IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JESSIE TITO MELENDREZ,
Petitioner.

No. 2 CA-CR 2022-0081-PR
Filed October 21, 2022

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NOT FOR PUBLICATION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. CR20134508001
The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mark Brnovich, Arizona Attorney General
John Johnson, Criminal Division Chief
By Nicholas Klingerman, Assistant Attorney General, Tucson
Counsel for Respondent

Law Offices of Erin E. Duffy P.L.L.C., Tucson
By Erin E. Duffy
Counsel for Petitioner

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Jessie Melendrez seeks review of the trial court's ruling dismissing, after an evidentiary hearing, his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Melendrez has not met his burden of establishing such abuse here.

¶2 In 2013, Melendrez was indicted for seven drug-related offenses.[1] Before trial, the state extended two plea offers to Melendrez. For each, the trial court held a *Donald* hearing,[2] during which it determined Melendrez had been adequately advised of the plea offer and had knowingly, intelligently, and voluntarily rejected it. After a jury trial, Melendrez was convicted as charged. The trial court sentenced him to concurrent prison terms, the longest of which are 15.75 years. This court affirmed his convictions and sentences on appeal. *State v. Melendrez*, No. 2 CA-CR 2015-0344 (Ariz. App. Sept. 7, 2016) (mem. decision).

¶3 Thereafter, Melendrez sought post-conviction relief. Appointed counsel filed a notice that she had "found no colorable claims" to raise and requested leave for Melendrez to file a pro se petition. Counsel stated Melendrez had told her that "he suffered from a traumatic brain injury which might have interfered with his ability to understand the plea agreement and the differences between it and the potential consequences at trial." However, counsel explained that she was unable to obtain any medical records from Melendrez or his family that might support his claim. She further asserted that the record "does not show any apparent

[1]Melendrez was also indicted for weapons misconduct. But that count was severed, and, pursuant to the state's motion, the trial court later dismissed it.

[2]*State v. Donald*, 198 Ariz. 406 (App. 2000).

irregularities" in either of the *Donald* hearings. After Melendrez failed to file a pro se petition, the trial court dismissed the proceeding.

¶4 Upon Melendrez's motion for reconsideration, the trial court vacated the dismissal and granted Melendrez additional time in which to file a pro se petition. Melendrez received several extensions but failed to file a petition, and the court again dismissed the proceeding. Melendrez filed a motion for reconsideration, arguing, in part, that he was awaiting documents from appointed counsel. The court vacated the dismissal and reinstated the Rule 32 proceeding.[3]

¶5 The trial court subsequently appointed new counsel to assist Melendrez in obtaining the necessary documents. The court granted counsel several extensions to obtain and review the complete record. In January 2021, Melendrez—through counsel—filed a petition for post-conviction relief. Melendrez raised a claim of ineffective assistance, arguing trial counsel had rendered deficient performance by (1) failing to obtain copies of his medical and mental health records before withdrawing a motion to determine his competency pursuant to Rule 11, Ariz. R. Crim. P., (2) withdrawing that motion three days after it was filed, and (3) allowing Melendrez to reject the second plea agreement, which he "did not understand" because of his "ongoing treatment for a disability related injury that may include mental health treatment."

¶6 In May 2021, the trial court ordered an evidentiary hearing, explaining, "in the absence of an affidavit from trial counsel, . . . the record is inadequate to address the claim that defense counsel was ineffective."[4] At the hearing in November 2021, both Melendrez and trial counsel testified.

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[3]In March 2020, Melendrez sought special-action review of "an accum[u]lation of rulings" that he alleged interfered with his ability to file a Rule 32 petition. This court declined to accept special-action jurisdiction. *State v. Melendrez*, No. 2 CA-SA 2020-0018 (Ariz. App. July 28, 2020) (order).

[4]The state sought special-action review of this ruling, arguing that the trial court had applied an incorrect legal standard. This court declined to accept special-action jurisdiction. *State v. Melendrez*, No. 2 CA-SA 2021-0042 (Ariz. App. Aug. 25, 2021) (order). However, the trial court later vacated its May 2021 order, re-evaluated the matter using "the proper standard," and again granted Melendrez an evidentiary hearing.

¶7 In January 2021, the trial court issued its under-advisement ruling, dismissing the Rule 32 petition. First, the court rejected Melendrez's argument that trial counsel had been ineffective in failing to obtain his medical and mental health records before withdrawing the Rule 11 motion. The court explained that the failure to obtain the records "does not, in and of itself, fall below an objective standard of reasonableness" and that counsel "did not believe a Rule 11 motion was necessary because [Melendrez] demonstrated that he understood the plea." The court also determined that counsel had not been ineffective in withdrawing the Rule 11 motion three days after it was filed because counsel believed, "based on his interactions with [Melendrez], there [were] no competency issues." Finally, the court dismissed Melendrez's claim that counsel was deficient in allowing him to reject the second plea, explaining that "there is no evidence to support a finding that [Melendrez] was incompetent at the time." This petition for review followed.[5]

¶8 On review, Melendrez argues the trial court used "erroneous facts not supported by the record" in rejecting his claim of ineffective assistance of trial counsel. To prevail on a 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) (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.* "We examine a trial court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous." *State v. Berryman*, 178 Ariz. 617, 620 (App. 1994).

¶9 First, Melendrez challenges the trial court's finding that trial counsel was aware of his brain injury and mental health issues before the second *Donald* hearing. Melendrez maintains, "The record is clear that trial counsel had no information regarding [his] brain injury and mental health history, other than the fact that they may exist." But Melendrez misconstrues the court's finding. The record shows trial counsel did not know the specifics of Melendrez's mental health issues but was aware of his industrial injury and his claim that he was receiving mental health treatment as a result. Indeed, counsel confirmed at the evidentiary hearing that he knew of Melendrez's "current mental health status" but not

[5]After the state filed its response to the petition, Melendrez filed a pro se supplemental brief. Rule 32 does not permit such a filing. *See* Ariz. R. Crim. P. 32.16 (filing of petition). In any event, Melendrez's arguments seem to parallel those raised in the petition for review filed by counsel.

necessarily a "diagnosis." This is consistent with the court's finding that counsel "had knowledge of [Melendrez's] mental health issues" and "prior brain injury."

¶10 Next, Melendrez challenges the trial court's finding that trial counsel's "frequent" contact with Melendrez supported his decision that a Rule 11 motion was not necessary. Melendrez points out that counsel had only been appointed in November 2014 and had lost contact with Melendrez sometime in January 2015, before the second *Donald* hearing in February 2015. However, the record shows three hearings from December 2014 to January 2015, during which both counsel and Melendrez were present. In addition, counsel testified to at least two separate conversations with Melendrez regarding the Rule 11 motion and the second plea agreement. Counsel also indicated that he had sufficiently interacted with Melendrez to determine he understood the nature of the proceedings and the charges against him. Accordingly, we cannot say the court's finding was clearly erroneous.

¶11 Additionally, Melendrez disputes the trial court's determination that "[n]othing about [trial counsel] failing to obtain the . . . medical and mental health records influenced [Melendrez's] own decision to reject the plea that had been offered to him." Melendrez reasons, "Had trial counsel obtained the records and pursued the Rule 11, trial counsel would have been able to effectively impart to [Melendrez] the benefits of the plea agreement and [Melendrez] would have been able to understand that advice and accept the plea agreement." But even assuming counsel pursuing the Rule 11 motion would have somehow altered the advice counsel gave, Melendrez has failed to establish prejudice.

¶12 "To establish prejudice in the rejection of a plea offer, a defendant must show 'a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer' and declined to go forward to trial." *State v. Donald*, 198 Ariz. 406, ¶ 20 (App. 2000) (quoting *People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997)). The only evidence offered in support of his claim was Melendrez's self-serving statements that if he understood the second plea offer then as he does now, he would have accepted it. Such conclusory assertions are insufficient. *See id.* ¶ 21; *see also State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999). Notably, Melendrez had also rejected the first plea offer, trial counsel encouraged Melendrez to accept the second plea offer, and Melendrez apparently indicated that he wanted to face the arresting officers in court.

¶13 Finally, Melendrez argues the trial court improperly relied on trial counsel having all the necessary information before the second *Donald* hearing, when counsel admitted he had not obtained any medical or mental health records at that time.[6] But Melendrez again seems to misapprehend the court's statement. When the court indicated that it relies on defense counsel to have "all the proper information ready and available" for a *Donald* hearing, it was suggesting that it generally depends on counsel to raise concerns about a defendant's competency. However, the court also explained that counsel in this case had no need to raise such concerns after interacting with Melendrez. Indeed, the court agreed with counsel that, based on Melendrez's demeanor and his "verbal and non-verbal cues during the *Donald* hearing," Melendrez "had a thorough understanding of his decision in rejecting the plea." We cannot say the court abused its discretion in dismissing Melendrez's petition for post-conviction relief.

¶14 Accordingly, we grant review but deny relief.

[6]Melendrez also points out that trial counsel could not recall at the evidentiary hearing his conversations with Melendrez between the filing and withdrawal of the Rule 11 motion. But his failure to recall those conversations six years later does not inform us of counsel's knowledge at the time of the *Donald* hearing.