

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JEROME LEDARRYL BIRDOW,
Petitioner.

No. 2 CA-CR 2017-0300-PR
Filed April 10, 2018

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pima County
Nos. CR20104165001 and CR20120162001
The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Jerome Ledarryl Birdow, San Luis
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brearcliffe concurred.

STARING, Presiding Judge:

¶1 Jerome Birdow seeks review of the trial court's order summarily denying his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Birdow has not shown such abuse here.

¶2 Pursuant to contingent plea agreements, Birdow entered guilty pleas in two cause numbers. In CR20104165001, he pled guilty to five counts of sale of a narcotic drug. In CR20120162001, he pled guilty to three counts of aggravated assault and one count each of leaving the scene of an accident resulting in death or serious physical injury and criminal damage. He was sentenced to concurrent and consecutive prison terms totaling 26.25 years.

¶3 On review of the denial of post-conviction relief in Birdow's first post-conviction proceeding, this court ordered the parties to submit supplemental briefs addressing whether Birdow's plea agreement and sentence in CR20120162001 were illegal pursuant to *State v. Ofstedahl*, 208 Ariz. 406 (App. 2004), and, if so, to identify the appropriate remedy. *State v. Birdow*, No. 2 CA-CR 2014-0316-PR (Ariz. App. Apr. 9, 2015) (order). The parties agreed fundamental error had occurred because Birdow's concurrent convictions in CR20104165001 could not properly be treated as historical prior felonies to enhance his sentences in CR20120162001. However, the state asserted the plea should be vacated, while Birdow argued he should be resentenced without the improper historical prior convictions. We agreed fundamental error had occurred, but determined the trial court was in the best position to determine the appropriate remedy, and stayed the proceeding for the court to do so. After hearing argument, the trial court set aside both plea agreements and vacated the convictions and sentences. This court then dismissed the pending review proceeding as moot.

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¶4 Birdow was subsequently convicted after a jury trial in CR20104165001 of five counts of sale of a narcotic drug and sentenced to concurrent, 9.25-year prison terms for each offense. We affirmed his convictions and sentences on appeal. *State v. Birdow*, No. 2 CA-CR 2016-0288 (Ariz. App. July 21, 2017) (mem. decision). In CR20120162001, Birdow again pled guilty to three counts of aggravated assault and one count each of leaving the scene of an injury accident and criminal damage. As before, the trial court sentenced him to concurrent, 15.75-year prison terms for the aggravated assault convictions and a concurrent ten-year term for criminal damage,¹ to be followed by a 10.5-year term for leaving the scene.

¶5 Birdow sought post-conviction relief, asserting his counsel fell below prevailing professional norms by incorrectly advising him he was eligible for less than the presumptive term for aggravated assault, and claiming that advice was material to his decision to plead guilty. He further argued counsel was ineffective for failing to argue the pleas should not have been set aside because jeopardy had attached. The trial court summarily denied relief. As to Birdow's first claim, the court noted that he was, in fact, eligible for less than the presumptive term for the aggravated assault counts and counsel therefore had not given deficient advice. As to Birdow's second claim, the court concluded that counsel had little reason to reurge a claim based on double jeopardy because the trial court had already rejected the notion that the state should not be permitted to withdraw from the plea. The court further concluded that, in any event, double jeopardy did not prevent the state from withdrawing from the plea. This petition for review followed.

¶6 On review, Birdow first repeats his claim counsel had "misadvised" him about his potential sentences. "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 (2006); accord *State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016); see also *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Birdow, however, merely repeats verbatim the argument raised in his petition below without identifying any error in the trial court's reasoning. See Ariz. R. Crim. P. 32.9(c)(4)(B)(iv) (petition for review must contain "reasons why the appellate court should grant the petition"). In the absence of any developed argument that the court erred in rejecting this claim, we are compelled to

¹As under the original plea, these terms were also concurrent to the terms imposed in CR20104165001.

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deny relief. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim on review).

¶7 Birdow also reurges his claim that counsel was ineffective by “fail[ing] to argue that since [Birdow] had not breached the plea agreement, jeopardy had attached and the plea in each case should not have been set aside.” But, again, Birdow does not address the trial court’s conclusion that counsel had little reason to do so given that previous counsel had already raised the issue and the court had nonetheless permitted the state to withdraw from the plea. *See Bennett*, 213 Ariz. 562, ¶ 21. Thus, again, we must conclude Birdow has waived this argument on review. *See Stefanovich*, 232 Ariz. 154, ¶ 16.

¶8 Birdow additionally claims, for the first time on review, that his trial counsel “failed to argue a possible conflict of interest and request a change of venue,” apparently because the victim was married to an employee of the prosecuting agency. We do not address claims not raised below. *See State v. Fowler*, 156 Ariz. 408, 414 (App. 1987).

¶9 We grant review but deny relief.