

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ERIC BRAN IBARRA SR.,  
*Petitioner.*

No. 2 CA-CR 2023-0104-PR  
Filed June 9, 2023

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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NOT FOR PUBLICATION  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).*

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Petition for Review from the Superior Court in Yuma County  
No. S1400CR201701000  
The Honorable Stephen J. Rouff, Judge Pro Tempore

**REVIEW GRANTED; RELIEF GRANTED IN PART  
AND DENIED IN PART**

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COUNSEL

Jon R. Smith, Yuma County Attorney  
By Charles Platt, Deputy County Attorney, Yuma  
*Counsel for Respondent*

Elizabeth M. Brown, Phoenix  
*Counsel for Petitioner*

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MEMORANDUM DECISION

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

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V Á S Q U E Z, Chief Judge:

¶1 Eric Ibarra seeks review of the trial court’s order summarily dismissing 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. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We grant review and partial relief because Ibarra is entitled to an evidentiary hearing on his claim that counsel failed to adequately advise him about a plea offer.

¶2 Ibarra was convicted after a jury trial of assault, resisting arrest, and weapons misconduct, specifically, possessing a firearm while being a prohibited possessor. The trial court imposed jail terms for resisting arrest and assault and a concurrent, ten-year prison term for weapons misconduct. We affirmed his convictions and sentences on appeal. *State v. Ibarra*, No. 1 CA-CR 18-0767 (Ariz. App. June 4, 2020) (mem. decision).

¶3 Ibarra sought post-conviction relief, arguing his trial counsel had been ineffective by failing to adequately advise him of the consequences and comparative risks of going to trial rather than accepting a plea offer, including by “mistakenly advis[ing]” him regarding the law of constructive possession and not advising him about the potential prison term if convicted at trial. He additionally argued counsel had been unprepared for trial, had advanced a “legally defective” defense that Ibarra did not own the firearm, and had failed to pursue a defense that the weapon was inoperable. The trial court summarily dismissed the petition, and this petition for review followed.

¶4 On review, Ibarra repeats the bulk of his claims and asserts he is entitled to an evidentiary hearing. “To state a colorable claim of ineffective assistance of counsel,” Ibarra “must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced” him. *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.* “[W]e must presume ‘counsel’s conduct falls within the

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wide range of reasonable professional assistance’ that ‘might be considered sound trial strategy.’” *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). Although we must treat Ibarra’s factual assertions as true, see *State v. Watton*, 164 Ariz. 323, 328 (1990), he cannot meet his burden by “mere speculation,” *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999). Ibarra is entitled to an evidentiary hearing only if he has alleged facts that, if true, “would probably have changed” his verdict. *State v. Amaral*, 239 Ariz. 217, ¶ 11 (2016).

¶5 As he did below, Ibarra asserts that trial counsel did not adequately advise him regarding a plea offer and that he rejected the plea because “he did not understand the State’s case against him nor the sentence ranges if convicted.” He additionally asserts counsel did not explain “the concept of ‘constructive possession’” and instead advised him “that the outcome of this offense would turn on the ownership or actual possession of the firearm.” To show his trial counsel was deficient during plea negotiations, Ibarra must demonstrate counsel gave him erroneous advice or “failed to give information necessary to allow [him] to make an informed decision whether to accept the plea.” *State v. Donald*, 198 Ariz. 406, ¶ 16 (App. 2000). “To establish prejudice in the rejection of a plea offer, [Ibarra] 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.” *Id.* ¶ 20 (quoting *People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997), *abrogated on other grounds by Missouri v. Frye*, 566 U.S. 134 (2012)).

¶6 Ibarra has made a colorable claim that trial counsel’s purported failure to adequately advise him about the plea and the consequences of going to trial caused him to reject a plea offer. He included with his petition an affidavit avowing that his attorney never explained to him the “meaning of constructive possession” or what sentence he could face if convicted at trial and, had counsel done so, he would have accepted the plea offer. Although the state provided an affidavit by Ibarra’s trial counsel contradicting Ibarra’s account, we are required to treat Ibarra’s factual assertions as true. See *Watton*, 164 Ariz. at 328. The trial court did not conduct a hearing pursuant to *Donald*, and the state has not identified anything in the trial record showing Ibarra was properly advised about the sentencing range or the strength of the state’s case.<sup>1</sup>

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<sup>1</sup>Although Ibarra participated in a settlement conference, a transcript has not been provided.

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¶7 However, we agree with the trial court that Ibarra’s other claim of ineffective assistance warrants summary dismissal. He argues counsel should have pursued a defense that the firearm was inoperable, including by asking for a judgment of acquittal on that basis. The definition of a firearm specifically excludes weapons that are “in permanently inoperable condition.” A.R.S. § 13-105(19). But that does not mean, as Ibarra suggests, that the state is required to prove a firearm is operable. “Absent reasonable doubt as to the operability of a firearm, the state has no burden to prove [a] gun was not permanently inoperable.” *State v. Valles*, 162 Ariz. 1, 7 (1989); *see also State v. Kelly*, 210 Ariz. 460, ¶¶ 10-11 (App. 2005) (statutory exceptions do not constitute “an element of the offense that the state must prove”).

¶8 Ibarra has identified no basis for the jury to have doubted the firearm’s operability. He cites only an officer’s testimony that the gun was never test-fired.<sup>2</sup> Absent evidence of inoperability, there was no basis for counsel to present a defense on that basis, much less ask for acquittal. Although Ibarra argues trial counsel was ineffective in failing to investigate whether the gun was inoperable, he has identified no evidence suggesting the result of such investigation would have aided his defense. In sum, although Ibarra asserts counsel pursued a “legally defective” defense that the firearm did not belong to Ibarra, he has not explained how a different approach would have been more likely to result in his acquittal.

¶9 We grant review and relief in part. We remand the case for an evidentiary hearing on Ibarra’s claim that trial counsel was ineffective in failing to adequately advise him about the plea offer. We otherwise deny relief.

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<sup>2</sup>Ibarra ignores testimony by his son that the gun “was rusted” and that he had purchased it from a “friend,” who “had buried it in his back yard.” But, even in light of that evidence, there would have been no basis for the trial court to have granted acquittal.