during a search of his bedroom; (4) present adequate mitigating factors at sentencing; and, (5) explain to St. Brice and the trial court that the weapons offense was dangerous.

¶4 In its ruling summarily dismissing St. Brice's claims,² the trial court articulated the correct legal standard for determining whether a defendant has raised a colorable claim of ineffective assistance of counsel. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (to establish colorable claim of ineffective assistance, defendant must show counsel's performance fell below objectively reasonable standards and outcome of case would have been different but for deficient performance), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 On review, St. Brice essentially reasserts the claims he raised in his Rule 32 petition³ and maintains he is entitled to an evidentiary hearing.⁴ St. Brice has not sustained his burden of establishing the trial court abused its discretion in finding he had failed to raise colorable claims for relief. *See State v. Fillmore*, 187

² Although St. Brice outlined only four claims in the introduction to his Rule 32 petition, all of which the trial court addressed in its ruling, he also raised in his petition an additional claim of ineffective assistance of trial counsel related to the court's imposition of a consecutive sentence for the weapons offense, which the court did not address specifically.

³In its response to the petition for review, the state incorrectly contends St. Brice raises two issues for the first time on review, which it urges us not to address. Despite the state's claim, St. Brice argued below that trial counsel was ineffective by consenting to an "unschedule[d]" hearing pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). And, as to the other issue, that counsel had incorrectly stated that the weapons-misconduct offense was not dangerous, St. Brice also raised this claim in his petition below.

⁴St. Brice also asserts he is entitled to a new attorney, to have the original plea agreement reinstated, or, alternatively, to have his convictions vacated.

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Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996) (“[t]o avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel,” petitioner must raise colorable claim on both parts of *Strickland* test). The court’s description of the proceedings below are supported by the record, and it resolved St. Brice’s claims of ineffective assistance of trial counsel correctly in a thorough, well-reasoned minute entry, allowing this court, and any other in the future, to understand its resolution. See *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We therefore adopt the court’s ruling.

¶6 In addition, we note that St. Brice asserts the trial court abused its discretion by failing to conduct an evidentiary hearing, pointing to the affidavits of his fiancée and sister, “who have sworn under oath that they heard with their own ears, [trial counsel’s] advice, St. Brice could under no circumstances face a prison term of more than 5 years, even if he lost at trial.” However, his fiancée did not specifically attest she had heard anything firsthand, as St. Brice suggests. And, although his sister attested she had heard trial counsel make this representation, the court correctly concluded the transcript of the *Donald* hearing established that St. Brice “fully understood the State’s offer [of a 3.5-year sentence] and the scope of the risk of a trial,” which notably included the possibility of a 106-year prison term. Nor did St. Brice include an affidavit of trial counsel stating he had made such a representation. Additionally, despite St. Brice’s assertion that he would have accepted the plea offer if counsel had advised him properly, St. Brice’s (fourth) attorney told the court at sentencing St. Brice had “always maintained his innocence,” and he had not considered accepting a plea offer.

¶7 Whether a post-conviction claim warrants an evidentiary hearing “is, to some extent, a discretionary decision for the trial court.” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). We therefore review a court’s decision to deny an evidentiary hearing for an abuse of discretion. See *State v. Sanchez*, 200 Ariz. 163, ¶ 10, 24 P.3d 610, 613 (App. 2001). A “defendant is entitled to an evidentiary hearing only when he presents a colorable claim” for post-conviction relief, “one that, if the allegations are true,

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might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Here, in light of the significant evidence undermining St. Brice’s assertion that trial counsel misadvised him regarding the plea agreement, along with his failure to provide a supporting affidavit from an attorney suggesting counsel’s conduct was deficient, we cannot find the trial court abused its discretion by dismissing this claim without conducting an evidentiary hearing.

¶8 Finally, to the extent the trial court did not address specifically St. Brice’s claim that trial counsel was ineffective for misrepresenting the “dangerous” nature of the weapons offense, we find no abuse of discretion. As the state correctly argued in its response to the petition for review, “St. Brice misconstrues a legal allegation of dangerousness with a sentencing consideration that the presence of a weapon created a ‘separate danger’ and was subject to a consecutive sentence.” *See* A.R.S. § 13-711(A) (multiple sentences imposed at same time “shall run consecutively” unless court expressly directs otherwise).

¶9 And, St. Brice seems to have blended this argument with his claim that counsel did not present sufficient mitigating evidence at sentencing, a claim the trial court expressly addressed in its ruling. In any event, although the court did not address specifically St. Brice’s argument that counsel misrepresented the dangerous nature of the weapons offense, we cannot say it abused its discretion in implicitly rejecting it.

¶10 Accordingly, we grant St. Brice’s petition for review but deny relief.