IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GERMAN B. VALDEZ,
Petitioner.

No. 2 CA-CR 2016-0289-PR
Filed October 12, 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NOT FOR PUBLICATION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 Santa Cruz County
No. S1200CR201200092
The Honorable Anna M. Montoya-Paez, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

George E. Silva, Santa Cruz County Attorney
By Kimberly J. Hunley, Deputy County Attorney, Nogales
Counsel for Respondent

The Law Offices of David Michael Cantor, Phoenix
By Stephen Garcia
Counsel for Petitioner

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 German Valdez petitions for review of the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

¶2 After a jury trial, Valdez was convicted of one count of sexual conduct with a minor under fifteen years of age, based on evidence that he had sexual intercourse with A.U. between mid-August and early September 2010, when she was fourteen years old. A.U. gave birth to a child in June 2011, and DNA[1] testing established Valdez was the father. This court affirmed Valdez's conviction and sentence on appeal. *State v. Valdez*, No. 2 CA-CR 2013-0463, ¶ 29 (Ariz. App. Jan. 30, 2015) (mem. decision).

¶3 Valdez then filed a petition for post-conviction relief in which he alleged trial counsel had been ineffective in failing to inform him of his right to testify; in failing to raise certain arguments when objecting to the admission of evidence that Valdez had sexual intercourse with A.U. on four occasions during the weeks alleged; in failing to raise certain arguments in moving to suppress DNA evidence, obtained by the state pursuant to A.R.S. § 13-3905; and in failing to identify specific evidence of A.U.'s prior sexual conduct he sought to introduce or why he believed it fell within an exception to

[1]Deoxyribonucleic acid.

Arizona's Rape Shield statute, A.R.S. § 13-1421.[2] The trial court summarily dismissed Valdez's petition, finding the "overwhelming evidence" in the case precluded any finding of the prejudice required for a claim of ineffective assistance of counsel. This petition for review followed.

¶4 We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶5 A defendant is entitled to an evidentiary 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 "[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*). "If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal." *Id.*, *quoting Amaral*, 239 Ariz. 217, ¶ 11, 368 P.3d at 928.

¶6 Similarly, to establish the prejudice required to prevail on a claim of ineffective assistance of counsel, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985), *quoting Strickland v. Washington*, 466 U.S. 668, 694 (1984). Thus, to avoid summary dismissal on an ineffective assistance of counsel claim, "a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68, *citing Strickland*, 466 U.S. at 687.

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[2]Certain aspects of these latter three claims were addressed in our decision on appeal. *See Valdez*, No. 2 CA-CR 2013-0463, ¶¶ 12-17, 18-22, 24-28.

¶7 Because DNA evidence that Valdez is the father of A.U.'s child contributed to the "overwhelming" nature of the evidence at trial, we first consider Valdez's argument that trial counsel failed to raise a meritorious issue in his motion to suppress DNA results. Valdez asserts counsel should have sought suppression based on the state's purported failure to comply with § 13-3905. But because the argument Valdez proposes is not meritorious, counsel was not ineffective for failing to raise it. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (counsel not ineffective "for failing to make an essentially futile request").

¶8 Pursuant to A.R.S. § 13-3905(A), a peace officer investigating a felony may obtain an order from a magistrate authorizing a person's "temporary detention, for the purpose of obtaining evidence of identifying physical characteristics" upon a showing of all of the following:

> 1. Reasonable cause for belief that a felony has been committed.
>
> 2. Procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense.
>
> 3. The evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the department of public safety.

In his petition for review, Valdez argues trial counsel was ineffective in failing to argue DNA evidence should have been suppressed because "[his] identification was available through [other] information obtained by law enforcement," such as A.U.'s allegations that he was the father of her child and evidence that A.U.'s brother had seen her at Valdez's house.

¶9 This argument reflects misapprehension of § 13-3905(A). A.U.'s pregnancy at the age of fourteen gave rise to a reasonable belief that a felony had been committed, § 13-3905(A)(1), and Valdez was an "identified . . . individual" by virtue of A.U.'s statement to police, § 13-3905(A)(2). The third requirement of § 13-3905(A)—that the "evidence cannot otherwise be obtained" from another source—refers here to the DNA evidence, the "evidence of identifying physical characteristics" at issue. The statute does not preclude an order for DNA evidence because other evidence of identity, such as a witness's testimony, might be considered sufficient. As we stated in our memorandum decision on appeal, "The state had probable cause to believe Valdez's DNA profile would either provide evidence he had committed the offense or exonerate him." *Valdez*, No. 2 CA-CR 2013-0463, ¶ 28.

¶10 With respect to his allegation that counsel failed to inform him of his right to testify, Valdez argues, without citation to authority, that prejudice may be "presumed," and he is therefore not required to establish the prejudice required by *Strickland*. We disagree. As the United States Court of Appeals for the Third Circuit has explained, "[E]very authority we are aware of that has addressed the matter of counsel's failure to advise a client of the right to testify has done so under *Strickland's* two-prong framework, which requires the petitioner to 'show that [the deficient conduct] actually had an adverse effect on the defense.'" *Palmer v. Hendricks*, 592 F.3d 386, 397 (3d Cir. 2010), *quoting Strickland*, 466 U.S. at 693 (alteration in *Palmer*). Valdez has failed to identify any testimony he might have given, and so has made no showing of a reasonable probability that, had he testified, he would not have been convicted. *See id.* at 399 (defendant claiming ineffective assistance related to right to testify "not excused from making a *prima facie* showing of prejudice in his petition for post-conviction relief").

¶11 Similarly, with respect to Valdez's allegations that counsel argued inadequately for exclusion of evidence that Valdez had sexual intercourse with A.U. on multiple occasions, or failed to develop an as-yet unidentified basis to introduce as-yet unidentified evidence of A.U.'s prior sexual conduct, the trial court did not abuse its discretion in finding "there is no reasonable probability that the

result would have been any different" had such arguments been raised. As the court stated in its dismissal order,

> The facts remain the same that Valdez had sexual intercourse with A.U., a girl 14 years of age, and unable to consent. A.U. testified that she and Valdez had sexual intercourse . . . . A.U. became pregnant. A.U. had a child. The conception of the child falls within the charged timeframe and the dates A.U. testified she had sexual intercourse with Valdez; and, finally, the DNA collected established that Valdez is the father of the child born to A.U.

¶12 The trial court did not abuse its discretion in summarily dismissing Valdez's petition for post-conviction relief. Accordingly, although we grant review, we deny relief.