

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GUSTAVO FELIX NUNEZ,
Petitioner.

No. 2 CA-CR 2021-0006-PR
Filed April 1, 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NOT FOR PUBLICATION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
No. CR20154350001
The Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Joshua Moser, Assistant Attorney General, Tucson
Counsel for Respondent

Robert A. Kerry, Tucson
Counsel for Petitioner

STATE v. NUNEZ
Decision of the Court

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Petitioner Gustavo Nunez seeks review of the trial court’s order dismissing his petition for post-conviction relief, filed pursuant to Rule 33, Ariz. R. Crim. P.¹ “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Nunez has not sustained his burden of establishing such abuse here.

¶2 Nunez pled guilty to sixteen counts of aggravated assault, nine counts of practicing medicine without a license, and one count each of fraudulent schemes and artifice, conspiracy, and control of an illegal enterprise. He was sentenced to concurrent and consecutive prison terms totaling 38.25 years. He sought post-conviction relief, and the trial court summarily rejected his claims. On review, however, this court granted relief in part, remanding the matter “to the trial court for an evidentiary hearing to determine whether counsel gave improper or inadequate advice to Nunez and, if so, whether his guilty plea was involuntary because that advice was critical to his decision to plead guilty.” *State v. Nunez*, No. 2 CA-CR 2019-0087-PR, ¶ 26 (Ariz. App. Nov. 15, 2019) (mem. decision). Specifically, we determined that the trial court had erred in rejecting his affidavit insofar as he alleged counsel “advised him his prison conditions would be significantly more restrictive if he went to trial,” *id.* ¶¶ 12-13, and “fail[ed] to advise him about his ineligibility for pardon,” *id.* ¶ 23. In denying a subsequent motion for reconsideration, we also clarified that our

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.*

STATE v. NUNEZ
Decision of the Court

decision did not prohibit him from arguing that an alleged conflict of interest arising from a fee arrangement “contributed to counsel’s ineffectiveness.”

¶3 After a two-day evidentiary hearing, the trial court denied relief. During the hearing, the court heard testimony from Nunez, several relatives, another attorney as an expert witness, trial counsel, and trial counsel’s staff. The court noted that “Nunez provided the only direct testimony to support [the] claim of ineffective assistance of counsel,” as his other witnesses “never testified [defense counsel] was unwilling to proceed to trial.” The court did not find Nunez’s testimony credible and found that counsel had not improperly advised him as to the length or conditions of his incarceration, the state’s burden of proof, or his eligibility for a pardon.

¶4 Our review of the trial court’s factual findings “is limited to a determination of whether those findings are clearly erroneous”; we “view the facts in the light most favorable to sustaining the lower court’s ruling, and we must resolve all reasonable inferences against the defendant.” *State v. Sasak*, 178 Ariz. 182, 186 (App. 1993). When “the trial court’s ruling is based on substantial evidence, this court will affirm.” *Id.* And, “[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence.” *Id.*; see also *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding). And, Nunez had the burden of proving his factual allegations by a preponderance of the evidence. See Ariz. R. Crim. P. 33.13(c).

¶5 The trial court’s factual determinations as to what counsel had told Nunez about his prison sentence and the possibility of a pardon were supported by evidence presented at the hearing. Nunez does not, however, specifically argue the court erred in rejecting his claims that trial counsel had misinformed him as to the length and conditions of his prison term or as to his eligibility for probation. Rather, he contends the court erred in finding counsel had been effective and therefore concluding his plea had been voluntary. He bases his argument on the premise that “counsel had an economic interest in avoiding trial,” and therefore had a conflict of interest that led to ineffective advice as to his plea agreement, and therefore an involuntary plea.

¶6 The authority Nunez cites in support of his argument that trial counsel had a conflict of interest that gave rise to an involuntary plea or the need for a referral for independent legal advice is, however,

STATE v. NUNEZ
Decision of the Court

inapposite in these circumstances. Rules 1.7 and 1.8(a) of the Arizona Rules of Professional Conduct, and comments 1 and 10 to Rule 1.8 all relate to representation of multiple parties in a proceeding, or involvement in “a business transaction” with a client in a “dual role as both legal adviser and participant in the transaction.” They do not address flat-fee arrangements for representation in a criminal case. Similarly, the cases on which he relies also relate to third-party payment for representation, *see Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 200 Ariz. 146 (2001), or to the “[a]cquisition by a lawyer of a proprietary interest in a cause of action he is conducting for a client,” *Skarecky & Horenstein, P.A. v. 3605 N. 36th St. Co.*, 170 Ariz. 424, 427 (App. 1991) (quoting *In re Stewart*, 121 Ariz. 243, 245 (1979)). Indeed, the court in *In re Stewart*, specifically noted that acquiring such an interest “in addition to his fees” might incentivize a lawyer to act contrary to the client’s interest. 121 Ariz. at 245. Thus, although Nunez claims this principal was set forth “[i]n an analogous situation,” it was not.

¶7 “[C]ourts generally presume that counsel will subordinate his or her pecuniary interests and honor his or her professional responsibility to a client.” *United States v. Taylor*, 139 F.3d 924, 932 (D.C. Cir. 1998) (citing *United States v. O’Neil*, 118 F.3d 65, 71 (2d Cir. 1997)). Thus, a defendant “must establish that an actual financial conflict existed by showing that his counsel actively represented his own financial interest during [the defendant]’s trial, rather than showing [only] the possibility of an actual financial conflict.” *Caderno v. United States*, 256 F.3d 1213, 1218 (11th Cir. 2001).

¶8 In this case, Nunez’s argument that his trial attorneys acted in their own financial interests amounts to a request for this court to reweigh the evidence presented at the evidentiary hearing, which we will not do. *See Fritz*, 157 Ariz. at 141. Counsel testified that they had been prepared to go to trial and planned to do so on the payment they had already received. Likewise, Nunez’s brother-in-law testified that payments made to counsel were “supposed to see us all the way through . . . probably a six-week trial” and that counsel had never said Nunez should accept a plea offer due to lack of funds for a trial. And, as discussed at the evidentiary hearing, the trial court itself recommended that Nunez accept a plea offer at the pretrial settlement conference, supporting counsel’s advice that doing so was in his best interest. Thus, because the trial court’s ruling was supported by evidence at the hearing, we will affirm its decision. *See Sasak*, 178 Ariz. at 186.

¶9 We grant the petition for review but deny relief.