IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARIAN D. TIGLA,
Petitioner.

No. 2 CA-CR 2020-0068-PR
Filed August 7, 2020

Petition for Review from the Superior Court in Pinal County
No. S1100CR201700241
The Honorable Jason Holmberg, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine L. Roll, Deputy County Attorney, Florence
Counsel for Respondent

Rosemary Gordon Pánuco, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 In this delayed petition for review, petitioner Marian Tigla seeks review of the trial court's ruling partially granting and partially dismissing his petition for post-conviction relief, filed pursuant to Rule 33, Ariz. R. Crim. P., arguing he is entitled to an evidentiary hearing.[1] We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Tigla has not shown such abuse here.

¶2 After Tigla pleaded guilty to molestation of a child in 2017, the trial court sentenced him to the maximum twenty-four-year prison term. Tigla then filed a notice of and petition for post-conviction relief, claiming his guilty plea was not knowingly, intelligently, and voluntarily entered. Tigla, whose primary language is German, also maintained that trial counsel, Paula Cook, had been ineffective for failing to provide an interpreter, despite his having told her he had difficulty understanding the proceedings. In an unrelated argument, he contended the court considered an improper aggravating factor at sentencing. In a November 2018 ruling addressing Tigla's petition for post-conviction relief, the court found his request to withdraw from the guilty plea "based on his claim that he does not fully understand English is without merit," and concluded that he had "knowingly, intelligently and voluntarily entered into a plea agreement after he expressly acknowledged that he reads and understands English." The court, however, granted Tigla's request for resentencing.

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) ("amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

¶3 In January 2019, the trial court resentenced Tigla to the same maximum twenty-four–year prison term it had previously imposed.[2] At the resentencing hearing, Tigla told the court he wanted to withdraw his guilty plea, and the court explained it had previously denied that request. At the conclusion of the hearing, the court suggested setting a hearing to address Tigla's claim that Cook had been ineffective, and Rule 33 counsel, Harriette Levitt, responded that "the issue with respect to ineffective assistance of counsel is rendered moot because the court has already found that the plea was entered knowingly, intelligently, and voluntarily." The court agreed.

¶4 In December 2019, Tigla's new Rule 33 counsel filed a successive Rule 33 petition and a motion to file a delayed petition for review of the trial court's November 2018 ruling. *See* Ariz. R. Crim. P. 33.16(a)(4)(B). In the Rule 33 petition, Tigla acknowledged he was precluded from challenging the voluntariness of his guilty plea and Cook's ineffectiveness for failing to request an interpreter, but instead argued that Levitt had been ineffective for failing to timely notify him of his right to file a petition for review of the court's dismissal of that portion of his first petition in which he had raised those claims. The state conceded Tigla was entitled to an evidentiary hearing on the issue of Levitt's failure to timely advise him of his right to file a petition for review, after which the parties filed stipulated facts in lieu of an evidentiary hearing in March 2020; the court then deemed Tigla's December 2019[3] successive Rule 33 petition "moot," but granted his motion for permission to file a delayed petition for review. This petition for review of the court's November 2018 ruling followed.

¶5 On review, Tigla argues the trial court abused its discretion by failing to grant an evidentiary hearing on the issue of the voluntariness of his plea, much less address his claim that Cook had been ineffective in failing to request an interpreter, and asks that we remand this matter for a hearing to address both of these claims. He maintains, as he did below, that because his primary language is German, he had difficulty understanding the court proceedings and that he had told Cook about his language difficulty. He further contends he had believed that his sentence would not exceed ten years, he did not understand the rights he was giving up by

[2]Tigla was provided with an interpreter at the resentencing hearing.

[3] The trial court mistakenly stated the petition was filed on December 20, 2020, rather than December 20, 2019.

pleading guilty, he is not familiar with the criminal justice system, and he "was desperate to get out of jail because he had been assaulted." In an affidavit filed shortly after Tigla filed his first petition below, he similarly avowed, in part, that he is not fluent in English; he told Cook he did not understand legal terminology in English; Cook did not tell him he could have an interpreter, nor did he know he could ask for one; he believed he would receive a ten-year sentence; and, although he told the judge he read and understood English (which he maintains Cook told him to say) and that he understood the terms of the plea agreement, he did not.

¶6 "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); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2 (App. 2004) (quoting *State v. Runningeagle*, 176 Ariz. 59, 63 (1993)); *see also State v. Fillmore*, 187 Ariz. 174, 180 (App. 1996) (to avoid summary dismissal on claim of ineffective assistance of counsel, defendant must make showing of colorable claim on both prongs of test).

¶7 The Rule 33 judge had observed Tigla's ability to understand the proceedings and to directly address the trial court on multiple occasions. In addition, Tigla's ability to understand English was reflected in the transcript of the December 2017 change-of-plea hearing, which was presided over by a different judge. At that hearing, the court expressly asked Tigla several questions, to which he responded appropriately: he told the court he took medication for depression and acknowledged it did not impact his ability to understand the proceedings; his highest level of education was a "GED"; he read and understood English; he understood the plea agreement, which he had read, reviewed with Cook, and signed; he had not been promised anything to get him to plead guilty, nor had he been threatened to do so; and, he understood the rights he was giving up by pleading guilty. *See State v. Hamilton*, 142 Ariz. 91, 93 (1984) (in determining whether defendant entered knowing, voluntary and intelligent guilty plea, court entitled to rely on defendant's responses to questions at change-of-plea hearing and assurances defendant understood plea agreement and had not been threatened or coerced); *see also State v. Chairez*, 235 Ariz. 99, ¶ 8 (App. 2013). An additional example of Tigla's ability to understand English occurred at a December 2017 hearing addressing his pro se motion to remove Cook; the trial court asked him if

he wanted "to supplement [his] motion," and he responded, "No," and when the court said, "I am going to go ahead and deny your motion," he responded, "Of course." At the original sentencing hearing in January 2018, Tigla told the court he had "[n]othing" to say when invited to do so. And, at his resentencing hearing in January 2019, the court informed Tigla it would affirm the appointment of an attorney to represent him if he "decide[d] to file an additional Rule 32," to which Tigla responded, "Yes, I do want to."

¶8 Nor is this case like *State v. Natividad*, 111 Ariz. 191 (1974), on which Tigla relies for the proposition that he is entitled to an evidentiary hearing. In that case, our supreme court remanded the matter to the trial court for an evidentiary hearing, in part because the record was "barren of a reliable indication as to the defendant's ability to comprehend" or speak English. *Id.* at 193. In contrast, Tigla meaningfully participated in multiple hearings. Importantly, the transcript and minute entry from the change-of-plea hearing establish that, not only did Tigla respond to questions about the plea, but he also satisfied the trial court that he had entered the plea agreement "knowingly, intelligently and voluntarily." *See State v. Gourdin*, 156 Ariz. 337, 338-39 (App. 1988) (appellant's contention he could not understand proceeding without interpreter undercut by participation in court and answering questions including whether he read, signed, and understood plea agreement).

¶9 Other than Tigla's own assertion that he had told Cook he did not understand the proceedings in English, the record does not support such a claim. Nor did he provide an affidavit from Cook in support of this claim. *See* Ariz. R. Crim. P. 32.7(e) ("The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition."). Not only were Tigla's responses to the trial court's questions appropriate, but the record before us does not suggest that, at any point, Tigla indicated to the court that he did not understand the proceedings. Accordingly, even assuming as true Tigla's avowal that he did not understand all of the legal terminology in English, *see State v. Watton*, 164 Ariz. 323, 328 (1990), the record does not support his assertion that his plea was not knowing, voluntary and intelligent.

¶10 Finally, Tigla argues the trial court should have conducted an evidentiary hearing to address his claim that Cook had been ineffective in failing to request an interpreter. However, as we previously noted, at the resentencing hearing Levitt conceded that the issue of Cook's ineffective

assistance had been rendered moot and that no evidentiary hearing was necessary in light of the court's finding that Tigla's plea was knowing, intelligent and voluntary. And, because we cannot say the court abused its discretion by so finding, Tigla cannot now assert he is entitled to an evidentiary hearing to challenge Cook's conduct. In any event, because the court properly rejected the claim that his plea was involuntary, given that such an assertion was at the heart of his ineffectiveness claim, that claim likewise must fail.

¶11 Accordingly, we grant review but deny relief.