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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OF ARIZONA, Respondent, v. RODRICK WADE HIGH-ELK, Petitioner.	2 CA-CR 2009-0119-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20052277

Honorable Charles S. Sabalos, Judge

REVIEW GRANTED; RELIEF DENIED

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Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Rodrick High-Elk was convicted following a jury trial of three counts of aggravated assault and one count each of aggravated driving under the influence of an intoxicant, aggravated driving with an alcohol concentration of .08 or higher, and fleeing from a law enforcement vehicle. The trial court sentenced him to concurrent, enhanced, presumptive prison terms, the longest of which was 15.75 years. This court affirmed his convictions and sentences on appeal. *State v. High-Elk*, No. 2 CA-CR 2006-0180 (memorandum decision filed Aug. 29, 2007).

¶2 After the trial court summarily dismissed High-Elk's first petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., High-Elk's trial counsel contacted Rule 32 counsel and informed him that he had given incorrect advice to High-Elk about the benefits of a plea agreement the state had offered before trial. Trial counsel provided an affidavit stating he had incorrectly determined that, should High-Elk be found guilty at trial, he would be "eligible for the same minimum sentence of 10.5 years at trial [for the aggravated assault counts] as he was offered under the plea agreement" and had advised High-Elk that there was, therefore, "no significant value to the plea." The minimum sentence available for those counts following trial, however, had been 15.75 years. *See* A.R.S. § 13-703(C), (J) (providing 15.75-year presumptive sentence for class two felonies committed after two or more historical prior felony convictions); A.R.S. § 13-709.01(A) (mandating person "convicted of intentionally or knowingly committing aggravated assault on a peace officer . . . shall be sentenced to imprisonment for not less than the presumptive sentence

authorized under this chapter").[1] Although the court imposed 15.75-year terms of imprisonment on the aggravated assault counts, it stated at sentencing that, had lower sentences been allowed under the law, it probably would have imposed twelve-year terms. Based on these newly discovered facts, High-Elk filed a second petition for post-conviction relief alleging he had received ineffective assistance from his trial counsel.[2] On review, he challenges the court's summary dismissal of his claim.

¶3 "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel, Defendant must present a colorable claim (1) that counsel's representation was unreasonable or deficient under the circumstances and (2) that he was prejudiced by counsel's deficient performance." *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984); Ariz. R. Crim. P. 32.6(c), 32.8(a). We will affirm a trial court's summary denial of relief if the defendant fails to present a colorable claim

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[1]Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

[2]Generally, a defendant is precluded from raising claims in a petition for post-conviction relief that have been waived in a previous collateral proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3). The rule of preclusion does not apply, however, to claims for relief based on Rule 32.1(e), involving newly discovered material facts. The state did not contend below that High-Elk's claim was precluded as a result of his previous Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(c) ("state has the burden to plead and prove grounds of preclusion," although court may raise preclusion sua sponte).

based on either of these two points. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). A colorable claim of post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶4 An attorney's failure to give accurate advice or information necessary to allow a defendant to make an informed decision whether to accept a plea agreement constitutes deficient performance. *See State v. Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d 1193, 1200 (App. 2000). Based on trial counsel's affidavit, stating he incorrectly informed High-Elk that the minimum possible sentence for the aggravated assault counts was the same under the plea agreement as it would be after trial, High-Elk presented a colorable claim that trial counsel had performed deficiently in communicating the benefits of the plea offer to him. But to establish a colorable claim that prejudice had resulted from counsel's deficient performance, High-Elk had the burden of showing "'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). High-Elk made no such showing.

¶5 Conspicuously absent from his petition for post-conviction relief was any definitive allegation or supporting affidavit stating that High-Elk would have accepted the plea agreement had he been correctly informed. Counsel's bare assertions that "there is a reasonable probability that [High-Elk]'s view of the plea agreement would have changed"

and that he "likely would have accepted [the agreement] had he been adequately informed" were not sufficient to present a colorable claim. *See id*. ¶ 21 (bare assertion that plea offer would have been accepted insufficient to support ineffective assistance of counsel claim). Nor was his claim sufficiently supported by the mere fact that, having rejected the plea offer, High-Elk was exposed to and received higher sentences for his aggravated assault convictions. Defendants may and do accept the risk of higher sentences in order to preserve the possibility of not guilty verdicts. And in this case, High-Elk argued in a motion for judgment of acquittal and contended on appeal that the state had presented insufficient evidence to support his convictions of aggravated assault.

¶6 The court in *Donald* recognized that ineffective assistance of counsel based on the rejection of a plea offer is "easy to claim," but evidence to support such a claim is "hard to secure," and "'the amount of objective evidence will quite understandably be sparse.'" *Id.*, *quoting Lewandowski v. Makel*, 949 F.2d 884, 889 (6th Cir. 1991). It stated that "[a] defendant may inferentially show prejudice by establishing a serious negative consequence, such as receipt of a substantially longer or harsher sentence than would have been imposed as a result of a plea" or "[a] defendant might also show that the risks inherent in proceeding to trial so substantially outweighed the benefits of the plea that proceeding to trial was an unreasonable risk." *Id*. But a longer sentence will not always suffice to establish a colorable claim of prejudice, and High-Elk did not attempt to show in his petition for relief that his proceeding to trial had constituted an unreasonable risk under the circumstances of his case.

Accordingly, we find no abuse of discretion in the trial court's summary denial of High-Elk's petition. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Therefore, although we accept review of High-Elk's petition, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge