IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SEVERO A. TORRES,
Petitioner.

No. 2 CA-CR 2017-0182-PR
Filed September 12, 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NOT FOR PUBLICATION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. CR201200116
The Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Neal W. Bassett, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 Severo Torres 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). Torres has not met his burden of demonstrating such abuse here.

¶2 Torres waived his right to a jury trial and, based on evidence submitted to the trial court, was convicted of conspiracy, transportation of marijuana for sale, and possession of drug paraphernalia. He was sentenced to concurrent prison terms, the longest of which were twelve years, and we affirmed the convictions and sentences on appeal. *State v. Torres*, No. 2 CA-CR 2013-0363 (Ariz. App. Sept. 15, 2014) (mem. decision).

¶3 Torres sought post-conviction relief, arguing his appellate counsel was ineffective for failing to raise a claim pursuant to *State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980), that he was not properly advised of the potential sentence he could face before he agreed the trial court could determine his guilt based on submitted evidence. He further argued appellate counsel was ineffective for failing to argue his paraphernalia conviction should be vacated because "the paraphernalia at issue was not an item independent of the drug seized."

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

¶4 The trial court summarily dismissed Torres's petition. It noted Torres had been made aware of the potential sentencing range at a hearing held pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), and, thus, his claim based on *Avila* "has no merit." The court further determined that his conviction for paraphernalia was proper under Arizona law. This petition for review followed.

¶5 On review, Torres again asserts his appellate counsel was ineffective in failing to raise a claim pursuant to *Avila*.[2] "To state a colorable claim of ineffective assistance of counsel," Torres is required to "show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced [him]." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). We presume appellate counsel provided effective assistance but, "if counsel ignores issues that are clearly stronger than those selected for appeal, a defendant can overcome the presumption of effective assistance of counsel." *Id.* ¶ 22.

¶6 In *Avila*, our supreme court determined that a defendant submitting the issue of guilt or innocence to the trial court must be informed of waived rights, including the right to a jury trial, the right to counsel, and "[t]he right to know the range of sentence and special conditions of sentencing." 127 Ariz. at 24-25, 617 P.2d at 1140-41. And, "it must appear from the record that the waiver was knowingly, intelligently and voluntarily made." *Id.*

¶7 Torres acknowledges he was informed of the sentencing range at the *Donald* hearing. He argues, however, that because that hearing occurred nine months before he waived his right to a jury trial and submitted his case for decision, his previous advisement about

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[2]Torres does not assert the trial court erred in rejecting his claim regarding his paraphernalia conviction. We therefore do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "the reasons why the petition should be granted" and "specific references to the record"); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

his sentence did not comply with Rule 17.2, Ariz. R. Crim. P. That rule requires a trial court, "[b]efore accepting a plea of guilty or no contest," to "address the defendant personally in open court" to confirm the waiver of rights and "[t]he nature and range of possible sentence." According to Torres, the rule thus requires that the colloquy occur "*immediately*" before the court accepts a plea, and any defect in that colloquy is fatal.

¶8 Not only did Torres not raise this argument below, his interpretation finds no textual support in the statute and, in any event, is contrary to established law, including *Avila*. *See Avila*, 127 Ariz. at 25, 617 P.2d at 1141 (remanding case for evidentiary hearing to determine "whether respondent was aware, prior to submission, of the possible range of sentence" when defendant not advised of sentencing range in open court); *State v. Tiznado*, 112 Ariz. 156, 157, 540 P.2d 122, 123 (1975) (oral advisement unnecessary if entire record demonstrates "defendant made a knowing and voluntary waiver of his rights"); *State v. Darling*, 109 Ariz. 148, 153, 506 P.2d 1042, 1047 (1973) (remanding to superior court "to determine if, at the time of the plea of guilty, the defendant did in fact know of the two further rights [omitted from the colloquy] he was waiving"). Thus, Torres has demonstrated neither that competent counsel would have raised this claim nor that it would have entitled him to relief. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. The court therefore did not err in summarily rejecting his claim of ineffective assistance of appellate counsel.

¶9 Although we grant review, relief is denied.