

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 29 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0252-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MARK FERNANDO CASTANEDA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20071255

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert S. Wolkin, P.C.
By Robert S. Wolkin

Tucson
Attorney for Petitioner

HOWARD, Chief Judge.

¶1 Mark Castaneda petitions this court for review of the trial court's April 7, 2010, order denying his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and the court's April 30 order denying his motion for rehearing.

We will not disturb these rulings unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Castaneda pled guilty to second-degree murder and aggravated assault with a deadly weapon. The trial court sentenced him to presumptive, consecutive prison terms of sixteen and 7.5 years, respectively. Castaneda filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the case and found “no issues of merit . . . to argue on Mr. Castaneda’s behalf.” *See* Ariz. R. Crim. P. 32.4(c)(2). The court granted Castaneda leave to file a pro se petition for post-conviction relief. Castaneda retained counsel, who filed a petition on his behalf asserting a claim of ineffective assistance of trial counsel. In that petition and his supporting affidavits, Castaneda claimed his trial counsel had told him he would be sentenced to concurrent prison terms upon pleading guilty. Castaneda asserted he would not have pled guilty had he known the court could impose consecutive sentences.

¶3 Accepting Castaneda’s affidavits as true, the trial court concluded trial counsel’s actions “fell below objectively reasonable standards.” The court summarily denied relief, however, finding Castaneda had failed to demonstrate he had been prejudiced by his counsel’s actions. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of counsel warranting relief, defendant must show counsel’s performance both deficient and prejudicial). The court stated that, at the change-of-plea hearing, it had “made [Castaneda] aware that he could be sentenced consecutively,” Castaneda had stated he understood that fact, and he nonetheless had pled

guilty without objection. The court further noted Castaneda had “agreed that no one had made any promises to him regarding the outcome of his case, that he had gone over the plea agreement with his attorney, and that he had read and signed it.” Thus, the court concluded, “the misinformation provided by [trial counsel] as to how [Castaneda] would be sentenced would have been corrected by [Castaneda’s] reading of the agreement and the plea colloquy with the Court.” The court reiterated these findings in denying Castaneda’s motion for rehearing.

¶4 On review, Castaneda asserts the trial court erred in finding he had not presented a colorable claim of prejudice and therefore erred in denying his petition without an evidentiary hearing. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (“[A] defendant is entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome.”). As we understand his argument, Castaneda contends the court’s providing of correct information was insufficient to change his “actual subjective belief” he would receive concurrent sentences because the court did not expressly tell him his attorney had given him incorrect information.

¶5 We reject this argument. In this context, a claim of ineffective assistance is essentially a claim that the guilty plea was not knowing, intelligent, and voluntary because the defendant relied on incorrect information provided by his attorney in deciding whether to accept the plea. *See Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *see also State v. Soto*, 223 Ariz. 407, ¶ 10, 224 P.3d 223, 226 (App. 2010) (valid guilty plea

has sufficient factual basis and is entered knowingly, intelligently, and voluntarily). But such a claim necessarily evaporates when the defendant ultimately is provided the correct information before pleading guilty. *See State v. Short*, 23 Ariz. App. 59, 60-61, 530 P.2d 905, 906-07 (1975) (when court correctly informs defendant of sentencing range, incorrect sentencing information counsel previously provided does not render plea invalid).

¶6 Castaneda does not cite, nor do we find, authority suggesting that, in order to ensure a plea is voluntary, a trial court must determine if counsel has provided incorrect information before the court, as required by our rules, provides the correct information and conducts the plea colloquy. *See Ariz. R. Crim. P. 17.2, 17.3*. As the court noted, it advised Castaneda he could face consecutive sentences, Castaneda stated he understood the potential sentences, and Castaneda avowed he had not been promised a particular sentence. Moreover, the plea agreement specifically provided there had been no agreement regarding whether the sentences would be consecutive or concurrent. In light of these facts, Castaneda's assertions in his affidavit, even assuming their truth, do not demonstrate he was prejudiced by his trial counsel's conduct. Any incorrect information given Castaneda by his trial counsel was corrected before Castaneda pled guilty, and the incorrect information thus could not render the plea invalid. *See Short*, 23

Ariz. App. at 60-61, 530 P.2d at 906-07. The court therefore did not err in summarily denying Castaneda's petition for post-conviction relief.¹

¶7 Although we grant Castaneda's petition for review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

¹Castaneda also asserts the trial court erred in finding he had failed to demonstrate prejudice because he had not shown he would have received a lesser sentence had he rejected the plea and gone to trial. Because we conclude the court correctly found Castaneda was not prejudiced because any misinformation was corrected at the change-of-plea hearing, we need not address this argument.