IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JORGE RAYMAUNDO FLORES,
Petitioner.

No. 2 CA-CR 2016-0234-PR
Filed January 12, 2017

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NOT FOR PUBLICATION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. CR20094628003
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Law Office of Paul S. Banales, Tucson
By Paul S. Banales
Counsel for Petitioner

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Jorge Flores seeks review of the trial court's denial following an evidentiary hearing 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 abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In September 2010, Flores moved for a hearing pursuant to Rule 11, Ariz. R. Crim. P., to determine his competency to stand trial. Based on psychologists' reports, the trial court determined he was not competent to stand trial and committed him to the Pima County Restoration to Competency Program (RTC). At a contested competency hearing in May 2011, the court found Flores had been restored and was competent to stand trial. At a hearing on Flores's motion to suppress, held in October 2011, the court also addressed defense counsel's request for a bench trial, after which Flores waived his right to a jury trial orally and in writing. In November 2011, before his trial began, Flores filed a motion for redetermination of competency based on the assessment of Dr. Stephen Greenspan, who concluded the RTC assessment was flawed. The court denied that motion.

¶3 Following a bench trial in November 2011, Flores was convicted of one count of burglary, six counts each of kidnapping, armed robbery, and aggravated assault, and two counts of aggravated assault of a peace officer. The trial court imposed presumptive and minimum, concurrent and consecutive sentences totaling 30.5 years of imprisonment. On appeal, we affirmed Flores's convictions and sentences and vacated the criminal

restitution order.[1] *State v. Flores,* No. 2 CA-CR 2012-0211, ¶ 8 (Ariz. App. Aug. 26, 2013) (mem. decision). Flores then initiated a post-conviction proceeding. Appointed counsel notified the court he was unable to find any "basis upon which to file a petition." The court, however, determined two of the claims of ineffective assistance raised in Flores's supplemental petition merited an evidentiary hearing; the court then appointed new Rule 32 counsel, who filed a supplemental petition and memorandum. In April 2016, the court conducted an evidentiary hearing to address claims of ineffective assistance of trial counsel, Alicia Cata.

¶4 On review, Flores argues Cata was ineffective by failing to request a separate hearing to determine his competency to waive his right to a jury and by failing to argue the trial court should have held such a hearing sua sponte. *See* Ariz. Const. art. II, §§ 23, 24. He also asserts Cata did not argue that a "higher level of competency is required" to waive a constitutional right, like waiver of a jury, than is required to stand trial. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 At the evidentiary hearing, Flores testified that Cata had not explained the function of a jury or how a bench trial worked before he had waived his right to a jury, and added that if he had understood these concepts, he would not have waived a jury trial. Flores nonetheless testified he had understood that waiving a jury would permit the judge to "understand more about" the "Rule 11 issues," meaning Flores's state of mind and the culpable mental states required to commit the charged offenses.

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[1]On appeal, Flores challenged the trial court's denial of his motion for redetermination of his competency, asserting Greenspan's report was "new evidence of his incompetence that required the court to grant a new hearing." *Flores,* No. 2 CA-CR 2012-0211, ¶¶ 5-6.

¶6 Cata testified that the restoration proceedings had been "faulty"; she did not believe Flores was competent to go to trial and she further understood that a person who is competent to stand trial may not be competent to waive a constitutional right; and, she "doubt[ed]" Flores understood the difference between a jury and a bench trial. And although Cata acknowledged that she had not asked for an additional hearing on Flores's competency to waive a jury or pointed out to the court its obligation to hold such a hearing, she nonetheless explained that because she "never really thought [Flores] was competent to go to trial[, t]hat's why [she] fought . . . the restoration proceedings." Cata also acknowledged that, based on Flores's mental health issues, she felt it was strategically better to try the case to the court rather than a jury.

¶7 At the conclusion of the evidentiary hearing, the trial court noted that although he did not "remember all of this," he "kn[e]w how [he] did [his] work," and stated that he had "presided over mental health court for three years." The court explained:

> You know, there is no question in my mind but that I considered all of the evaluations done by [Dr.] Barillas, by [Dr.] Streitfeld, by [Dr.] Greenspan. I considered the restoration of competency material. And I was satisfied that Mr. Flores was competent to proceed and competent to waive a jury trial and competent to elect not to testify.
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> So I didn't need to have a specific hearing. . . . And I don't think that Ms. Cata did anything that was below the community standard with regard to the competency issue, nor do I believe that the Court had any further obligation to look into that.
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> . . . .

> . . . You [defense counsel] can have your own opinion about the quality of the people who ran the restoration competency program. But they were all certified by the State of Arizona to do that kind of work. They did it. I reviewed it. And I considered it. And I ruled.
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> . . . .
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> The Court considered the credibility of the witnesses, the lack of memory, and the facts and circumstances that are important for the Court to consider all of the issues.
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> The Court finds that Ms. Cata's representation did not fall below the community standard, nor was the defendant prejudiced by her representation.

A defendant's waiver of his right to a jury trial must be knowing, voluntary, and intelligent. *State v. Innes*, 227 Ariz. 545, ¶ 5, 260 P.3d 1110, 1111 (App. 2011). The defendant must "manifest[] an intentional relinquishment or abandonment" of the right, *id.,* and must "understand that the facts of the case will be determined by a judge and not a jury," *State v. Conroy*, 168 Ariz. 373, 376, 814 P.2d 330, 333 (1991); *see also* A.R.S. § 13-3983; Ariz. R. Crim. P. 18.1(b).

¶8 Here, nothing in the record indicates the trial court erred by concluding Flores was competent to waive a jury and that Cata was not ineffective for having failed to request a separate hearing in this regard. At the October 2011 hearing, the court engaged in an extensive colloquy with Flores during which he personally explained to him his right to a jury trial, the difference between jury and bench trials, and the roles of juries, judges, and attorneys in these contexts. Flores avowed on the record and in writing that he preferred a bench rather than a jury trial, and the court found his waiver was knowing, intelligent, and voluntary.

Moreover, the trial court, which had presided over the entire matter and had observed Flores throughout the proceedings, implicitly reaffirmed in its Rule 32 ruling its previous finding that Flores's waiver of a jury was knowing, voluntary, and intelligent. Based on this record, we will not second-guess the court's ruling.

¶9 Relying on *Sieling v. Eyman*, 478 F.2d 211, 215 (9th Cir. 1973), Flores also argues Cata was ineffective by failing to inform the trial court that competency to waive a jury requires a higher standard than competency to stand trial.[2] Even if Arizona courts were to apply the heightened standard Flores urges us to apply, the court did not abuse its discretion by implicitly denying this claim. As previously noted, the court expressly stated that before it had determined Flores was competent to waive a jury trial, it had considered all of the information presented, including the reports prepared by the psychologists, the credibility of the witnesses and the results of the RTC review. And notably, prior to the evidentiary hearing, Flores presented the court with this very claim in his Rule 32 memorandum and the issue was specifically addressed at the hearing. Even under the heightened standard, based on the court's ruling denying Flores's petition, we can infer it would not have ruled differently even if Cata had raised this issue. Accordingly, because Flores has not established that he was prejudiced by Cata's conduct, we find no abuse of discretion. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (failure to satisfy either prong of *Strickland* test fatal to claim of ineffective assistance of counsel).

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[2]Although the Supreme Court expressly has rejected, as a constitutional requirement, the suggestion in *Sieling* that "two different competency standards" apply to defendants facing trial and those waiving their right to trial, "[s]tates are free to adopt competency standards that are more elaborate than the *Dusky* [*v. United States*, 362 U.S. 402 (1960)] formulation." *Godinez v. Moran*, 509 U.S. 389, 397, 402 (1993); *see also State v. Gunches*, 225 Ariz. 22, ¶¶ 9, 11, 234 P.3d 590, 592, 593 (2010) (recognizing, "[u]nder the Due Process Clause of the Fourteenth Amendment, the competency standard for waiving the right to counsel is the same as the competency standard for standing trial," and refusing to decide whether Arizona courts would apply heightened standard).

¶10 Therefore, we grant review and deny relief.