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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THE STATE OF ARIZONA, Respondent, v. MARCOS PUENTE, Petitioner.	2 CA-CR 2008-0259-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054673

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III
Tucson
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 Petitioner Marcos Puente was charged with first-degree murder, attempted murder, and three counts of aggravated assault with a deadly weapon after one man was killed and another wounded during a fight. The state alleged that all charges were for

dangerous nature offenses, that Puente had one historical prior felony conviction and was on probation for that conviction at the time he committed these offenses, and that the offenses were committed with the intent to promote, further, or assist criminal conduct by a criminal street gang. Pursant to a plea agreement, Puente plead guilty to a reduced charge of manslaughter and one count of aggravated assault with all other charges dismissed. The plea agreement established sentencing ranges of seven to twenty-one years' imprisonment for the manslaughter, with 10.5 years as the presumptive term, and five to fifteen years' imprisonment for the aggravated assault, with 7.5 years as the presumptive sentence. The parties had made no agreement about whether sentences imposed would be consecutive or concurrent, either with respect to each other or to the prison term Puente had begun serving when his probation was revoked.

¶2 At sentencing, the trial court found the mitigating circumstances, including Puente's dysfunctional childhood and substance abuse, were outweighed by the aggravating circumstances of his prior felony conviction, his status as a probationer and absconder when he committed the offenses, and his substantial juvenile court history. The court sentenced Puente to aggravated prison terms of twelve years for the manslaughter and ten years for the aggravated assault, to be served consecutively to each other but concurrently with the four-year term Puente was already serving.

¶3 Puente filed a timely notice of post-conviction relief of-right pursuant to Rule 32, Ariz. R. Crim. P., and, in his petition below, claimed his plea of guilty was the result of

ineffective assistance of trial counsel. Specifically, Puente argued counsel's recommendation that he plead guilty was based on inadequate investigation and testing of the state's evidence. He also maintained counsel had unreasonably predicted the sentence Puente would receive after entering a guilty plea.

¶4 After conducting an evidentiary hearing pursuant to Rule 32.8 and reviewing exhibits Puente filed after the hearing, the trial court denied relief in a minute entry addressing each of Puente's allegations. The court found, inter alia, that Puente's trial counsel had been "sufficiently familiar with the facts and the strength of the state's case to provide effective assistance" to Puente during plea negotiations, that Puente had not been misled about the possibility of receiving aggravated or consecutive sentences, and that Puente had failed to establish he was prejudiced by counsel's performance.[1] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (ineffective assistance of counsel claim requires showing of both substandard performance by counsel and resulting prejudice); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (same).

¶5 In this petition for review of the trial court's decision, Puente maintains the court abused its discretion in denying relief. He contends, as he did below, that his trial

[1]According to its minute entry, the trial court had considered the following factors in rendering its decision: (1) the nature and quality of witness interviews conducted by police, including the interview with informant Ronald B.; (2) lineup photographs and documentation; (3) trial counsel's experience, particularly in homicide cases; (4) preparation by trial counsel prior to Puente's change of plea; and (5) the relatively favorable outcome for Puente, compared to the probable outcome if he had been tried on the original charges.

attorney—who had recommended the state's plea offer without first interviewing witnesses, requesting independent ballistics testing, or filing substantive pretrial motions—was incapable of advising Puente adequately about the strength of the state's case. He also argues counsel was ineffective because he "significantly down-played" the possibility that Puente would receive aggravated or consecutive sentences.

¶6 This court reviews a trial court's grant or denial of post-conviction relief only for an abuse of the court's discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). "We do not reweigh the evidence," *State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003), but "'defer to the trial court's factual findings that are supported by the record and are not clearly erroneous,'" *State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004), *quoting State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000).

¶7 "Arizona courts recognize that a defendant may seek relief from a conviction on the basis that counsel's ineffective assistance induced a guilty plea." *State v. Donald*, 198 Ariz. 406, ¶ 10, 10 P.3d 1193, 1198 (App. 2000); *see also State v. Anderson*, 147 Ariz. 346, 351-52, 710 P.2d 456, 461-62 (1985). But a plea agreement waives all nonjurisdictional defects, *State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 708 (App. 2008), and a claim of ineffective assistance of counsel brought by a pleading defendant does not encompass all errors that might be raised after a trial. Rather, the claim is limited to "the nature of [counsel's] advice and the voluntariness of the plea." *Tollett v. Henderson*, 411 U.S. 258,

266 (1973). Thus, to the extent a defendant claims counsel was incompetent in failing to investigate evidence or file pretrial motions, he must establish that counsel's advice to plead guilty without having first pursued those actions "rendered that advice outside the 'range of competence demanded of attorneys in criminal cases.'" *Id*. at 268, *quoting McMann v. Richardson*, 397 U.S. 759, 771 (1970). And, "[t]o establish prejudice in the context of a plea agreement, a defendant must show a reasonable probability that except for his lawyer's error he would not have waived his right to trial and entered a plea." *State v. Ysea*, 191 Ariz. 372, ¶ 17, 956 P.2d 499, 504 (1998). "[W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence," prejudice will depend on "the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea," which, "in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¶8 We cannot say the trial court abused its discretion in finding Puente's trial attorney was competent to assess the strength of the state's case and to advise Puente adequately about the relative merits of entering the plea agreement or facing trial. Counsel testified at the evidentiary hearing that he had prepared drafts of substantive motions but did not file them because he had changed his focus from trial preparation to plea negotiations in the spring of 2006, after reading the statement of Ronald B., a Pima County jail inmate. Ronald had been housed in the cell next to Puente's and had reported to police detectives,

that Puente had told him in detail about the fight and had admitted shooting both victims. Although counsel had not yet interviewed any witnesses listed by the state when he received a transcript of Ronald's interview, he testified he had reviewed police reports containing detailed witness accounts. He stated he had "charted and cross-referenced" these statements with witnesses' statements to highlight their inconsistencies and intended to use them to create reasonable doubt about Puente's guilt at trial. But before conducting interviews, he concluded those inconsistencies would not be significant at trial in light of Ronald's statement, particularly because it contained details that Ronald could only have learned from Puente himself. As the trial court noted in its order denying relief, although Puente testified at the hearing that he had been innocent of the crimes and had lied at his change-of-plea hearing, he did not deny his conversations with Ronald or dispute the accuracy of Ronald's account.

¶9 Puente contends counsel was ineffective in failing to investigate whether Ronald received consideration from the state in his own pending case after talking with police and failing to discover Ronald's history of mental illness. But, although counsel had investigated Ronald's criminal history, he believed a jury would likely believe Ronald's detailed testimony at trial, despite impeachment. Based on the transcript of Ronald's interview with the police, counsel concluded he would be "a very, very good witness," and it appears unlikely that further impeachment evidence would have changed counsel's recommendation or altered his assessment of Puente's risk of conviction at trial. *See Hill*,

474 U.S. at 59. Substantial evidence supports the trial court's finding that Puente failed to establish either that his attorney was incompetent in investigating the evidence before recommending the plea agreement or that Puente was prejudiced by counsel's pre-trial omissions, and we will not disturb that finding.

¶10 We are somewhat more troubled by Puente's allegations that counsel had advised him that he saw "no reason for" the court to impose aggravated or consecutive terms of imprisonment. A defendant's guilty plea must be entered with "sufficient awareness of the relevant circumstances and likely consequences" and counsel is expected to assist a defendant in making "an intelligent assessment of the relative advantages of pleading guilty." *Brady v. United States*, 397 U.S. 742, 748 & n.6 (1970). Counsel's advice may be ineffective because it is incomplete, even if it is not incorrect. *See Anderson*, 147 Ariz. at 351-52, 710 P.2d at 461-62 (counsel ineffective in advising defendant he could later "move to withdraw" plea without informing him showing of manifest injustice would be required to prevail). Based on counsel's own testimony, it appears he failed to explain the reasons the court might impose aggravated or consecutive sentences, or both, such as Puente's prior criminal history and the fact that multiple victims had been shot. But, even if counsel's predictions about Puente's sentences fell short of reasonable competence, we find no abuse of discretion in the court's determination that Puente had not been prejudiced by counsel's advice.

¶11 Puente acknowledged that counsel had made no promises about the sentences and, at his change-of-plea hearing, the trial court fully advised Puente of the sentencing

ranges and factors that would be considered at sentencing, including his criminal record. The plea agreement, as well, made clear that Puente understood he could not rely on counsel's predictions but could only expect a sentence within the agreed-upon range. At the evidentiary hearing, Puente testified that he agreed to plead guilty because counsel had told him he was unlikely to be acquitted after a trial and "[ten] years sound[ed] a lot better to me than . . . doing [twenty-]something years." Had Puente been convicted after trial on the original charges, he would have been exposed to a sentence of natural life for the first-degree murder alone. *See* A.R.S. §§ 13-703(A); 13-1105(D). The trial court did not abuse its discretion in concluding Puente would have accepted the plea agreement notwithstanding counsel's inaccurate prediction of his sentence and was not prejudiced by counsel's advice. *See*, *e.g.*, *State v. DiFrisco*, 645 A.2d 734, 746 (N.J. 1994) ("Erroneous sentencing predictions . . . do not amount to constitutionally-deficient performance under *Strickland*.").

¶12 For the foregoing reasons, we grant review but deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge