IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

VANCE JOHNSON,
Petitioner.

No. 2 CA-CR 2016-0281-PR
Filed December 8, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201201686
The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Wade C. Tanner, Deputy County Attorney, Florence
Counsel for Respondent

Harriette P. Levitt, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Judge Staring and Judge Kelly[1] concurred.

E S P I N O S A, Judge:

¶1 Vance Johnson 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 that order unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Johnson has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Johnson was convicted of dangerous or deadly assault by a prisoner and sentenced to a twenty-eight-year prison term. His conviction was based on stabbing a fellow inmate in the neck with a shank. On appeal, we affirmed the conviction but vacated Johnson's sentence because the trial court had found essential elements of his offense to also be aggravating factors. *State v. Johnson*, No. 2 CA-CR 2014-0136, ¶¶ 12-15 (Ariz. App. Mar. 30, 2015) (mem. decision). On remand, the trial court imposed a twenty-five-year prison term, which this court affirmed on appeal. *State v. Johnson*, No. 2 CA-CR 2015-0375, ¶¶ 1, 11 (Ariz. App. Aug. 8, 2016) (mem. decision).

¶3 Johnson sought post-conviction relief, arguing his trial counsel had been ineffective for failing to adequately investigate his case when he did not attempt to interview inmates to find potential witnesses. He asserted that, had counsel done so, he would have interviewed M., who would have testified Johnson had not been present during the altercation during which the victim was stabbed,

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

but instead was in his cell, next to M.'s cell. He additionally claimed M.'s statement constituted newly discovered evidence. Johnson further asserted his appellate counsel had been ineffective by failing to ensure that certain transcripts were made part of the record on appeal, and by failing to raise on appeal the purported violation of his *Miranda* [2] rights and speedy-trial rights. The trial court summarily denied relief, and this petition for review followed.

¶4 On review, Johnson repeats his claims of ineffective assistance of trial counsel and of newly discovered evidence, asserting he was entitled to an evidentiary hearing. A defendant is entitled to a hearing only if he presents a colorable claim. *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). Our supreme court has explained that "[t]he relevant inquiry" to determine whether a defendant has stated a colorable claim "is whether he has alleged facts which, if true, would probably have changed the verdict or sentence." *State v. Kolmann*, 239 Ariz. 157, ¶ 8, 367 P.3d 61, 64 (2016), *quoting State v. Amaral*, 239 Ariz. 217, ¶ 11, 368 P.3d 925, 928 (2016) (alteration in *Kolmann*) (emphasis omitted).

¶5 Furthermore, a colorable claim of ineffective assistance of counsel 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); *accord Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64. And, to establish a claim of newly discovered evidence, defendant must show "the evidence was discovered after trial although it existed before trial; that it could not have been discovered and produced at trial through reasonable diligence; that it is neither cumulative nor impeaching; that it is material; and that it probably would have changed the verdict." *State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000); *see also* Ariz. R. Crim. P. 32.1(e).

¶6 Johnson has not demonstrated counsel fell below prevailing professional norms by declining to investigate and interview potential inmate witnesses. *See Bennett*, 213 Ariz. 562,

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

¶ 21, 146 P.3d at 68 (defendant must show attorney's performance fell below objectively reasonable standards). "[A]lthough counsel has a duty to engage in adequate investigation of possible defenses, counsel may opt not to pursue a particular investigative path based on his or her reasoned conclusion that it would not yield useful information." *See State v. Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d 98, 102 (App. 2013). Trial counsel stated in an affidavit that, "in [his] experience," inmates are rarely "helpful or . . . willing to testify on behalf of another defendant if there is not some benefit attached thereto." Johnson has identified no evidence suggesting counsel should have been aware interviewing inmates would have been fruitful here.

¶7 Moreover, even were we to agree counsel should have sought inmate witnesses, M.'s testimony was unlikely to have altered the jury's verdict. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 (defendant must show counsel's deficient performance prejudiced him). A corrections officer saw Johnson stab the victim. And Johnson admitted to an investigating officer that he had fought with the victim and struck him several times, but denied having stabbed him, claiming another inmate involved in the altercation had done so. M.'s claim that Johnson was in his cell and did not participate in the altercation contradicts Johnson's own account, and Johnson does not explain this discrepancy.[3]

¶8 Nor does M.'s statement qualify as newly discovered evidence. Although counsel chose not to interview inmates, Johnson does not explain why counsel would not have uncovered M.'s statement had he done so. *See Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d at

[3]Johnson initially claimed he was not involved in the fight, asserting he had left his cell and had seen the blood-covered victim from about fifty feet away. He acknowledged the victim's blood was on his clothes, however, claiming he and the victim had "crossed paths" on the stairs. This initial statement is also inconsistent with M.'s claim that Johnson was in his cell with the door "closed and secured" at the time of the incident.

1032. And, in any event, as we have explained, M.'s testimony is unlikely to have altered the jury's verdict. *See id.*

¶9 We grant review but deny relief.