

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSHUA ALLEN ROACH,
Petitioner.

No. 2 CA-CR 2020-0219-PR
Filed December 16, 2020

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NOT FOR PUBLICATION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 Maricopa County
No. CR2016120468001DT
The Honorable Annielaurie Van Wie, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Allister Adel, Maricopa County Attorney
By Daniel Strange, Deputy County Attorney, Phoenix
Counsel for Respondent

Joshua Allen Roach, Kingman
In Propria Persona

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MEMORANDUM DECISION

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

ECKERSTROM, Judge:

¶1 Joshua Roach seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.¹ We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Roach has not shown such abuse here.

¶2 Roach pled guilty to one count of aggravated driving under the influence (DUI) and was sentenced to an enhanced, eight-year prison term. He sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but found no “claims for relief to raise in post-conviction relief proceedings.” Roach filed a pro se petition asserting appointed counsel had made numerous errors throughout his proceeding, chiefly by telling him that he would have a “better opportunity” for a lesser sentence if he rejected the state’s initial plea offer, failing to make him aware that the plea was offered as part of the state’s “Fast Track” program, and by failing to raise issues about the use of previous convictions to enhance his sentences. The trial court summarily dismissed the proceeding, concluding Roach had not made a colorable claim of deficient performance and, in any event, “there is zero evidence of prejudice.” This petition for review followed.

¶3 Roach largely repeats his claim on review. “To state a colorable claim of ineffective assistance of counsel, a defendant must show

¹ Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). “The 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.’” *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). “Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.” *Id.*

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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) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* To establish prejudice, a defendant must show "a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶ 25 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694). And, to establish prejudice under the second prong of *Strickland*, defendant cannot meet that burden by "mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

¶4 "[A] defendant may obtain post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary." *State v. Banda*, 232 Ariz. 582, ¶ 12 (App. 2013). A defendant like Roach, who rejects an initial plea offer and accepts another, must show not only that his counsel was ineffective, but that he would have accepted the initial offer except for his attorney's error. *See id.* ¶¶ 11-12.

¶5 We agree with the trial court that Roach has established neither deficient performance nor prejudice. Even taking as true Roach's allegations, as we must, *see State v. Watton*, 164 Ariz. 323, 328 (1990), he has not established that counsel promised him a better result if he chose to reject the state's initial plea offer—he has asserted only that counsel stated he would have a "better opportunity" for a lesser sentence as his case developed. And, although he asserts he would have accepted the initial offer had counsel "given [him] correct information," he has not explained how he was misinformed beyond claiming he did not understand the plea offer was part of a "Fast Track" program. But Roach has not described why that information would have been material to his decision to reject the state's initial plea offer. *See Banda*, 232 Ariz. 582, ¶ 12.

¶6 Roach's claims that counsel failed to raise issues related to his previous convictions also warrant summary rejection. He argues his previous aggravated DUI conviction was not a historical prior conviction, citing A.R.S. § 13-105(22)(c). But any previous aggravated DUI conviction is a historical prior felony conviction under § 13-105(22)(a)(iv). He also contends his conviction for failing to register as a sex offender could not

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serve to enhance his sentence because the underlying conviction was invalid. But Roach did not raise that argument in his petition below. Accordingly, we do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980). And, because he did not raise the issue until his reply to the state's response, we also do not address Roach's argument that the advisement given regarding the first plea offer was delivered by the state and not by the trial court. Thus, the trial court was not required to address this argument, and neither is this court. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7 (App. 2009) (trial court need not consider issues first raised in petitioner's reply).

¶7 We grant review but deny relief.