IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MANUEL ARMANDO REYNA JR.,
Petitioner.

No. 2 CA-CR 2016-0357-PR
Filed January 10, 2017

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NOT FOR PUBLICATION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 Pima County
No. CR20123455001
The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Dean Brault, Pima County Legal Defender
By Joy Athena, Deputy Legal Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Judge:

¶1 Manuel Reyna Jr. 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). Reyna has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Reyna was convicted of possession of a narcotic drug for sale, possession of a dangerous drug for sale, possession of drug paraphernalia, possession of a deadly weapon during the commission of a felony drug offense, use of a wire or electronic communication during a drug- or narcotic-related transaction, and possession of a deadly weapon by a prohibited possessor. The trial court sentenced him to concurrent prison terms, the longest of which was nineteen years. We affirmed his convictions and sentences on appeal. *State v. Reyna*, No. 2 CA-CR 2014-0039 (Ariz. App. Mar. 26, 2015) (mem. decision).

¶3 Reyna's convictions stemmed from a 2012 traffic stop of a van in which Reyna was a passenger. A search of the van uncovered heroin, a handgun, methamphetamine, and baggies near his seat. A search of his cell phone, pursuant to a warrant, revealed text messages consistent with drug sales.

¶4 Reyna sought post-conviction relief, arguing his trial counsel had been ineffective in failing to seek suppression of evidence discovered during the search of his cell phone. He argued the warrant affidavit was defective because it included information obtained from a previous warrantless search of the same device and,

absent that information, "the search warrant affidavit lacked probable cause." The trial court summarily denied relief, concluding that Reyna had not shown a suppression motion would have been granted because the excised affidavit contained "sufficient remaining facts . . . to establish probable cause and therefore to sustain the warrant." In addition to the facts we recited above, the court also noted that a search of another passenger's cell phone showed texts from "Silent" offering narcotics for sale, and that Reyna had the word "Silent" tattooed on his leg. This petition for review followed.

¶5 On review, Reyna asserts the trial court erred by concluding the redacted search warrant affidavit was sufficient to establish probable cause that the cell phone would contain evidence of a crime. Insofar as Reyna has asserted this argument independently of his claim of ineffective assistance of counsel, the claim is precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). Thus, we address this argument only in terms of his claim that trial counsel was deficient in failing to develop and raise this issue at trial. "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); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016).

¶6 The United States Supreme Court has determined that law enforcement officers generally must obtain a search warrant before searching a cell phone found on an arrestee's person. *Riley v. California*, ___ U.S. ___, ___, 134 S. Ct. 2473, 2485 (2014). When a search warrant is based in part on improperly seized evidence,[1] the

[1] We assume, without deciding, that the warrant affidavit improperly included information from Reyna's cell phone obtained in advance of the warrant. And, because we determine Reyna has not demonstrated prejudice, we do not address whether counsel fell below prevailing professional norms in failing to seek suppression based on purported defects in the warrant affidavit. *See State v.*

search is nonetheless valid if, after "excis[ing] the illegally obtained information from the affidavit," the "remaining information is sufficient to establish probable cause."[2] *State v. Gulbrandson*, 184 Ariz. 46, 58, 906 P.2d 579, 591 (1995).

¶7 Whether a warrant affidavit establishes probable cause is a mixed question of fact and law that we review de novo. *See State v. Sisco*, 239 Ariz. 532, ¶ 7, 373 P.3d 549, 552 (2016). "Probable cause exists when the facts known to a police officer 'would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present.'" *Id.* ¶ 8, *quoting Florida v. Harris*, ___ U.S. ___, ___, 133 S. Ct. 1050, 1055 (2013). But, "'[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable-cause] decision.'" *Id.* (first alteration added), *quoting Harris*, ___ U.S. at ___, 133 S. Ct. at 1055. "Instead, all that is 'required is the kind of fair probability on which reasonable and prudent [people,] not legal technicians, act.'" *Id.*, *quoting Harris*, ___ U.S. at ___, 133 S. Ct. at 1055. "This 'practical and common-sense' standard depends on the totality of the circumstances." *Id.*, *quoting Harris*, ___ U.S. at ___, 133 S. Ct. at 1055.

¶8 Reyna does not contend the trial court erred in evaluating what information to redact from the warrant affidavit.

Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (failure to establish either part of ineffective-assistance claim fatal to claim).

[2]Additionally, "the state must show that information gained from the illegal entry did not affect the officer's decision to seek the warrant or the magistrate's decision to grant it." *State v. Gulbrandson*, 184 Ariz. 46, 58, 906 P.2d 579, 591 (1995). The trial court did not expressly evaluate this factor in its order denying Reyna's petition, but Reyna does not raise this issue on review. Accordingly, we 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); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

Instead, citing *State v. Miramon*, 27 Ariz. App. 451, 555 P.2d 1139 (1976), Reyna contends the proximity of the drugs and other items to him was insufficient to establish he was a "drug dealer" because "[i]t could have been anyone in the vehicle." He also asserts the fact that his tattoo of the word "Silent" matched "the name of someone on the passenger's cell phone" was a "coincidence" and did not establish probable cause. He claims the word is "very common" and "is a fairly common tattoo to obtain." Thus, he concludes, the search warrant affidavit "does not have enough information to establish with any sense of particularity that [he] was engaged in selling drugs and that he was using his phone to do so."

¶9 In *Miramon*, we addressed whether marijuana found under the passenger's seat was sufficient to show constructive possession. *Id.* at 452-53, 555 P.2d at 1140-41. We concluded that "mere knowledge of the existence of the marijuana is not enough" to establish possession, even in light of the defendant's possession of two marijuana cigarettes. *Id.* at 453, 555 P.2d at 1141. We find Reyna's reliance on *Miramon* unpersuasive for several reasons. First, its reasoning does not address probable cause, but instead sufficiency of the evidence. As we noted above, evidentiary standards do not inform the evaluation of probable cause. *See Sisco*, 239 Ariz. 532, ¶ 8, 373 P.3d at 552. And, in any event, our supreme court has rejected the theory that nonexclusive possession of contraband is insufficient evidence. *See State v. Villavicencio*, 108 Ariz. 518, 519-20, 502 P.2d 1337, 1338-39 (1972) (evidence of possession sufficient for drugs found on back porch of apartment "open and accessible to anybody who would want to walk through").

¶10 Finally, *Miramon* is factually distinguishable because, unlike in that case, there was information directly linking Reyna to drug transactions. Investigating deputies could fairly conclude that Reyna had offered to sell drugs to the passenger based on the information in her cell phone and, thus, that Reyna's phone would contain related evidence. Although Reyna asserts the fact his tattoo matched the name on the passenger's phone was mere "coincidence," the likelihood of coincidence was slight in light of the significant quantity of drugs found in the vehicle near where Reyna

had been sitting.[3] *See Sisco*, 239 Ariz. 532, ¶ 8, 373 P.3d at 552 (probable cause based on totality of the circumstances).

¶11 Reyna has not established the trial court erred by determining he failed to establish how he was prejudiced by counsel's performance, even assuming that performance fell below prevailing professional norms. Accordingly, although we grant review, we deny relief.

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[3]Reyna has included with his petition for review a document he claims shows a tattoo of the word "Silence" is common. He did not present this document below, and we thus do not consider it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review).