IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

KENNETH STEVENSON,
Petitioner.

No. 2 CA-CR 2017-0070-PR
Filed June 14, 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NOT FOR PUBLICATION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 Yuma County
No. S1400CR201000916
The Honorable John N. Nelson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Jon R. Smith, Yuma County Attorney
By Chris Aaron Weede, Deputy County Attorney, Yuma
Counsel for Respondent

Yuma County Legal Defender, Yuma
By Terri Capozzi
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 Kenneth Stevenson seeks review of the trial court's order summarily dismissing 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). Stevenson has not met his burden of demonstrating such abuse here.

¶2 In 2010, Stevenson was indicted for fraudulent schemes and artifices and class three felony theft. Pursuant to a plea agreement, he pled guilty to class four felony theft. As part of the plea agreement, the parties stipulated that Stevenson "shall be sentenced to 36 months of probation" and must pay "restitution on all original counts of the indictment in an amount to be determined at a restitution hearing." The parties' stipulation was "subject to court approval" and the parties acknowledged it was "not binding on the court." The trial court, without objection, imposed a forty-eight-month probation term. And, after a hearing, the court ordered that Stevenson pay $397,002.01 to the victim of fraudulent scheme and artifice, but found the theft victims had "been made whole."

¶3 Stevenson sought post-conviction relief, arguing his guilty plea was involuntary because he was not advised of the amount of restitution he would have to pay, and there was an insufficient factual basis for his plea because the value of the stolen property exceeded the range for class four felony theft. He also asserted his trial counsel had been ineffective because he did not request withdrawal from the plea when the court imposed the forty-eight-month probation term and because counsel did not prepare

adequately for the restitution hearing, object to the amount of restitution, or "adequately cross-examine the [s]tate's witnesses."

¶4 The trial court summarily dismissed the petition. It concluded there was "absolutely no question" that Stevenson was aware of the amount of restitution he would be expected to pay due to "the nature of his ongoing fraudulent conduct" and the potential damages in a pending civil suit by the victim of the fraudulent scheme and artifice. And it rejected Stevenson's argument that the factual basis for his plea was insufficient because the value of the stolen property exceeded that required for theft to constitute a class four felony. Additionally, the court noted, Stevenson had initialed provisions in the written plea agreement notifying him of his right to withdraw from the plea if the court rejected the proposed thirty-six-month probation term. The court further found that, even had counsel advised Stevenson of his right to withdraw from the plea, Stevenson had not demonstrated that the increased probation term would have prompted him to do so. Finally, the court concluded Stevenson had not shown the amount of restitution would have been any less had counsel acted differently. This petition for review followed.

¶5 On review, Stevenson argues he presented colorable claims for relief and was entitled to an evidentiary hearing. A defendant is entitled to an evidentiary hearing only if he presents a colorable claim. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). "The relevant inquiry" to determine whether a defendant has stated a colorable claim "is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence." *State v. Kolmann*, 239 Ariz. 157, ¶ 8, 367 P.3d 61, 64 (2016), *quoting State v. Amaral*, 239 Ariz. 217, ¶ 11, 368 P.3d 925, 928 (2016). Thus, "[i]f the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal." *Id.*, *quoting Amaral*, 239 Ariz. 217, ¶ 11, 368 P.3d at 928. Insofar as Stevenson's claims are based on the ineffective assistance of trial counsel, he must show both that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced him. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶6 Stevenson asserts the trial court erred in concluding that he had adequate notice of the potential restitution amount due to his ongoing participation in the fraudulent scheme and artifice or due to the pending civil lawsuit. A defendant is entitled to a "thorough understanding" of the amount of restitution he could be required to pay as the result of entering a plea agreement. *State v. Crowder*, 155 Ariz. 477, 479, 747 P.2d 1176, 1178 (1987). Thus, because a defendant's decision to plead guilty must be knowing, voluntary, and intelligent, a defendant's plea may not be valid if he is not adequately informed of the amount of restitution he might owe. *See id.* But a defendant is entitled to withdraw from the plea only if the amount of restitution was material to his decision to plead guilty. *See id.* at 479-80, 747 P.2d at 1178-79. Additionally, "[w]hen the defendant claims his plea was unknowing and therefore involuntary, the question is not simply what the defendant was told in court but what he knew from any source." *Id.* at 479, 747 P.2d at 1178.

¶7 Stevenson contends, without citation to authority, that the trial court improperly determined he "was guilty of count one, fraudulent schemes," and "use[d] that behavior as proof [he] was aware of the amount of restitution, where that charge was dismissed pursuant to the plea offer." Stevenson ignores that the plea agreement unambiguously provided he would owe restitution for that count. He therefore cannot reasonably assert he was unaware he would owe restitution for the conduct alleged in that count. Nor does Stevenson assert in his affidavit that the potential restitution was material to his decision to plead guilty.

¶8 Additionally, Stevenson has not identified any evidence contradicting the trial court's finding that the civil proceeding gave him adequate notice of the potential restitution amount. He complains that his trial counsel, who also represented him in that civil proceeding, was incompetent in both proceedings. He does not, however, explain in his petition for review why that alleged incompetence led him to so misapprehend the amount of restitution he might owe that his plea was rendered involuntary. Nor is his conclusory statement in his affidavit that counsel had advised him "the facts would show" he would owe little or no restitution for

fraudulent scheme and artifice sufficient to create a colorable claim.[1] *State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995) (court may disregard "conclusory" affidavit "completely lacking in detail"); *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶9 Stevenson also repeats his claim that counsel was ineffective in failing to move for withdrawal from the plea when the trial court imposed a longer probation term than that provided in the plea agreement. A defendant is entitled to withdraw from a plea agreement "if the court has rejected a provision in the plea agreement regarding the sentence or the term and conditions of probation." *State ex rel. Polk v. Hancock*, 237 Ariz. 125, ¶ 14, 347 P.3d 142, 146 (2015); *see also* Ariz. R. Crim. P. 17.4(e), 17.5. But he does not address the court's conclusion he was aware of his right to withdraw from the plea in those circumstances. Nor does he assert that he informed counsel he wished to withdraw from the plea for that reason. Thus, Stevenson has identified no prejudice resulting from counsel's purported failure[2] to advise him of his right to withdraw from the plea. The court did not err in summarily rejecting this claim.

¶10 Stevenson also argues trial counsel failed to adequately investigate his case. To the extent he claims further investigation by

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[1]To the extent Stevenson repeats his claim that the factual basis for his plea was insufficient, he has not developed this argument in any meaningful way and we do not address it. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).

[2]Stevenson also claims ineffective assistance of counsel based on his trial attorney's mental and ethical problems. Although the latter factual assertions may be accurate, the argument does not contradict or undermine the trial court's conclusions that (1) Stevenson was aware of his rights under the plea agreement, and (2) the additional time on probation was de minimis when compared with the potential prison sentence confronting the seventy-four-year old defendant.

counsel would have caused him to reject the state's plea offer and proceed to trial, he did not raise this claim in his petition below, but instead alluded to this argument for the first time in his reply to the state's response. Thus, the trial court was not required to address that argument, and neither is this court. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 7-8, 221 P.3d 1052, 1054 (App. 2009) (trial court need not consider issues first raised in petitioner's reply); *see also* Ariz. R. Crim. P. 32.9(c) (permitting petition "for review of the actions of the trial court").

¶11 Insofar as Stevenson reasserts his argument that counsel failed to prepare for and conduct the restitution hearing, he does not adequately develop this claim. He argues counsel should have consulted with an expert or conducted further investigation, but he has not identified on review any relevant evidence such consultation and investigation would have uncovered, much less established it would have changed the result of the hearing. For this reason, Stevenson's reliance on *State v. Denz*, 232 Ariz. 441, ¶¶ 7, 11, 306 P.3d 98, 101, 102 (App. 2013) (failure to consult expert may not be strategic decision), is unavailing.[3] Thus, he has not established the trial court erred in rejecting this claim.

¶12 In a separate section of his petition for review, Stevenson argues he "was denied his constitutional rights to due process, competent counsel in the investigation, plea process, during sentencing and was also denied a fair hearing regarding restitution." He clarifies, however, that "these allegations of the denial of constitutional rights are not separate claims, but rather the constitutional and legal consequences of [his] claims of error." Because Stevenson has failed to establish the trial court erred in

[3]The petition for review copies a significant amount of text from *Denz* without attribution or even updating the Supreme Court citation. *Compare* Petition at 10, *with Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d at 102. Whether this occurred because of inattentive proofing or intentional copying, it does not well serve the argument. If intentional it likely violates the rules of professional conduct. *See In re Hamm*, 211 Ariz. 458, ¶ 39, 123 P.3d 652, 661 (2005), *citing* Ariz. R. Sup. Ct. 42, ER 8.4(c).

summarily rejecting those claims, we need not address his various constitutional arguments.

¶13 We grant review but deny relief.