IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LEE MICHAEL BEITMAN,
Petitioner.

No. 2 CA-CR 2017-0324-PR
Filed December 20, 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NOT FOR PUBLICATION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 Maricopa County
Nos. CR2001019200 and CR2002006119
The Honorable J. Justin McGuire, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By David R. Cole, Deputy County Attorney, Phoenix
Counsel for Respondent

The Law Offices of David Michael Cantor, Phoenix
By Omer Gurion
Counsel for Petitioner

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Lee Beitman seeks review of the trial court's orders summarily dismissing in two cause numbers his petitions for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Beitman has not demonstrated such abuse here.

¶2 In CR2001019200, Beitman pled guilty to attempted sexual conduct with a minor. The trial court suspended the imposition of sentence and placed Beitman on lifetime probation. In CR2002006119, he pled guilty to attempted sexual exploitation of a minor. The court again suspended the imposition of sentence and imposed lifetime probation.

¶3 In 2014, the state filed petitions to revoke Beitman's probation in both cause numbers.[1] After he admitted violating the terms of his probation, the trial court revoked probation and sentenced Beitman to a 3.5-year prison term in the 2001 matter, to be followed by a ten-year prison term in the 2002 case.

¶4 Beitman sought post-conviction relief in each cause number, and appointed counsel filed notices stating she had reviewed the record but found no colorable claims to raise. Beitman then retained counsel, who filed petitions claiming trial counsel had been ineffective. He argued counsel should have sought a change of judge for cause pursuant to Rule 10.1, Ariz. R. Crim. P., when he learned the trial court likely would not follow the state's recommendation to continue Beitman on probation for the 2002 offense. He also argued counsel should have objected to the court's apparent reliance on Beitman's efforts to learn to defeat a polygraph test in

[1] Since 2005, the state has filed numerous petitions to revoke Beitman's probation. The trial court continued Beitman on probation each time.

determining the appropriate sentence. The court summarily denied relief, and these petitions for review followed.[2]

¶5 On review, Beitman repeats his claims of ineffective assistance of counsel. To state a colorable claim of ineffective assistance, "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 (2006); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶6 We first address Beitman's claim that counsel should have moved for a change of judge for cause upon learning the trial court would not follow the state's recommendation.[3] Rule 10.1(a) permits a change of judge for cause only if "a fair and impartial hearing . . . cannot be had by reason of the interest or prejudice of the assigned judge." We presume trial courts are free of bias or prejudice. *State v. Granados*, 235 Ariz. 321, ¶ 14 (App. 2014). And, "[j]udicial bias or prejudice ordinarily must 'arise from an extrajudicial source and not from what the judge has done in his participation in the case.'" *Id.*, *quoting State v. Emanuel*, 159 Ariz. 464, 469 (App. 1989). "Thus, 'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.'" *Id.*, *quoting Liteky v. United States*, 510 U.S. 540, 555 (1994).

¶7 Beitman has cited no authority, and we find none, suggesting that a trial court's decision to disregard the state's disposition recommendation establishes, or even suggests, judicial bias. *Cf. State v. Moya*, 136 Ariz. 534, 537-38 (App. 1983) (fact that court imposed different sentence than that indicated by previous judge does not suggest bias). Thus, Beitman has not demonstrated any reason for counsel to have sought a change of judge for cause or any possibility such a motion would have been granted. *See Bennett*, 213 Ariz. 562, ¶ 21.

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[2]This court granted the state's motion to consolidate the petitions for review.

[3]Beitman provided an affidavit in which he asserted the trial court had, in an "off-the-record conversation" between counsel and the court, "reminded the State and Defense that he did not have to follow the State's recommendation." He further alleged the court's "tone of voice" made it "obvious that he intended to sentence [Beitman] to a harsher disposition."

¶8 Beitman next repeats his claim that counsel should have objected to the trial court's reference at sentencing to Beitman's efforts to learn to defeat a polygraph test. The probation violation report stated that Beitman possessed an audio recording of him "reciting relaxation techniques to pass his polygraph" and that Beitman "was aware that a referral had been submitted for his maintenance polygraph." Although he labels the allegation as "unfounded," he does not develop this argument in any meaningful way. Accordingly, we do not address it. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim on review).

¶9 Beitman's argument, instead, appears to be that he would have no reason to learn to defeat a polygraph examination because the state could not require him to waive his right against self-incrimination as a condition of probation. *See Jacobsen v. Lindberg*, 225 Ariz. 318, ¶ 13 (App. 2010) (concluding probationer permitted to "assert the privilege against self-incrimination as to polygraph questions that may incriminate him"). However, Beitman has not explained why that would render it improper for the trial court to consider his efforts when evaluating the proper sentence. The right against self-incrimination is not implicated in a probation revocation hearing—thus, Beitman could be compelled to take a polygraph as a condition of his probation and give answers that inculpate him in a non-criminal violation of the terms of his probation. *See Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) (state permitted to "insist on answers to even incriminating questions and hence sensibly administer its probation system" without violating Fifth Amendment). Again, Beitman has shown neither that competent counsel would have objected nor that, had counsel done so, it would have influenced the court's sentencing decision. *See Bennett*, 213 Ariz. 562, ¶ 21. The court did not err in summarily rejecting this claim.

¶10 Although we grant review, relief is denied.