IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SHAWN WAYNE HIDY,
Petitioner.

No. 2 CA-CR 2017-0101-PR
Filed September 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NOT FOR PUBLICATION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 Cochise County
No. S0200CR201400590
The Honorable John F. Kelliher Jr., Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Brian M. McIntyre, Cochise County Attorney
By Sara V. Ransom, Deputy County Attorney, Bisbee
Counsel for Respondent

Law Office of Joseph P. DiRoberto, Tucson
By Joseph P. DiRoberto
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Shawn Hidy seeks review of the trial court's order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Hidy has not met his burden of demonstrating such abuse here.

¶2 Hidy pled guilty to attempted sexual assault. The trial court sentenced him to the maximum prison term of seven years. It found as aggravating factors the emotional and physical harm he had caused the victim, his previous felony conviction, and a subsequent felony conviction. The court found as mitigating Hidy's "acceptance of responsibility by him taking the plea, sparing the victim the experience . . . of going through trial."

¶3 Hidy sought post-conviction relief, arguing his trial counsel was ineffective in failing to obtain and submit at sentencing a psychosexual evaluation that, he claimed, may have resulted in a lesser sentence.[1] With regards to prejudice, he asserted that, because the evaluation he obtained after sentencing suggested he was amenable to treatment and was a "low risk offender[]," the trial court

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[1] The sole evidence Hidy provided for his claim that trial counsel fell below prevailing norms was Rule 32 counsel's signed but unsworn "affidavit" asserting trial counsel's conduct "fell below the prevailing professional norms for criminal defense lawyers in Cochise County." We direct Rule 32 counsel to review Ethical Rule 3.7(a), Ariz. R. Sup. Ct. 42.

"may wish to explore a different approach to [his] sentencing based more on treatment options." The court summarily denied relief, concluding the "psycho-sexual evaluation, and respective counsels' perspectives thereon, does not alter the Court's original perception of the appropriate sentence for this Defendant" and it "would issue the same sentence to the Defendant today, after having read the psycho-sexual evaluation." This petition for review followed.

¶4 On review, Hidy argues the trial court erred by rejecting his claim of ineffective assistance of counsel "without an evidentiary hearing." A defendant is entitled to a hearing only if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would probably have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11, 368 P.3d 925, 927-28 (2016) (emphasis omitted). "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 demonstrate prejudice, Hidy must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64, *quoting Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1089 (2014). "In deciding an ineffectiveness claim, this court need not approach the inquiry in a specific order or address both prongs of the inquiry if the defendant makes an insufficient showing on one." *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶5 Hidy claims the trial court erred by concluding the psychosexual evaluation would not have altered its decision to impose a seven-year prison term. Citing comments made by the court at sentencing, he claims the psychosexual evaluation rebuts the court's belief that Hidy was a "stalker" or a "sociopath." Thus, he asserts, based on the evaluation, he should have received "a sentence of probation/intensive probation or at worst a presumptive prison term of 3.5 years."

¶6 Although Hidy contends he is entitled to an evidentiary hearing, he does not suggest the author of the evaluation would testify at that hearing or at any resentencing, or that any other evidence relevant to prejudice need be developed. His argument, as we understand it, is that, had counsel presented the evaluation at sentencing, the trial court would have been required to impose a lesser sentence. We disagree. Hidy's argument ignores the considerable discretion of a trial court in evaluating the appropriate sentence to impose. *See State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001); *see also State v. Vermuele*, 226 Ariz. 399, ¶¶ 15-16, 249 P.3d 1099, 1103 (App. 2011). The court here considered the evaluation in light of the facts of the case and concluded unequivocally that it would not alter Hidy's sentence. There is no suggestion in the record that the court was unaware of or failed to consider its previous comments at sentencing in reaching that determination.

¶7 And, even if we agreed with Hidy that the psychosexual evaluation contradicted the trial court's view of Hidy's conduct, the court was free to reject that evaluation. *See State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996). Nor has Hidy cited any authority suggesting that the court was required to place Hidy on probation instead of imposing a prison term simply because Hidy might have been amenable to treatment. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review). Moreover, the psychosexual report had little relation with the aggravating factors found by the court that resulted in Hidy's seven-year prison term. Thus, Hidy has not established that the court erred by concluding the psychosexual evaluation would not have altered his sentence and that he was thus not prejudiced by counsel's conduct.

¶8 We grant review but deny relief.