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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOHN WILLIAM CAPES, Petitioner.	2 CA-CR 2010-0157-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200301462

Honorable Janna L. Vanderpool, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Law Offices of Harriette P. Levitt
By Harriette P. Levitt
Tucson
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner John Capes was convicted of aggravated assault with a deadly weapon or dangerous instrument, a dangerous-nature offense. He seeks review of the trial court's order granting him only a portion of the relief he requested in a successive petition for post-conviction relief filed pursuant to

Rule 32, Ariz. R. Crim. P., asserting a claim of newly discovered evidence. We will not disturb a trial court's ruling on a petition for post-conviction relief unless it clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In June 2002, a car driven by Capes collided with a pickup truck on Interstate 10, causing a rollover accident that seriously injured the driver of the truck. According to the presentence report's summary of the Department of Public Safety report, a 9-1-1 caller had reported just before the accident occurred that Capes's car was weaving on the highway, as if its driver were falling asleep. Witnesses later reported having seen the car "swerving in and out of the lanes, and . . . nearly collid[ing] with another vehicle" before it "clipped the left rear bumper" of the pickup truck and caused it to roll.

¶3 Capes admitted at the scene that he was taking prescription drugs but said he did not feel impaired. He fell asleep as soon as he was placed in a patrol car, slept all the way to a substation, and could not stay awake during a subsequent evaluation by a drug recognition expert, who determined Capes was "under the influence of a narcotic analgesic, and . . . unable to safely operate a motor vehicle." A red duffel bag found in Capes's vehicle contained bottles of seven different drugs prescribed to Capes, including diazepam (Valium) and Viagra. All except the Viagra bore the warning, "May cause drowsiness." More than seven hours after the accident, Capes told an officer that he had taken all of the prescription drugs in the duffel bag, except for Amitriptyline, at 11:00 a.m. that day, approximately two and one-half hours before the accident.

¶4 Charged with the dangerous-nature aggravated assault and two misdemeanor counts of driving under the influence of a drug and driving with a drug or

its metabolite in his body, Capes pled guilty to the aggravated assault charge. The trial court sentenced him in June 2005 to an enhanced, aggravated, twelve-year term of imprisonment. The court cited in aggravation not the drug or drugs Capes had taken before the accident but only his four prior felony convictions within the preceding ten years and his long criminal history. Capes initiated a post-conviction proceeding, in which counsel filed a notice of review pursuant to Rule 32.4(c)(2), stating she could find no colorable claims to raise. After Capes filed a supplemental petition pro se, the court summarily denied relief in August 2006.

¶5 In June 2008, Capes instituted this successive Rule 32 proceeding. Appointed counsel subsequently filed a petition for post-conviction relief, asserting as newly discovered evidence a claim that the 360 nanograms per milliliter of diazepam measured in Capes's blood had been "improperly interpreted." At Capes's sentencing hearing, the prosecutor had argued that Capes had taken "more than one" Valium before the accident because 360 nanograms was "much more than a slight dose." Thus, in Capes's second post-conviction petition, counsel asserted that, in fact, "the amount of [d]iazepam found in [Capes's] system were [sic] well within therapeutic levels and was not an unduly large dose." Arguing he therefore had done nothing illegal, his ability to drive should not have been impaired, and he could not have been "lawfully" convicted of driving under the influence of drugs, Capes sought to have his "convictions and sentences" set aside.[1]

[1]In his petition for review—although not in his petition for post-conviction relief—Capes asserts, without supporting citation to the record, that the 360 nanograms per milliliter of diazepam measured in Capes's blood "was misinterpreted by both the County Attorney assigned to the case and by Petitioner's attorney as being an extraordinary level of Diazepam." Based on this misinterpretation, Capes asserts, he accepted the state's offer to plead guilty to "dangerous Aggravated Assault." But we do not consider issues or arguments presented for the first time on review, s*ee State v.*

¶6 The trial court—a different judge than either of those who had presided over his change-of-plea and sentencing hearings—held an evidentiary hearing on Capes's claim. The only witness at the hearing was a toxicologist retained by the defense, who testified that the amount of diazepam in Capes's system around the time of the accident was "well within the therapeutic range, and . . . actually closer to the low end than the high end of the therapeutic range." Defense counsel argued at the conclusion of the hearing that Capes's guilty plea had not been knowing, intelligent, and voluntary because it had been "entered into on mistaken information."

¶7 In its written ruling, the trial court did not directly address the issue of voluntariness but found there had been a factual basis for Capes's guilty plea to aggravated assault.[2] It therefore denied Capes's request to set aside his conviction. It found, however, that the prosecutor had erroneously "suggested" at sentencing that Capes had "had a large amount of Diazepam in his system" when he caused the accident, "which evidenced his state of mind and his level of intentional/knowing/reckless behavior at the time of the offense, and supported an aggravated sentence." Because the court "presumed" the sentencing court had thus believed Capes had wantonly driven with "a large amount of the drug in his system" and had considered that factor in making its sentencing determination, the court granted the second petition for post-conviction relief, vacated Capes's original sentence, and ordered him resentenced.

Ramirez, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980), and we have found no corroboration in the record for these claims in any event. We thus do not accept Capes's belated and unsupported assertions that his trial counsel misinterpreted the toxicology result or that counsel's interpretation induced his decision to plead guilty.

[2]The court appears to have believed, mistakenly, that Capes had also pled guilty to the misdemeanor charge of driving with the metabolite of a dangerous drug in his body and found a factual basis existed to establish that offense as well.

¶8 At the resentencing hearing in February 2010, the trial court again imposed the same aggravated, twelve-year prison term to which Capes had originally been sentenced. The court again cited in aggravation Capes's numerous prior felony convictions and continuous course of illegal conduct, but it also found as additional aggravating factors his failure to benefit from past lenient treatment; the physical and financial harm the victim had suffered; Capes's having jeopardized the safety of other motorists besides the victim; and the fact that Capes had inflicted serious physical injury.

¶9 The record fully supports the trial court's refusal to set aside Capes's guilty plea or vacate his conviction. First, because Capes's mother had asserted at the time of his original sentencing that the toxicology report showed "only a trace of [diazepam] in his system" when the accident occurred, Capes's claim that the correct interpretation of the report is somehow newly discovered evidence rings hollow.[3] Second, the transcript of his change-of-plea hearing reflects that his decision to accept the state's plea offer was influenced by the possibility he could be sentenced to sixty-four years in prison if found guilty of all outstanding charges in the four separate cases that were pending against him

[3]The prosecutor did not misstate the numerical result reported in the toxicology report but allegedly misrepresented the significance of that number in arguing the state's position at Capes's first sentencing hearing. Thus, the prosecutor stated: "[H]e's admitted to the officer that he took diazepam an hour before the collision. He obviously took more than one, because the toxicology report [showed 360 nanograms of diazepam per milliliter of urine, which] is much more than a slight dose."

The court, however, challenged the prosecutor about the factual basis for that assertion, which the prosecutor claimed was "common knowledge." The court replied that it did not have "common knowledge" that 360 nanograms represented more than a trace of diazepam. The state offered no expert testimony on the subject, and it is far from clear from the transcript that the court even accepted the prosecutor's assertion. The only aggravating factors it cited in imposing an aggravated sentence were Capes's long criminal history and his four felony convictions within the previous ten years.

in April 2005. Capes had already stated his desire to plead guilty and had entered his plea in this case before the prosecutor supplemented defense counsel's statement of the factual basis for the plea with the further statement that "the toxicology report . . . indicated the presence of diazepam in the defendant's blood." As far as we can determine, this was the sole reference to diazepam—or any other drug—made at the change of plea hearing.

¶10 Moreover, in a letter Capes had written to the court in April 2004,[4] he had stated, "I realize I deserve to be punished." He acknowledged that he had caused the accident after taking new pain medication he had obtained the previous day, stating he had "had no idea it would affect [him] as it did." He also wrote that he had "told the officer how much of each of the medication[s] he had taken," thus corroborating the accident report. The sentencing memorandum his counsel submitted to the court in May 2005 states, "It is clear that Mr. Capes exercised poor judgment when he made the decision to drive his vehicle while taking his medication . . . ." And, at his first sentencing hearing in June 2005, Capes acknowledged that he "had taken a dose of diazepam" when he "was extremely exhausted," which he was "pretty sure [had] played a role in [his] falling asleep at the wheel." In short, nothing in the available record suggests Capes pled guilty based on any misunderstanding about either the fact or the amount of diazepam in his system at the time of the accident.

¶11 In his petition for review, Capes again asserts that he pled guilty because he "believed that the toxicology report demonstrated an unusually high level of Diazepam in his system." Ignoring his own previous admissions, he further argues that, because the toxicology report did not confirm the presence of other medications in his system, he

[4]Capes wrote the letter in anticipation of a sentencing hearing that did not occur in 2004 because he ultimately withdrew his first plea of guilty to the same charge.

therefore "could not have been affected by the other drugs." And he maintains, mistakenly, that the aggravated assault charge to which he pled "was based on the incorrect premise that [he] had an inordinately high level of Diazepam in his system." As discussed above, the record does not support those assertions.

¶12 In short, we cannot say the trial court abused its discretion in refusing to set aside Capes's guilty plea and conviction based on newly discovered evidence. The court has already granted the alternative relief Capes requested, having resentenced him in February 2010. Finding no abuse of the trial court's discretion, therefore, we grant the petition for review but deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge