

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

MICHAEL ANTHONY FLORES,  
*Petitioner.*

No. 2 CA-CR 2013-0443-PR  
Filed February 25, 2014

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

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Petition for Review from the Superior Court in Pima County

No. CR20101123001

The Honorable Sean E. Brearcliffe, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Lori J. Lefferts, Pima County Public Defender  
By Lisa M. Hise, Deputy Public Defender, Tucson  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Presiding Judge Kelly authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

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K E L L Y, Presiding Judge:

¶1 Michael Flores petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Flores has not met his burden of demonstrating such abuse here.

¶2 Flores was convicted after a jury trial of criminal damage and aggravated driving under the influence of intoxicating liquor or drugs while his driver license was suspended or revoked. He was sentenced to concurrent prison terms, the longer of which was eight years. We affirmed his convictions and sentences on appeal. *State v. Flores*, No. 2 CA-CR 2011-0269 (memorandum decision filed May 21, 2012).

¶3 Flores then filed a notice of and petition for post-conviction relief, arguing that his appellate counsel had been ineffective in failing to argue that the trial court had erred in precluding "character evidence" of a police officer based on the officer's "repeated[] discipline[] for untruthfulness in his duties." He also claimed his trial counsel had been ineffective in waiving his presence for one day of trial because counsel did not first ascertain whether he wished to waive his presence or was competent to do so. The trial court summarily denied relief.

¶4 Flores restates his claims on review, first asserting his appellate counsel should have argued that the trial court had improperly precluded evidence of an investigating officer's disciplinary record. To establish a colorable claim of ineffective assistance of appellate counsel, Flores must show counsel's performance was deficient and that there is a "reasonable

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probability . . . but for counsel's unprofessional errors, the outcome of the appeal would have been different." *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶5 At trial, the state objected when Flores's counsel began to question a police officer about his disciplinary record. The court sustained the state's objection but permitted counsel to make an offer of proof concerning the issue. That offer of proof included documentation of several instances in which the officer had been disciplined. The court precluded the evidence, concluding it was not admissible pursuant to Rule 608, Ariz. R. Evid., and, in any event, the prejudicial effect of such evidence substantially outweighed its probative value pursuant to Rule 403, Ariz. R. Evid.

¶6 Rule 608(a) permits a trial court to admit "testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character." Rule 608(b) prohibits the admission of "extrinsic evidence . . . to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness" but permits such instances "to be inquired into if they are probative of [a witness's] character for truthfulness or untruthfulness."

¶7 But, even assuming Flores is correct that any meaningful portion of the officer's disciplinary record was admissible under Rule 608, he ignores on review the trial court's determination that the evidence was inadmissible pursuant to Rule 403. Rule 403 permits a trial court to preclude otherwise-admissible evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Absent an argument that the court's decision pursuant to Rule 403 was error, Flores's claim of ineffective assistance of appellate counsel fails because he has not demonstrated any reasonable likelihood we would have granted relief on appeal. *See Herrera*, 183 Ariz. at 647, 905 P.2d at 1382.

¶8 Flores next asserts he raised a colorable claim of ineffective assistance based on trial counsel's having waived his

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presence the second day of trial. “To state a colorable claim of ineffective assistance of counsel,” Flores was required to “show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced [him].” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate resulting prejudice, Flores must show a reasonable probability that the outcome would have been different absent counsel’s ineffectiveness. See *State v. Nash*, 143 Ariz. 392, 397-98, 694 P.2d 222, 227-28 (1985). A claim for relief is colorable if the “defendant’s allegations[, if] true, might have changed the outcome.” *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

¶9 At the beginning of the second day of trial, Flores was not present, and his counsel advised the court that Flores had informed her “he was supposed to be going to the . . . [h]ospital to be treated” for a leg injury that was healing improperly. Although the court stated it might be necessary to declare a mistrial, counsel stated Flores “may be willing to waive his presence today” so that the trial could continue.

¶10 After speaking with Flores, counsel further advised the court that Flores “would like to waive his presence today” and that “he appears to be of sound mind, and he made the decision on his own.” After the jury began deliberations, counsel informed the court she had consulted with Flores and he had told her the hospital was “going to keep him there for a few days.” The jury returned its verdicts without Flores present.

¶11 Flores asserted in an affidavit attached to his petition for post-conviction relief that he had been “prescribed pain medications” while hospitalized and that he “ha[d] no recollection of any conversation with my lawyer in which I agreed to waive my presence for the remainder of my trial.” He argues that trial counsel fell below prevailing professional norms because she had failed to “ascertain whether [his] medical condition or medication were interfering with his ability to make a knowing, intelligent and voluntary waiver” and that an evidentiary hearing is required to “develop a record.”

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¶12 Flores further contends counsel's conduct prejudiced him because "he was not able to assist counsel" at trial, resulting in "structural error" caused by his absence. But this argument does not address the threshold question of whether Flores was able to validly waive his presence at trial. If he was, then counsel's failure to ascertain that fact had no effect on the proceedings.<sup>1</sup> Although Flores provided with his petition below numerous documents related to his treatment that day and states he was on pain medication, he does not state in his affidavit or identify evidence suggesting that any medication rendered him unable to knowingly and voluntarily waive his right to be present. Nor does he develop any argument to support his claim that his absence was involuntary even if he did validly waive his presence. Accordingly, his claim of ineffective assistance of trial counsel fails because he has not made a colorable claim of resulting prejudice.

¶13 For the reasons stated, although review is granted, relief is denied.

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<sup>1</sup>Despite his claim in his affidavit that he did not recall having a conversation with counsel about his right to be present, Flores does not argue on review that counsel failed to discuss it with him, only that she failed to determine if he was competent to waive his right. In any event, he does not assert he would not have done so had counsel discussed the matter with him nor that his alleged lack of memory supports an inference that he was incompetent to waive his presence right.