

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN PATRICK KELLY,
Petitioner.

No. 2 CA-CR 2017-0022-PR
Filed April 5, 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NOT FOR PUBLICATION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 Gila County
No. S0400CR20080005
The Honorable Timothy M. Wright, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Petitioner

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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 John Kelly seeks review of the trial court’s order, entered after an evidentiary hearing, denying 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. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Kelly has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Kelly was convicted of fraudulent schemes and artifices, theft, trafficking in stolen property, attempted theft, and three counts of criminal impersonation. The trial court imposed enhanced, concurrent, aggravated and presumptive prison terms, the longest of which were twenty-two years. This court affirmed his convictions and sentences on appeal. *State v. Kelly*, No. 2 CA-CR 2011-0003 (Ariz. App. Jan. 27, 2012) (mem. decision).

¶3 Kelly then sought post-conviction relief and appointed counsel—who had also represented him on appeal—filed a notice stating she had found no claims to raise in a Rule 32 proceeding. In his subsequent pro se proceeding, Kelly raised various claims of ineffective assistance of trial and appellate counsel including a claim trial counsel had failed to inform him of several plea offers.

¶4 The trial court summarily rejected several claims but determined an evidentiary hearing was warranted for others, and “reappointed” his previous counsel. After that hearing, counsel filed a supplemental brief asserting trial counsel had not informed Kelly of a plea offer dated January 27, 2009, that was set to expire on February 27; further, although counsel initially had difficulty locating Kelly, he had been informed by February 6 that Kelly was in the custody of the

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Maricopa County Sheriff's Office (MCSO) but still did not notify Kelly about the offer. The court concluded counsel had been ineffective in failing to notify Kelly of the plea offer, which the court described as "requiring a 9.25 year sentence." The court denied relief, however, determining Kelly had not shown prejudice because the state had "shown that it indeed would have withdrawn the plea offer due to [Kelly]'s charges then pending in Maricopa County," noting the January 27 plea offer "did not address or relate to any other then-pending charges."

¶5 Kelly sought review only of his claim of ineffective assistance of trial counsel related to the plea offer. We declined to address the issue, noting that Kelly was entitled to different counsel in his Rule 32 proceeding than the attorney who had represented him on appeal. Thus, we granted the petition for review and granted relief, remanding the "matter to the trial court for appointment of new Rule 32 counsel and for further proceedings." *State v. Kelly*, No. 2 CA-CR 2015-0046-PR, ¶ 6 (Ariz. App. June 15, 2015) (mem. decision).

¶6 On remand, the trial court appointed new counsel, who filed a petition for post-conviction relief again asserting that Kelly's trial counsel had been ineffective in failing to inform Kelly of the January plea offer calling for a 9.25-year prison term. Kelly argued "no actual testimony" supported the court's conclusion the state would have withdrawn the plea, and asserted, because the state knew Kelly was in the custody of the MCSO, the "state had to have known that [Kelly] had pending charges in Maricopa County." Thus, Kelly concluded, the state knew of his pending charges when it offered the plea in January. He also asserted the plea was withdrawn in May 2009 not due to Kelly's other pending charges, but in accordance with office policy because Kelly had requested the case be set for trial.

¶7 After a second evidentiary hearing, the trial court again denied relief. The court found the state had made a plea offer in January 2009 "with a range of 9.5 to 12 years" that did not address charges from any other county and "therefore would have been consecutive to any other matters." The court stated it "was not provided with any credible evidence" demonstrating whether Kelly had been apprised of that plea offer. It also found that, in May 2009,

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Kelly had rejected a plea offer that “contemplated 15.75 years on the Gila County charges, concurrent to the Maricopa County time,” resulting in a “net of 3.75” years considering the twelve-year prison term imposed in the Maricopa County case. The court concluded that, because Kelly had rejected the “best offer made to [him] during the duration of th[e] case,” Kelly was not entitled to relief. This petition for review followed.

¶8 To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). An attorney’s representation may be found constitutionally deficient if he fails to timely communicate a formal plea offer to his client, *Missouri v. Frye*, 566 U.S. 133, 147 (2012); provides his client with erroneous plea advice; or, fails to provide “information necessary to allow [him] to make an informed decision whether to accept the plea,” *State v. Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d 1193, 1200 (App. 2000). To establish prejudice in this context, a defendant must show a reasonable probability that, absent his attorney’s deficient conduct, he would have accepted the plea offer. *Id.* ¶ 20.

¶9 On review, Kelly asserts the trial court erred in rejecting his claim of ineffective assistance of counsel because it incorrectly found he had rejected “[t]he 15.75 concurrent plea offer,” in May 2009. Kelly maintains that offer had not been extended until 2010.¹ We

¹Kelly also suggests counsel was ineffective in failing to explain that plea. It appears, however, that Kelly rejected a plea in February 2010 only after a hearing held pursuant to *Donald*. In any event, Kelly did not assert this claim in his new petition below, and we therefore do not address it further. See Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App.

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agree with Kelly that the record does not support the court's finding that he rejected a plea agreement calling for a 15.75-year prison term in May 2009. This error, however, does not vitiate the court's conclusion that Kelly is not entitled to relief.

¶10 The plea offered January 27, 2009, would have required Kelly to plead guilty to fraudulent schemes and artifices with "one prior felony" and first-degree trafficking in stolen property. The sentencing range for the fraudulent schemes offense was 4.5 to twenty-three years, with a presumptive term of 9.25 years. *See* A.R.S. § 13-703(B), (I). The agreement provided that probation would be imposed for the second offense. The record shows, however, that the state offered an amended plea in March 2009. Although a copy of that plea does not appear in the record, an e-mail sent on May 11, 2009, from the prosecutor to Kelly's counsel states the plea offer in effect at that time called for "a 9.25 year presumptive term on the lead charge, with the other term concurrent." Nothing in the record indicates any other offers were extended before that date. More important, at a hearing held May 11, Kelly rejected the state's plea offer.

¶11 There does not appear to be any salient difference between the plea offered in January 2009 and the plea offered in March 2009. If anything, the January plea was more onerous because it imposed a probation tail that extended Kelly's period of monitoring and which could have resulted in additional incarceration if he violated probation. Kelly was informed about the more favorable March plea and rejected that plea in open court. Thus, even assuming counsel fell below prevailing professional norms by failing to advise Kelly of the January plea, he cannot show prejudice because he cannot show he would have accepted that plea in light of his rejection of a plea that would have resulted in the same aggregate prison term.

¶12 We grant review but deny relief.

1980) (appellate court will not consider on review claims not raised below).