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 13 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RICHARD I. VALENZUELA, Petitioner.	2 CA-CR 2009-0152-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200600589

Honorable Stephen M. Desens, Judge

REVIEW GRANTED; RELIEF DENIED

Law Office of Ronald Zack
By Ronald Zack
Tucson
Attorney for Petitioner

E S P I N O S A, Presiding Judge.

¶1 Pursuant to a plea agreement, Richard Valenzuela pled guilty to a single count of burglary. The trial court sentenced him to an aggravated term of 11.5 years' imprisonment

and ordered him to pay $7,404.49 in restitution. Valenzuela subsequently filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. In this petition for review, he challenges the court's summary denial of his petition for post-conviction relief. Although we grant review, we deny relief.

¶2 As he did below, Valenzuela claims his guilty plea was not knowing, voluntary, and intelligent. He asserts:

> [he] had misunderstood the plea agreement. He felt he was pressured to accept it, influenced by medication that [had] affected his thinking, and had immediate misgivings about having signed the plea agreement. Furthermore, at the time of his acceptance, he had no idea of the amount of restitution he would be required to pay . . . . That restitution later became a significant portion of his sentence.

Valenzuela also claims he believed "promises had been made to him," apparently related to the conditions of his imprisonment. He stated in an affidavit filed below that he had been "promised that if [he] signed the plea agreement, [he] would be able to hold [his] daughter and [he] would be on a three yard." He also asserted that, had he properly understood the terms of the agreement and the amount of restitution he would be ordered to pay, he would not have signed the agreement.

¶3 Relying substantially on its own memory of the prior proceedings, the trial court found Valenzuela had failed to raise a colorable claim for post-conviction relief. The court noted it had

> had the unique ability to observe the demeanor, conduct and other physical expressions such as frowns, smiles or gestures of

> the Defendant during the court hearings in this matter. They were all appropriate in light of the circumstances and were consistent with his responses during the change of plea proceedings and the sentencing proceedings including but not limited to his response in both proceedings that he had not taken any drugs or prescription medications which would affect his ability to understand the proceedings.

The court found "disingenuous" Valenzuela's claim that he had not understood the meaning of the term "stipulation" in the plea agreement "in light of his prior criminal history and contact with the courts and lawyers in the past." And it found patently incredible, Valenzuela's claim that his trial counsel had promised him that he would be assigned to a "three yard" at prison and would be able to hold his daughter. The court also noted Valenzuela had not requested a restitution hearing at sentencing or objected to the victims' claims of loss stated in the presentence report.

¶4 Absent an abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Sepulveda*, 201 Ariz. 158, ¶ 3, 32 P.3d 1085, 1086 (App. 2001). We find no abuse of discretion in the court's finding that Valenzuela's plea had been knowing, intelligent, and voluntary. The court was entitled to rely on its own observations of Valenzuela's demeanor and responses at the change-of-plea hearing. *See State v. Djerf*, 191 Ariz. 583, ¶ 25, 959 P.2d 1274, 1283 (1998) ("defendant's appropriate and rational responses" relevant to conclusion that defendant fully understood consequences of waiver). And, the transcript of that change-of-plea hearing supports the court's determination that Valenzuela had knowingly, voluntarily, and intelligently entered into the

plea agreement. He repeatedly told the court he understood the terms of the agreement, including the stipulated term of 11.5 years' imprisonment. He denied he was under the influence of drugs or medications that could affect his ability to understand the proceedings. And, he stated no one had either used force, threats, or promises outside the terms of the agreement itself to gain his assent to it.

¶5 Nothing in the record, other than Valenzuela's own, self-serving statement, supports his contention that he would not have signed the plea agreement had he known the amount of restitution the trial court would ultimately order him to pay. Valenzuela's failure to object before the sentencing hearing to the amount of restitution claimed by the victim and his failure to object to the amount when awarded at the sentencing hearing belie his claim. *See State v. Crowder*, 155 Ariz. 477, 480-82, 747 P.2d 1176, 1179-81 (1987) (defendant's lack of knowledge of specific amount of restitution does not render plea involuntary unless amount of restitution relevant and material to defendant's decision to enter into agreement). Indeed, although Valenzuela had expressed a desire to withdraw from the plea agreement before sentencing, he did not cite the amount of restitution claimed in the presentence report as a ground for that desire until the post-conviction proceedings. Even then, he did not raise the issue in the notices or petition he had filed pro se, before his attorney filed the petition for post-conviction relief on which the trial court ruled.

¶6 In order to be entitled to post-conviction relief, a defendant must prove the allegations in the petition by a preponderance of the evidence. Ariz. R. Crim. P. 32.8 (c); *see*

also State v. Verdugo, 183 Ariz. 135, 139, 901 P.2d 1165, 1169 (App. 1995). "To mandate an evidentiary hearing, [a] defendant's challenge must consist of more than conclusory assertions and be supported by more than regret." *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000). The trial court did not abuse its discretion in summarily dismissing Valenzuela's claim that his plea had not been voluntary or sufficiently knowing and intelligent.

¶7 Likewise, we find no abuse of discretion in the trial court's summary denial of relief on Valenzuela's claim that the restitution order constitutes an illegal sentence, imposed in violation of his due process rights. Essentially, Valenzuela contends the restitution award lacked proper evidentiary support because it was based solely on hearsay contained in the presentence report. Valenzuela has cited no authority establishing that a court may not rely upon information in a presentence report in determining the appropriate amount of restitution. As we have previously noted, "the statutory sentencing scheme implies that the presentence report and victim impact statement will provide restitution information for the sentencing court's consideration." *State v. Dixon*, 216 Ariz. 18, ¶ 13, 162 P.3d 657, 660 (App. 2007); *see* A.R.S. § 12-253(4). And "several cases . . . suggest a presentence report provides sufficient evidence" to support a restitution order. *Dixon*, 216 Ariz. 18, ¶ 13, 162 P.3d 657, 661, *citing Shenah v. Henderson*, 106 Ariz. 399, 476 P.2d 854 (1970); *State v. Holguin*, 177 Ariz. 589, 870 P.2d 407 (App. 1993); *State v. Mears*, 134 Ariz. 95, 654 P.2d 29 (App. 1982). Moreover, Valenzuela failed to present the trial court with evidence

establishing the amount of restitution the court awarded did not bear a reasonable relationship to the losses sustained as a result of Valenzuela's crime. *See State v. Wilson*, 185 Ariz. 254, 260, 914 P.2d 1346, 1352 (App. 1996) (appellate court will uphold restitution award if reasonably related to victim's loss).

¶8 Accordingly, although we grant review of Valenzuela's petition for review, we deny relief.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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PETER J. ECKERSTROM, Judge