IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TREVOR FERRELL MARQUEZ,
Petitioner.

No. 2 CA-CR 2020-0212-PR
Filed February 18, 2021

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NOT FOR PUBLICATION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. CR20165255001, CR20172232001, and CR20182080001
The Honorable Michael J. Butler, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harold L. Higgins PC, Tucson
By Harold L. Higgins
Counsel for Petitioner

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Trevor Marquez 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 ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Marquez has not shown such abuse here.

¶2 In May 2018, Marquez pled guilty to one count of first-degree burglary, two counts of second-degree burglary, and one count of prohibited possession of a deadly weapon in a plea agreement encompassing three cause numbers. The plea agreement called for concurrent sentences with no sentence to exceed the presumptive term, and, consistent with that provision, the trial court sentenced Marquez to concurrent prison terms, the longest of which was a "partially mitigated" thirteen-year term imposed for first-degree burglary.

¶3 Marquez sought post-conviction relief, arguing his trial counsel had been ineffective in failing to timely inform him of a plea offer made in one of the cause numbers—CR20165255—encompassing the charge of first-degree burglary and one charge of second-degree burglary. That plea offer listed a presumptive prison term of 9.25 years for first-degree burglary and 6.5 years for second-degree burglary. He asserted he would have accepted that plea had he been aware of it before it expired.

[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.*

¶4 Marquez further argued he was prejudiced by counsel's conduct because reinstating the first plea would result in his longest prison term being the ten-year term imposed for second-degree burglary in a later cause number, CR20172232. As relief, he requested that the first plea be reinstated without "chang[ing] the terms of his plea in the other cases."

¶5 The trial court summarily dismissed the proceeding. Although it "question[ed]" Marquez's assertions that he had been unaware of the plea and that he would have accepted it, the court did not rule on that basis. Instead, it determined Marquez was unable to show "he would have received a shorter sentence" because it might have imposed a sentence greater than the presumptive in the 2016 cause number and, moreover, would have had the option to impose consecutive prison terms. The court further observed that it could have then imposed consecutive prison terms in the later cause numbers as well, noting Marquez was "ignor[ing] the benefit he received by obtaining a wrap plea that allowed him to serve concurrent sentences on all cases and all counts." This petition for review followed.

¶6 On review, Marquez repeats his claim and again asks that the first plea be reinstated without disturbing the second plea as to the remaining counts. A defendant is entitled to relief if he proves he was prejudiced by the ineffective assistance of counsel causing him to reject a favorable plea offer. *See State v. Donald*, 198 Ariz. 406, ¶¶ 14-15 (App. 2000); *see also Missouri v. Frye*, 566 U.S. 134, 138, 145 (2012) (Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse). To demonstrate prejudice, a defendant must show the plea would have been available, he would have accepted it, and "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler v. Cooper*, 566 U.S. 156, 164 (2012).

¶7 Marquez devotes a portion of his petition to argument that the trial court erred by being skeptical of his claims he had been unaware of the first plea offer and would have accepted it had he been told about it. We need not address this argument—the court did not dismiss Marquez's petition on this basis and, as we explain, correctly concluded Marquez had not shown prejudice.

¶8 There is little dispute that, had Marquez accepted the first plea offer, he likely would have received lesser individual prison terms for

first-degree burglary and one charge of second-degree burglary. The plea called for a lower sentencing range and the mitigating factors identified by the trial court largely would have applied with equal force under the first plea offer. We note, however, that Marquez's aggregate prison term under the first plea offer could have exceeded the thirteen-year term imposed for first-degree burglary because it permitted the imposition of consecutive sentences and the two crimes occurred on different dates and had different victims. *See* A.R.S. §§ 13-116, 13-711(A); *State v. Riley*, 196 Ariz. 40, ¶ 21 (App. 1999). Marquez has identified nothing in the record suggesting the court would have foregone consecutive sentences under the first plea offer.

¶9 Additionally, as the trial court noted, limiting the prejudice analysis to the effect of the first plea offer ignores the second plea agreement. Even if we concluded that agreement would remain in force, the provision calling for concurrent sentences would no longer apply as to the convictions encompassed by the first plea offer. And, again, consecutive terms clearly would be permitted. *See* §§ 13-116, 13-711(A); *Riley*, 196 Ariz. 40, ¶ 21.

¶10 Marquez asserts his case "in all material respects mirrors" the circumstances presented in *Frye* and argues, under *Frye*, that he "would receive a sentence three years less than he received." Marquez insists that *Frye* is comparable because, like Marquez, Frye was not informed of an initial plea offer and later "went to trial after charges pertaining to a second indictment were added, just as they were in this case." Marquez misreads the procedural history of *Frye*—although the decision notes Frye was arrested for a new charge just before his preliminary hearing in the initial case, the Supreme Court's decision does not discuss the disposition of that charge. 566 U.S. at 139. Nothing in *Frye* indicates that allowing the defendant to accept the earlier plea had any effect on the later charge.

¶11 Marquez also contends the trial court would be prohibited from imposing a longer sentence by Rule 26.14, Ariz. R. Crim. P. That rule provides that, if a sentence has been set aside, a trial court may not impose a more severe sentence "for the same offense, or a different offense based on the same conduct" unless the earlier sentence "is no longer appropriate" based on new conduct by the defendant, the earlier sentence was unlawful, or if "other circumstances exist and there is no reasonable likelihood that an increase in the sentence is the product of actual vindictiveness by the sentencing judge." *Id*. Even assuming, without deciding, that Rule 26.14 would apply to a court's decision to order that a sentence be served consecutively instead of concurrently, the removal of the plea agreement's

provision requiring concurrent sentences would be an "other circumstance[]" allowing an increased sentence.

¶12 Finally, even were we required to artificially narrow our prejudice determination by disregarding the second and third cause numbers encompassed by the second plea, Marquez has not established that we may grant the relief he seeks. He cites no authority, and we find none, permitting this court to unilaterally modify the bargain struck between Marquez and the state. *See State v. Robertson*, 249 Ariz. 256, ¶ 24 (2020) (noting that "principles of contract law typically govern plea agreements"). Indeed, the second plea specifically precludes the result Marquez has requested, stating "the plea agreement will become void" if "at any time before or after sentencing, the defendant's guilty plea is rejected, withdrawn, vacated, or reversed by any court." Removing the charges encompassed by the first plea offer would void the second plea.

¶13 We grant review but deny relief.