

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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0243-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MICHAEL ALLEN LEOVITZ,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20071263 and CR-20072321 (Consolidated)

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Pursuant to a plea agreement, petitioner Michael Lebovitz was convicted of attempted kidnapping, a class three felony, and sexual conduct with a minor under the age of eighteen, a class six felony. According to the terms of the plea agreement, Lebovitz

waived the right to a restitution hearing and agreed that the restitution claim form would be accepted as “conclusive proof of the victims’ economic loss,” which was capped at \$50,000. *See State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992) (right to be heard as to amount of restitution may be waived). The trial court imposed consecutive, substantially aggravated prison terms totaling 10.75 years and ordered Lebovitz to pay restitution in the amount of \$32,400.56. Lebovitz filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing trial counsel was ineffective in failing to challenge the restitution award. The court denied post-conviction relief without conducting an evidentiary hearing, and this petition for review followed. We will not disturb a trial court’s denial of post-conviction relief absent a clear abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 The victim’s father requested restitution in the amount of \$32,400.56, representing economic losses the victim and her parents had suffered as a result of Lebovitz’s conduct with the victim while he was her dance instructor. *See* A.R.S. §§ 13-603(C) (trial court required to order defendant to pay victim full amount of economic loss sustained), 13-804(B) (in ordering restitution for economic loss, court shall consider all losses caused by offenses for which defendant convicted). According to the receipts and cancelled checks attached to the restitution claim form, as well as the victim’s impact statement in the presentence report, the victim’s parents incurred, inter alia, expenses related to her psychiatric treatment and her attendance at the New Haven Residential Treatment Center for

Troubled Teen Girls in Utah. *See State v. Scroggins*, 168 Ariz. 8, 9, 810 P.2d 631, 632 (App. 1991) (although imposition of restitution mandatory, trial court has “discretion to set the amount of restitution according to the facts”); *see also State v. Dixon*, 216 Ariz. 18, ¶ 13, 162 P.3d 657, 660 (App. 2007) (court may consider evidence from presentence report in setting restitution). Lebovitz argues, as he did below, that despite the provisions in the plea agreement regarding restitution, trial counsel was ineffective for having failed to advise him of a \$2,977.47 discrepancy between the restitution award and the supporting documents and that the claimed economic losses were not reasonably related to his criminal conduct. Lebovitz also asserts he was entitled to an evidentiary hearing.

¶3 The trial court provided the following explanation for its denial of Lebovitz’s ineffective assistance claim:

Ineffective assistance of counsel can be shown through a two-pronged test. First, that counsel’s performance was unreasonable under the circumstances and second, that but for counsel’s unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. *See[] Strickland v. Washington*, 466 U.S. 668, 694 (1984).

In the instant case, Petitioner fails to meet the first prong of the test. The plea clearly indicated that Petitioner had waived a right to an evidentiary hearing and that the restitution affidavit was conclusive proof of the victim’s loss. Petitioner cannot now fault his counsel for not challenging the restitution amount because such a challenge would have been tantamount to a request to revoke the plea agreement, the terms of which Petitioner does not challenge. Furthermore, as Petitioner has indicated his desire to resolve the case through a plea, jeopardizing the plea would have gone against Petitioner’s own wishes Thus, Petitioner failed to show that counsel’s

performance was unreasonable under the circumstances. Secondly, since defendant does not contest that he knowingly, intelligently and voluntarily entered into the plea agreement which precluded his ability to contest the amount of restitution, there is no reasonable probability that the result would have been different even if counsel had attempted to contest the restitution amount.

(Footnote omitted.)

¶4 Because the trial court denied post-conviction relief in a minute entry order that clearly identified Lebovitz’s claim and correctly ruled on it in a manner that will allow this court and any future court to understand its resolution, we adopt the trial court’s ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶5 Because we find no abuse of discretion in the amount of restitution ordered, we grant the petition for review, but we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge