IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LUIS RANDULFO PARRADO,
Petitioner.

No. 2 CA-CR 2016-0300-PR
Filed January 25, 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NOT FOR PUBLICATION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. CR20130021002
The Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART AND DENIED IN PART

COUNSEL

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

MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 Luis Parrado seeks review of the trial court's orders denying his petition for post-conviction relief and motion for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). For the reasons that follow, we grant review and partial relief and remand the case for an evidentiary hearing on Parrado's claim that his trial counsel failed to adequately advise him in regards to a plea offer by the state.

¶2 After a jury trial, Parrado was convicted of two counts each of kidnapping, armed robbery, aggravated robbery, aggravated assault, and possession of a narcotic drug, and one count each of first-degree burglary, kidnapping a minor under the age of fifteen, aggravated assault of a minor under the age of fifteen, and possession of drug paraphernalia. His convictions stemmed from his participation in a home invasion involving several victims, including a three-year-old child. Parrado was sentenced to concurrent and consecutive prison terms totaling 19.5 years. We affirmed his convictions and sentences on appeal. *State v. Parrado*, No. 2 CA-CR 2015-0075 (Ariz. App. Sept. 25, 2015) (mem. decision).

¶3 Parrado sought post-conviction relief, arguing his trial counsel had been ineffective in failing to: (1) challenge a pretrial identification procedure; (2) move to sever the drug and paraphernalia possession charges; and (3) provide adequate information for him to evaluate whether he should accept a plea

offer from the state, particularly in light of DNA[1] and fingerprint evidence linking him to the offenses. The court found Parrado had not shown resulting prejudice regarding the pretrial identification because of "substantial evidence of guilt . . . independent of the victim's identification," namely, the presence of one of the victim's blood on Parrado's hand and his fingerprint on the victims' television. The court also noted that counsel's decision not to seek severance of the drug-related charges was tactical in nature, because his possession of drugs and paraphernalia "provide[d] a motive" for him to have fled from police "outside of participation in a home invasion." Additionally, the court concluded Parrado had not "establish[ed] by a preponderance of the evidence" that he had the opportunity to accept the state's plea offer before the state revoked it or that there was a "reasonable probability that the end result of the criminal process would have been more favorable" because the "total sentence" imposed after trial was not "substantially longer or harsher" than could have been imposed under the plea. This petition for review followed the court's denial of Parrado's subsequent motion for rehearing.

¶4 On review, Parrado repeats his claims of ineffective assistance and asserts he is entitled to an evidentiary hearing. "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); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "To establish deficient performance, a defendant must show that his counsel's assistance was not reasonable under prevailing professional norms, 'considering all the circumstances.'" *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64, *quoting Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1088 (2014). "To establish prejudice, a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, *quoting Hinton*, ___ U.S. at ___, 134

[1]Deoxyribonucleic acid.

S. Ct. at 1089. In evaluating whether a claim is colorable and whether Parrado is thus entitled to an evidentiary hearing, we must assume the facts he has alleged are true. *See State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

¶5 We agree with the trial court that Parrado has not shown prejudice resulting from counsel's decision not to challenge the pretrial identification procedure. Although he asserts the presence of a victim's blood on his hand and his fingerprint on the victims' property is merely "circumstantial" evidence, it is in fact compelling evidence of his participation in the home invasion. He claims that, without the identification, trial counsel might have challenged that evidence, but he has not explained on what basis counsel might have done so. Thus, he has not shown a reasonable probability the result of his trial would have been different absent the identification testimony.[2] *See Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64.

¶6 We also reject Parrado's argument that trial counsel's decision not to seek severance cannot be fairly characterized as a reasoned, strategic decision. Whether to seek severance is a strategic decision to be made by counsel. *See State v. Flythe*, 219 Ariz. 117, ¶ 9, 193 P.3d 811, 814 (App. 2008). Indeed, we must presume counsel's decision "'falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting Strickland*, 466 U.S. at 689. Therefore, "disagreements about trial strategy will not support an ineffective assistance claim if 'the challenged conduct has some reasoned basis,' even if the tactics counsel adopts are unsuccessful." *Id.*, *quoting State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). The trial court identified a

[2] Citing *State v. Pedroza-Perez*, 240 Ariz. 114, 377 P.3d 311 (2016), Parrado asserts that, in evaluating prejudice, we must determine "counsel's error to have been harmless." That case does not address prejudice resulting from counsel's deficient conduct but instead discusses harmless error review on direct appeal. *See id.* ¶ 17. That standard is not implicated here.

reasoned basis for counsel's conduct; Parrado's claim of ineffective assistance therefore fails.

¶7 We agree with Parrado, however, that he is entitled to an evidentiary hearing on his claim that trial counsel failed to adequately advise him in regards to a plea offer from the state. Counsel has a duty to communicate not only the terms of a plea offer, but also its relative merits compared to a defendant's chances at trial. *State v. Donald*, 198 Ariz. 406, ¶ 9, 10 P.3d 1193, 1198 (App. 2000). Accordingly, "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to reject a plea bargain and proceed to trial." *Id.* ¶ 14.

¶8 To prevail on such a claim, a defendant must show counsel "either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea." *Id.* ¶ 16. Additionally, the defendant must prove there was a reasonable probability he or she would have accepted the plea absent counsel's deficient conduct. *Id.* ¶ 20. "A defendant may inferentially show prejudice by establishing a serious negative consequence, such as receipt of a substantially longer or harsher sentence than would have been imposed as a result of a plea." *Id.* ¶ 21. Or, a defendant might demonstrate that "the risks inherent in proceeding to trial so substantially outweighed the benefits of the plea that proceeding to trial was an unreasonable risk." *Id.*

¶9 The state made several plea offers to Parrado. He apparently rejected the first offer. A second offer, made in February 2014, proposed that Parrado would plead guilty to armed robbery and face a sentencing range of 10.5 to twenty-one years.[3] Parrado acknowledged he had been advised of that plea offer, but avowed his trial counsel had not "explain[ed] all the evidence the State was

[3]An additional plea offer was sent to counsel but included an incorrect sentencing range. Parrado stated that offer was "not the subject of" his petition for post-conviction relief.

going to use against me, or my chances of winning my case at trial," specifically referring to the fingerprint and DNA evidence. He asserted that, had she done so, he would have accepted the February plea offer.

¶10 There is no question that the existence of the DNA and fingerprint evidence would be crucial in evaluating Parrado's chance of prevailing at trial and, thus, crucial in evaluating whether to accept a plea offer. The trial court denied relief, however, in part because Parrado had not "establish[ed] by a preponderance of the evidence" that he had the opportunity to accept the state's plea offer before the state had revoked it. But, to obtain an evidentiary hearing, Parrado need only establish that his assertions, if taken as true, would entitle him to relief. *See Watton*, 164 Ariz. at 328, 793 P.2d at 85. Parrado claimed he had been informed of the state's plea offer and would have accepted it had he been properly advised. That claim implicitly means he had an opportunity to accept the plea offer. Although the state asserted the plea had been revoked "well before August 14, 2014," it did not specify when the revocation had occurred, nor did it provide any supporting evidence. In any event, nothing about the state's assertion suggests Parrado had no opportunity to accept the state's plea offer before it was revoked.[4]

¶11 The trial court also denied relief on the basis that Parrado's aggregate prison term was less than the maximum term available under the plea. Thus, the court concluded, Parrado had not shown prejudice. But the court's conclusion ignores that Parrado was convicted of fourteen offenses following a jury trial, instead of the single offense contemplated by the plea offer. And the court's reasoning assumes, without a clear basis, that Parrado would have received the maximum sentence available under the plea

[4]A failure by counsel to advise Parrado of the plea agreement before its revocation would support a claim of ineffective assistance. *See Missouri v. Frye*, ___ U.S. ___, ___, 132 S. Ct. 1399, 1409 (2012) (rejection or lapse of a plea offer due to counsel's deficient performance is a cognizable claim of ineffective assistance of counsel).

agreement. Notably, in sentencing Parrado after a jury trial, the court imposed only presumptive sentences despite considering several aggravating factors. Thus, had Parrado accepted the plea, it is reasonably likely he would have received a presumptive sentence of only 10.5 years under the plea, rather than the 19.5-year prison term imposed after trial.[5] *See Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201.

¶12 Based on the foregoing, we conclude the trial court erred by summarily rejecting Parrado's claim that he did not accept the state's plea offer because of counsel's inadequate advice. Accordingly, we grant relief on that claim and remand the case for an evidentiary hearing.[6] We otherwise deny relief.

[5]Based on the sentencing range provided, it appears the plea agreement called for Parrado to be sentenced as a first-time, dangerous offender under § 13-704(A). Following his convictions, he was apparently sentenced as a repetitive offender pursuant to § 13-703(J).

[6]Our resolution and remand of this issue does not suggest any particular outcome in addressing the issue's merits.