

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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STATE OF ARIZONA, *Respondent*,

*v.*

CHRISTOPHER ANTHONY BRAIN, *Petitioner*.

No. 1 CA-CR 15-0305 PRPC  
FILED 6-8-2017

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Petition for Review from the Superior Court in Yavapai County  
No. V1300CR820060752  
The Honorable Jennifer B. Campbell, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Yavapai County Attorney's Office, Camp Verde  
By Patti Marie Wortman  
*Counsel for Respondent*

Craig Williams Attorney at Law PLLC, Prescott Valley  
By Craig Williams  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler joined.

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**S W A N N**, Judge:

¶1 Christopher Anthony Brain petitions this court for review from the partial summary dismissal of his petition for post-conviction relief.<sup>1</sup> In 2007, Brain pled guilty to one count of attempted sexual conduct with a minor and pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), to two additional counts of attempted sexual conduct with a minor, all dangerous crimes against children. The superior court sentenced Brain to five years' imprisonment on one count and placed him on ten years' probation for the two remaining counts. Brain completed his prison sentence in 2011. For reasons that follow, we grant review but deny relief.

¶2 In 2013, Brain's probation officer sought to revoke Brain's probation after Brain failed to comply with several conditions of his probation. The superior court revoked Brain's probation after a contested violation hearing and sentenced Brain to two consecutive terms of five years' imprisonment. This court affirmed the revocation and sentences on direct appeal. *State v. Brain*, 1 CA-CR 13-0729, 2014 WL 2767082 (App. June 17, 2014).

¶3 Brain argues his trial counsel was ineffective when he failed to call three witnesses at the disposition hearing. Brain contends these witnesses could have provided valuable information for the court to consider in its determination of the punishment to impose. First, Brain argues counsel should have called Brain's probation officer to further explain the recommendations the officer made in the written report(s) the officer provided to the court. Second, Brain argues counsel should have called the psychologist the court ordered to examine Brain and prepare a report under Arizona Rule of Criminal Procedure 26.5. Brain contends the psychologist could have further explained the opinions and recommendations contained in the report. He does not contest that the superior court possessed and considered all of the materials prepared by

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<sup>1</sup> The superior court granted relief on a claim of sentencing error.

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these two witnesses before the disposition hearing. Finally, Brain argues counsel should have called Brain's polygraph examiner.

¶4 We deny relief. First, the court that considered the petition for post-conviction relief was the same court that revoked Brain's probation and sentenced him. The court determined that even if all of Brain's allegations about how the witnesses would have testified were true, the court would not have ruled differently. 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. *State v. Bennett*, 213 Ariz. 562, 567, ¶ 21 (2006). Because the court held the result of the disposition hearing would not have been any different, Brain has failed to present a colorable claim of ineffective assistance.

¶5 Second, Brain does not provide affidavits from any of the three witnesses. *See State v. Borbon*, 146 Ariz. 392, 399 (1985) (unsubstantiated claims do not support holding an evidentiary hearing). We will not speculate about how they would have testified even in light of the reports the probation officer and psychologist submitted to the court.

¶6 Finally, Brain also argues the court erred when it gave the testimony of one witness at the violation hearing more weight than the testimony of another witness. We deny relief on this issue as well because Brain did not raise it in the petition or supplemental petition he filed below. A petition for review may not present issues not first presented to the trial court. *State v. Wagstaff*, 161 Ariz. 66, 69 (App. 1988); Ariz. R. Crim. P. 32.9(c)(1)(ii). Besides, the trial court has discretion to evaluate witnesses' credibility. *State v. Hunt*, 13 Ariz. App. 267, 270 (App. 1970).

¶7 Accordingly, we grant review but deny relief.



AMY M. WOOD • Clerk of the Court  
FILED: AA