

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 10/29/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 12-0598-PR
)
Respondent,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
DWAINE WINFREY,) (Not for Publication -
) Rule 111, Rules of the
Petitioner.) Arizona Supreme Court)
)

Petition for Review from the Superior Court of Maricopa County

Cause No. CR2007-119599-001

The Honorable Julie P. Newell, Commissioner

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney Phoenix
By E. Catherine Leisch, Assistant County Attorney
Attorneys for Respondent

Dwaine Winfrey Kingman
Pro Se

T H O M P S O N, Judge

¶1 A jury convicted petitioner Dwaine Winfrey of possession of narcotic drugs. The trial court sentenced him to ten years' imprisonment and this court affirmed his conviction and sentence on direct appeal in *State v. Winfrey*, 1 CA-CR 07-

0987, 2009 WL 996312 (Ariz. App. Apr. 14, 2009) (mem. decision). Winfrey filed a pro se petition for post-conviction relief after his counsel found no colorable claims. The trial court summarily dismissed the petition and Winfrey now seeks review. We review the summary dismissal of a petition for post-conviction for abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c).

¶12 Winfrey presents three issues in his petition for review, all of which allege ineffective assistance of trial counsel. Winfrey argues his counsel was ineffective when he failed to file a motion to suppress the packet of cocaine a hospital nurse found in Winfrey's mouth; when he failed to subpoena six witnesses to appear at trial; and when he failed to file a motion in limine to preclude the nurse's testimony regarding how she found the cocaine in Winfrey's mouth.

¶13 To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

¶14 We deny relief. Regarding the failure to file a motion to suppress the drugs, emergency personnel took Winfrey to the hospital when he complained of chest pains after police told him he had an outstanding arrest warrant. While he was in the hospital, a nurse found a packet of crack cocaine in Winfrey's mouth. She took the packet from his mouth and gave it to a security officer, who in turn gave it to police. Defense counsel considered the viability of a motion to suppress, but found there were no grounds for suppression and that any such motion would be frivolous. Strategic choices of counsel made after adequate investigation of the law and facts "are virtually unchallengeable." *Id.* at 690-91. Winfrey failed to state a colorable claim for relief based on counsel's failure to file a motion to suppress.

¶15 Regarding the failure to subpoena six witnesses, Winfrey failed to provide affidavits from those witnesses identifying what testimony they could have provided. The failure to provide an affidavit from a witness containing the testimony the witness would have offered is fatal to a claim of ineffective assistance based on the failure to call a witness. *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985). Further, counsel did subpoena four of the six witnesses Winfrey identified and some of them simply did not show up for trial.

Finally, Winfrey represented himself beginning the third day of trial and could have subpoenaed the witnesses himself.

¶16 Finally, regarding the claim that counsel should have filed a motion in limine to preclude the nurse's testimony, the only ground of preclusion Winfrey offers is that the nurse found the hidden packet of cocaine while she was providing Winfrey medical treatment. Therefore, he argues, the information was confidential medical information protected by the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"). Such a motion would have been without merit and Winfrey cites no authority to the contrary. Further, the nurse did not testify until Winfrey represented himself at trial. Therefore, Winfrey could have moved to preclude the testimony himself.¹

¶17 Because Winfrey presented no colorable claims for relief, the trial court did not abuse its discretion when it summarily dismissed Winfrey's notice of post-conviction relief.

¹ Winfrey's reply raises new issues not presented in the petition for review. This court will not consider arguments or issues first raised in a reply. See *State v. Watson*, 198 Ariz. 48, 51, ¶ 4, 6 P.3d 752, 755 (App. 2000).

