

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STEPHEN VINCENT HAVERSTICK,
Petitioner.

No. 2 CA-CR 2016-0037-PR
Filed June 7, 2016

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NOT FOR PUBLICATION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. CR20094604001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

ESPINOSA, Judge:

¶1 Stephen Haverstick seeks review of the trial court's order denying, after an evidentiary hearing, his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Haverstick has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Haverstick was convicted of sexual conduct with a minor and child molestation. He was sentenced to life imprisonment without the possibility of release for thirty-five years for sexual conduct, consecutive to a seventeen-year prison term for child molestation. On appeal, we vacated a criminal restitution order imposed at sentencing, but otherwise affirmed his convictions and sentences. *State v. Haverstick*, No. 2 CA-CR 2012-0392 (memorandum decision filed Feb. 20, 2014). Haverstick then sought post-conviction relief, arguing his trial counsel had been ineffective by failing to advise him, in evaluating a plea offer from the state, that he would face a life term if convicted at trial and if the jury found the victim was twelve years of age or younger. The trial court denied relief after an evidentiary hearing. This petition for review followed.

¶3 "To prove ineffective assistance of trial counsel, a petitioner must show both deficient performance and prejudice." *State v. Donald*, 198 Ariz. 406, ¶ 15, 10 P.3d 1193, 1200 (App. 2000); *see Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant may show deficient performance during plea negotiations by proving counsel gave him erroneous advice or "failed to give information necessary to allow the [defendant] to make an informed decision

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whether to accept the plea.” *Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d at 1200. Under *Donald*, “[t]o establish prejudice in the rejection of the plea offer, a defendant must show ‘a reasonable probability that, absent his attorney’s deficient advice, he would have accepted the plea offer’ and declined to go forward to trial.” *Id.* ¶ 20, quoting *People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997).

¶4 Our review of the trial court’s factual findings on the claim addressed at the hearing “is limited to a determination of whether those findings are clearly erroneous”; we “view the facts in the light most favorable to sustaining the lower court’s ruling, and we must resolve all reasonable inferences against the defendant.” *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When “the trial court’s ruling is based on substantial evidence, this court will affirm.” *Id.* And, “[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence.” *Id.* The trial court is the sole arbiter of witness credibility. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988).

¶5 At sentencing, the state moved to amend and correct the presentence report to show a life term for sexual conduct with a minor. The report had indicated a sentencing range of thirteen to twenty-seven years for that offense. Haverstick’s counsel informed the court that he had “overlooked that when I went through the [report] with my client, but that’s something he and I talked about before.” At the evidentiary hearing held pursuant to Haverstick’s petition for post-conviction relief, counsel testified “[i]t was Mr. Haverstick’s decision to go to trial, not [his],” he had told Haverstick about the life term before trial, and, when advising his clients, he “start[s] with the worst case scenario.” Haverstick testified he did not remember being told he would receive a life sentence, but acknowledged he had significant memory problems. He had, however, signed an affidavit stating that counsel had not told him, at the time of the plea offer, “that if I was convicted of sexual conduct with a minor, and the jury found the minor was under the age of 12, that I would receive a mandatory sentence of 35 years to life.”

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¶6 The court found trial counsel's testimony should be afforded more weight, although it observed that Haverstick's memory issues were not "[his] fault [and] might just be the effect of his illnesses and what I'll refer to as potential for dementia." The court concluded Haverstick had not demonstrated counsel had fallen below prevailing professional norms or that he had been prejudiced.

¶7 On review, Haverstick contends the trial court abused its discretion by finding trial counsel more credible. His argument, taken as a whole, is nothing more than a request that we reweigh the evidence, something we will not do. *See Fritz*, 157 Ariz. at 141, 755 P.2d at 446. Haverstick characterizes trial counsel's testimony as "speculation," but that assertion ignores the record. Trial counsel not only avowed to the court at sentencing that he had discussed the potential life sentence with Haverstick, he testified at the evidentiary hearing that he had done so, consistent with his usual practice. There was ample evidence to support the court's conclusion that trial counsel had advised Haverstick about the life term.

¶8 Although we grant review, relief is denied.