

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

CURTIS RAY SMITH, JR., *Petitioner*.

No. 1 CA-CR 15-0195 PRPC
FILED 6-15-2017

Petition for Review from the Superior Court in Coconino County
No. S0300CR201100805
The Honorable Jacqueline Hatch, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Coconino County Attorney's Office, Flagstaff
By William P. Ring
Counsel for Respondent

Curtis Ray Smith, Jr., Buckeye
Petitioner

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in
which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

STATE v. SMITH
Decision of the Court

CATTANI, Judge:

¶1 Curtis Ray Smith, Jr., petitions for review from the superior court's summary dismissal of his first petition for post-conviction relief. For reasons that follow, we grant review but deny relief.

¶2 A jury convicted Smith of aggravated assault, attempted armed robbery, and criminal damage, and Smith pleaded guilty to an additional count of escape in the third degree. The superior court sentenced Smith to concurrent terms of imprisonment, the longest of which is 20 years. This court affirmed his convictions and sentences on direct appeal. *State v. Smith*, 1 CA-CR 13-0044, 2013 WL 6844346 (Ariz. App. Dec. 26, 2013) (mem. decision).

¶3 Smith now argues, without elaboration, that he was denied the right to effective assistance of counsel, that the State knowingly presented perjured testimony at trial, and that the sentence imposed was not in accordance with the law. But his petition for review is insufficient to justify relief because he failed to provide any supporting facts or argument relevant to these issues, or any citation to relevant portions of the record or applicable legal authority. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii)-(iv); *see also State v. Rodriguez*, 227 Ariz. 58, 61 n.4, ¶ 12 (App. 2010) (declining to address argument not presented in petition); *cf. State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101 (2004) ("Merely mentioning an argument is not enough[.]").

¶4 Moreover, the more fully developed version of these claims as presented to the superior court did not warrant relief. Smith's claims of prosecutorial misconduct and of illegal sentence could have been raised on direct appeal and thus were precluded. *See* Ariz. R. Crim. P. 32.2(a)(1).

¶5 Smith's ineffective assistance of counsel claims are not precluded, *see State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002), but are not colorable. He argues that counsel improperly failed to object to testimony characterizing red stains as "consistent with blood" absent forensic testing to confirm the presence of blood. He similarly argues that counsel improperly failed to move for a directed verdict on the criminal damage count because the only evidence of the value of the property damaged was the victim's testimony, not physical evidence. But in each case the testimony was based on a witness's personal observation or personal knowledge, and thus was not objectionable or insufficient. *See* Ariz. R. Evid. 602. Thus, there was no reasoned basis to object to the testimony. Moreover, although unsuccessful, defense counsel did in fact request a directed verdict on criminal damage based on insufficiency of the evidence.

STATE v. SMITH
Decision of the Court

¶6 Smith also asserts that counsel improperly failed to impeach witness Y.M.'s testimony regarding who caused a preexisting injury to her hand. But the source of the injury was at best collateral to the issue at trial (whether the injured hand prevented Y.M., who Smith argued was the actual perpetrator, from being able to wield the tire-checker that was used as a weapon in the offenses), and a strategic choice by counsel to avoid pursuing collateral matters does not show ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984).

¶7 Smith further argues that his trial counsel was ineffective for failing to obtain an independent DNA test on the tire-checker, which he claims would have shown that Y.M. was also a contributor. The DPS criminalist testified that Y.M. could be neither excluded nor included based on insufficient DNA present, and Smith does not explain how the DPS laboratory's requirement of a threshold amount of DNA to support inclusion required independent analysis. He further claims that counsel improperly failed to move to suppress the tire-checker evidence based on Y.M. allegedly touching the implement during the investigation. But he failed to specify how incidental contact with a third party would constitute "tampering" with evidence or otherwise be grounds for suppression.

¶8 Finally, Smith asserts that his trial counsel failed to inform him of his right to testify, and that his testimony could have included an alternative explanation for how his DNA wound up on the tire-checker. His trial counsel indicated, however, that it is his practice to discuss the right to testify with all of his clients, and that he believed he did so in this case. And although the superior court did not conduct a formal colloquy with Smith regarding his right to testify, Smith was implicitly informed of the right because he was present during discussion of jury instructions addressing a defendant's right to testify (or to choose not to do so), as well as during his counsel's statements indicating Smith was probably not going to testify. Cf. *State v. Allie*, 147 Ariz. 320, 328 (1985).

¶9 Because none of Smith's allegations presented a viable claim for post-conviction relief, we grant review but deny relief.

