IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSHUA DAVID NELSON,
Petitioner.

No. 2 CA-CR 2015-0168-PR
Filed January 19, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Cochise County
No. CR201100333
The Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Joel A. Larson, Cochise County Legal Defender, Bisbee
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner Joshua Nelson seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Nelson has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Nelson was convicted of transportation of methamphetamine for sale, possession of methamphetamine, and possession of drug paraphernalia. The trial court sentenced him to presumptive, concurrent prison terms, the longest of which was ten years. This court affirmed his convictions and sentences for transportation and drug paraphernalia, but vacated the conviction and sentence for possession of methamphetamine. *State v. Nelson*, No. 2 CA-CR 2012-0226 (memorandum decision filed June 21, 2013).

¶3 Nelson thereafter initiated a proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of trial counsel. Specifically, he maintained counsel had been ineffective for failing to introduce at a suppression hearing the audio recording of his interview with a detective or to object to certain testimony about the interview by the detective. The trial court summarily denied relief.

¶4 On review, Nelson again argues counsel was ineffective and contends the trial court abused its discretion in rejecting his claim relating to counsel's failure to introduce the audio recording of

his interview.[1] "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate 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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶5 In this case, the trial court accepted "for purposes of evaluating whether [the] defendant has presented a colorable claim" that counsel's failure to introduce the recording of Nelson's interview at the suppression hearing was deficient performance. The court, however, listened to the recording, determined "it support[ed]" the detective's testimonial account of the interview, and therefore concluded it would have denied Nelson's motion to suppress even had the recording been admitted.[2] Thus, the court ruled, Nelson had not established prejudice in regard to the suppression hearing itself.

¶6 The trial court likewise concluded Nelson had not established any prejudice to his appeal as a result of the failure to introduce the recording. It considered in great detail the authorities on which this court had relied and concluded it was "unlikely" our decision "would have been any different had the recording of the interview been part of the suppression hearing record."

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[1]Nelson does not address on review the trial court's ruling on his claim as it relates to the detective's testimony. We therefore do not address it. *See State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

[2]Although not dispositive, we note that the same trial judge ruled on the motion to suppress and the petition for post-conviction relief, lending support to the conclusion that the ruling would not have changed.

¶7 Nelson maintains the trial court abused its discretion in determining he was not prejudiced by counsel's omission. He contends first that "he was prejudiced on appeal" because he was "entitled to de novo review" of the recording in this court but was denied that review because the recording had not been admitted at the hearing.

¶8 This court reviews a trial court's ruling on a motion to suppress a post-arrest confession "for abuse of discretion, viewing the evidence presented at the suppression hearing in the light most favorable to sustaining the ruling." *State v. Naranjo*, 234 Ariz. 233, ¶ 4, 321 P.3d 398, 403 (2014), *cert. denied*, ___ U.S. ___, 135 S. Ct. 77 (2014). Had the recording been admitted at the suppression hearing, the trial court indicated its ruling would have remained unchanged. This court would, therefore, have reviewed the recording on appeal to determine if the court had abused its discretion in denying the motion, reviewing its legal conclusions de novo. *See State v. Peterson*, 228 Ariz. 405, ¶ 6, 267 P.3d 1197, 1999-2000 (App. 2011).

¶9 Relying on *State v. Sweeney*, 224 Ariz. 107, ¶ 12, 227 P.3d 868, 872 (App. 2010), Nelson therefore maintains he is "entitled to de novo review by this Court of the audio recording in this matter." In *Sweeney*, this court "conducted an independent review of the video evidence" in determining inter alia whether officers had reasonable suspicion to support an investigative detention under the totality of circumstances. *Id*. We pointed out that "the trial court [wa]s in no better position to evaluate the video than [this] court." *Id*. But Nelson reads *Sweeney* too broadly.

¶10 In certain contexts, specifically those in which this court is able to review some types of evidence in the same manner as the trial court—such as undisputed documentary evidence—this court "is not bound by findings of fact" made by a trial court. *In re Lagunowicz*, 21 Ariz. App. 442, 443, 520 P.2d 536, 537 (1974). But even so, we "should not disturb the findings of the trial court if they are based on reasonable inferences drawn from the documentary evidence." *Id.* We find this principle particularly relevant in the context of a motion to suppress statements, wherein we are

mandated to review the evidence in the light most favorable to upholding the trial court's determination. *See Naranjo*, 234 Ariz. 233, ¶ 4, 321 P.3d at 403. Having now reviewed the recording consistent with the above standard, we cannot say the court erred; the recording is entirely consistent with the court's description.

¶11 Nelson also maintains his case was distinguishable from a Florida case cited by this court on appeal and by the trial court in its ruling on his petition, as well as another case cited in the Florida decision and relied on by the trial court. Nelson's argument on this point, however, amounts to a request that we reconsider our decision on appeal and our conclusion that the cited authority was persuasive. *See Nelson*, No. 2 CA-CR 2012-0226, ¶ 12. Nothing in the argument suggests that our conclusion would have been different based on the admission of the recording. That being so, his claim amounts to one of error on appeal, which is not cognizable under Rule 32. *See* Ariz. R. Crim. P. 32.1, 32.2(a)(2).

¶12 For these reasons, although we grant the petition for review, we deny relief.