IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SHANE MICHAEL LAKE,
Petitioner.

No. 2 CA-CR 2016-0358-PR
Filed February 21, 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NOT FOR PUBLICATION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. CR20121147001
The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART AND DENIED IN PART

COUNSEL

Dean Brault, Pima County Legal Defender
By Joy Athena, Assistant Legal Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Petitioner Shane Lake seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "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). The state has not filed a response to the petition. Because we conclude Lake has stated a colorable claim of ineffective assistance of counsel, we grant relief in part.

¶2 After a jury trial, Lake was convicted of dangerous or deadly assault by a prisoner. The trial court sentenced him to an enhanced, maximum prison term of twenty-eight years. This court affirmed his conviction and sentence on appeal. *State v. Lake*, No. 2 CA-CR 2014-0447 (Ariz. App. Nov. 2, 2015) (mem. decision).

¶3 Lake thereafter sought post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel in relation to his rejection of an offered plea agreement. He further asserts counsel was ineffective in failing to present mitigation evidence at sentencing. The trial court summarily denied relief.

¶4 On review, Lake again contends he received ineffective assistance of counsel and argues the trial court abused its discretion in denying relief without an evidentiary hearing. As below, he first argues counsel was ineffective in failing to advise him he would face a flat-time sentence were he convicted under A.R.S. § 13-1206. And he contends had he known a flat-time sentence was mandatory he would have accepted the state's plea offer.

¶5 "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); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant's rejection of a favorable plea offer due to counsel's failure to give accurate advice about the relative merits and risks of the offer compared to going to trial is a cognizable claim of ineffective assistance. *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000). To establish prejudice in that context, a "defendant[] must demonstrate a reasonable probability [he or she] would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri v. Frye*, 566 U.S. 133, 147 (2012).

¶6 At the pretrial conference, the prosecutor explained that if Lake went to trial, "the minimum is going to be [a] mandatory prison term of 10 ½ years, with a maximum prison term of 35 years." The plea offered at that point was for "mandatory prison ranging from 5 years to 15 years." The trial court repeated these explanations, and Lake indicated he understood but wanted to proceed to trial.

¶7 At a later hearing, the state indicated it was offering a plea agreement with a range of seven to thirteen years, while if convicted at trial Lake would face "10.5 to 35." The trial court discussed the matter with Lake, stating "Your sentencing range would be in the Department of Corrections not less than 10 and one-half years, not more than 35 years, or anywhere between 10 and a half and 35 years."

¶8 Later, at a settlement conference, the trial court discussed a request Lake had made relating to the conditions of his incarceration and indicated no such promises could be made. Lake stated, "It would probably be best for me to then take the trial, because it's a death sentence to me either way it goes. I mean, whether it's six months in jail or 20 years, it makes no difference to me because they're going to kill me in prison." At no point in the

record before us was the question of Lake's eligibility for earned-release credit discussed with him.

¶9 In an affidavit filed with his petition for post-conviction relief, Lake averred he did not "recall any of [his] attorneys explaining" to him that his conviction would require that the sentence would be "a flat-time sentence." And, he averred, "had I known that I would be required to serve any sentence imposed as flat-time upon conviction at trial, I would have accepted the state's plea offer." In evaluating whether Lake had raised a colorable claim and was thus entitled to an evidentiary hearing, the trial court was required to treat the assertions he made in his affidavit as true. *See State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004).

¶10 The trial court, however, discounted Lake's averments, stating there was "no basis" for his contention because he was informed of the prison time he would face if he proceeded to trial and the offered plea agreements. Additionally, the court observed that even if Lake believed he was eligible for early release after eighty-five percent of his sentence had been served, he was informed that he could be required to serve up to 29.75 years. The court reasoned that because the actual sentence was 28 years, the argument regarding flat time was of "no consequence."

¶11 Nothing in the record conflicts with Lake's assertion that he was unaware of the flat-time requirement. And, as was the case in *Donald*, an attorney's failure to advise a defendant as to early-release eligibility can serve as the basis for a claim of ineffective assistance of counsel. 198 Ariz. 406, ¶¶ 16, 22, 10 P.3d at 1200, 1201. As we pointed out in that case, evidence to support a claim of prejudice in this context "will quite understandably be sparse." *Id.* ¶ 21, *quoting Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991). Lake's affidavit and the lack of discussion of release eligibility on the record creates a fact issue that the court can only address in an evidentiary hearing. Moreover, the difference between the minimum prison term Lake faced if subject to early release is just as important as the maximum time he could be required to serve. Because the flat time sentencing range is significantly different from

the eighty-five percent range, we conclude he raised a colorable claim and was entitled to an evidentiary hearing on this claim.

¶12 Lake also repeats his remaining claims of ineffective assistance of counsel in relation to sentencing on review, but the trial court clearly and correctly addressed those claims in its minute entry. We therefore adopt the remainder of its ruling. *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶13 For the reasons above, we grant the petition for review and grant relief in part.