

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALBERTO MARTINEZ,
Petitioner.

No. 2 CA-CR 2016-0233-PR
Filed December 21, 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NOT FOR PUBLICATION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
Nos. CR20131346001, CR20132045001, and CR20133818001
The Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Sherick & Bleier, PLLC, Tucson
By Steven P. Sherick
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Judge Staring and Judge Kelly¹ concurred.

ESPINOSA, Judge:

¶1 Alberto Martinez seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons that follow, we grant review but deny relief.²

¶2 Pursuant to a 2014 plea agreement, Martinez was convicted in three separate matters of theft of means of transportation, kidnapping, and aggravated assault on a corrections employee, and was sentenced to consecutive, maximum and presumptive prison terms totaling 15.5 years. In his petition for post-conviction relief, Martinez requested that the trial court conduct an evidentiary hearing and vacate his convictions and sentences, asserting he was denied due process because he was not competent when he pled guilty and was sentenced, and trial counsel was ineffective for failing to reinvestigate his competency and request an additional competency hearing.

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 our supreme court.

²In a response ordered by this court, the state agrees "it appears that Martinez did present a colorable claim," and that this matter should be remanded for an evidentiary hearing. For the reasons set forth in this decision, we disagree.

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¶3 Based on its review of the Rule 32 pleadings, the record, and the attached exhibits, the trial court summarily denied post-conviction relief. The court cited the following considerations in its ruling: two independent psychological evaluations conducted in January and February 2014 had concluded Martinez was competent to stand trial, the state and defense counsel had stipulated that the court could determine Martinez’s competency based on those reports, and one of the same evaluators had concluded in a separate report that Martinez was not insane at the time of the offenses. The court found that “the issue of competency and insanity were both brought to [its] attention and fully explored [and] trial counsel was effective,” and it specifically concluded that, in light of “the multiple hearings in which the Court was able to assess [Martinez’s] demeanor, and the colloquy between the Court and [Martinez],” a subsequent evaluation was not required.

¶4 On review, Martinez raises two arguments: 1) he was denied due process because he was not competent when he pled guilty and was sentenced; and 2) trial counsel was ineffective by failing to investigate his ongoing condition and request an additional competency examination. Martinez maintains the record shows his condition deteriorated in the six months between the trial court’s competency finding in March 2014 and the entry of his guilty plea in September 2014. He also asserts he is entitled to an evidentiary hearing.

¶5 Martinez attached as an exhibit to his petition for post-conviction relief the affidavit of Dr. Héctor Fernandez-Barillas, a clinical psychologist who examined Martinez ten days after sentencing³ and opined: Martinez was legally incompetent at the time of the examination; “more likely than not, Mr. Martinez, was

³ Martinez pled guilty on September 16, 2014, and was sentenced on October 20, 2014. Although Dr. Fernandez-Barillas’s affidavit indicates he examined Martinez on “October 30, 2015,” based on the record before us, it appears he meant 2014, rather than 2015.

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incompetent at the time of his change[-]of[-]plea and sentencing proceedings”; and Martinez “was likely unable to make a rational, voluntary, and knowing decision to plead guilty.” Martinez asserts that information in the jail medical records calls into question his competency. He also refers to exhibits attached to his Rule 32 petition, which included affidavits from family members questioning Martinez’s competency during the relevant time periods and a letter Martinez wrote to the court before sentencing.

¶6 “A criminal defendant is not competent to plead guilty if [his] mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and understand the nature of the consequences of his plea.” *State v. Rose*, 231 Ariz. 500, ¶ 26, 297 P.3d 906, 913 (2013), quoting *State v. Brewer*, 170 Ariz. 486, 495, 826 P.2d 783, 792 (1992) (alteration in *Rose*). A claim for relief is colorable, and a defendant is therefore entitled to an evidentiary hearing when the “allegations, if true, would have changed the verdict” or sentence. *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995). Here, nothing in the record indicates that the trial court erred by concluding that Martinez was capable of understanding the consequences of his plea and sentence.

¶7 When the trial court received Dr. Fernandez-Barillas’s affidavit, which it stated it had considered along with the other exhibits attached to the Rule 32 petition, it had already considered three other reports from mental health professionals. Those reports concluded Martinez was afflicted with schizophrenia or schizoaffective disorder, acknowledged his delusional behaviors, and noted that his mental illness is controlled in part by medication. Notably, in two of these reports, examiners found Martinez was able to understand the consequences of accepting a plea agreement. And, the record does not support Martinez’s argument that the court “ignored” evidence establishing that his condition had deteriorated from the time the reports were made until he pled guilty. Rather, the record shows that the court, which had presided over the entire matter and had observed Martinez throughout the proceedings, was aware of the relevant time frame, and had reviewed all of the exhibits. Based on this record, we will not second-guess the court’s ruling.

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¶8 Martinez also asserts the doctor who prepared the mitigation report was not retained to evaluate competency and did not review the jail medical records or speak with family members, thereby bringing into question the trial court's finding that "[m]ost notably, [the doctor who prepared the mitigation report] did not opine that [Martinez] did not seem competent or that he was insane at the time of any of his offenses." However, in the mitigation report, which was prepared shortly before sentencing, the evaluating doctor noted it had reviewed the jail reports, which referred to Martinez's paranoia, hallucinations and anger, and Martinez's self-reports, which were "consistent with a possible thought disorder/psychosis." Noting that the intent of his evaluation was "to determine the psychological state of [Martinez] and to offer expert opinion to assist the court," the evaluator concluded Martinez presented with "[s]chizophrenia, [m]ultiple [e]pisodes, in partial remission," and recommended that the court consider Martinez's "mental defect" at sentencing.

¶9 Moreover, defense counsel filed the mitigation report prior to sentencing, so the trial court necessarily knew generally about Martinez's jail behavior at sentencing.⁴ Because the court's ruling shows it fully considered all of the evidence presented in the Rule 32 petition, and because it concluded based on that evidence that Martinez had not made a colorable claim regarding his competency when he pled guilty and was sentenced, a conclusion supported by the record, we find the court did not abuse its discretion by summarily denying his petition.

¶10 As a "corresponding issue," Martinez argues trial counsel was ineffective by failing to investigate his ongoing decline and "renew the issue of competency" before he pled guilty and was sentenced. "To state a colorable claim of ineffective assistance of counsel," Martinez is required to "show both that counsel's

⁴At sentencing, the trial court stated it had "considered all of the mitigation argued . . . including family support and mental health issues that are significant."

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performance fell below objectively reasonable standards and that this deficiency prejudiced [him].” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate resulting prejudice, Martinez must show a reasonable probability that the outcome would have been different absent counsel’s ineffectiveness. *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). In light of our finding that Martinez’s due process rights were not violated, we necessarily conclude counsel was not ineffective for failing to request an additional competency evaluation.⁵ Martinez has demonstrated neither deficient performance nor prejudice. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶11 For all of the foregoing reasons, we grant review but deny relief.

⁵As the trial court accurately summarized in its ruling, trial counsel “did everything she could to investigate [Martinez’s] mental health issues and to use what was available in mitigation.” Those efforts included requesting Rule 11 and guilty except insane evaluations, retaining a doctor for a second opinion, and submitting a psychologist’s report documenting Martinez’s mental health issues and letters written by family members.