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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CARLOS ALEJANDRO FRASQUILLO, Petitioner.	2 CA-CR 2010-0414-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20081600

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery
Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Carlos Frasquillo seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged both trial and appellate counsel had been ineffective in failing to object to consecutive sentences imposed by the trial court. "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). Frasquillo has not sustained his burden of establishing such abuse here.

¶2 In 2008, Frasquillo was fleeing from an Arizona Department of Public Safety officer who had attempted to initiate a traffic stop when he collided head-on with another car. A passenger in that car, S.P., was pregnant and, as a result of the crash, was injured and suffered a miscarriage. After a jury trial, Frasquillo was convicted of two counts of aggravated assault, one count of aggravated driving with an illegal drug or its metabolite in his system while his driver license was suspended (DUI), one count of manslaughter, and various other charges. The trial court imposed a combination of concurrent and consecutive, presumptive prison terms totaling twenty-three years. This court affirmed Frasquillo's convictions and sentences on appeal. *State v. Frasquillo*, No. 2 CA-CR 2009-0030 (memorandum decision filed Nov. 27, 2009).

¶3 Thereafter, Frasquillo initiated proceedings pursuant to Rule 32, arguing in his petition that trial and appellate counsel had been ineffective for failing to object to or challenge on appeal the trial court's imposition of consecutive sentences on his DUI conviction and his manslaughter conviction. He maintained the consecutive sentences were prohibited by A.R.S. § 13-116 and the test set forth in our supreme court's decision in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989). The court denied relief, concluding, inter alia, that counsel had not been ineffective because the consecutive terms had been imposed properly.

¶4 On review, Frasquillo reiterates the *Gordon* arguments he made below and challenges what he characterizes as the trial court's treatment of *Gordon* as a "guideline [it] could follow at [its] option." Although we might not agree with all aspects of the court's ruling, its conclusion that Frasquillo had failed to state a colorable claim for relief

was correct. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) ("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.").

¶5 Section 13-116 provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A trial court, therefore, cannot impose consecutive sentences "when the defendant's conduct is a 'single act.'" *State v. Hampton*, 213 Ariz. 167, ¶ 64, 140 P.3d 950, 965 (2006), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. The test to determine whether conduct constitutes a single act for purposes of § 13-116 is as follows:

> First, we must decide which of the two crimes is the "ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." Then, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge." If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." Finally, we consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime."

State v. Urquidez, 213 Ariz. 50, ¶ 7, 138 P.3d 1177, 1179 (App. 2006), *quoting Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (citations omitted; alteration in *Urquidez*).

¶6 In this case, Frasquillo was convicted of manslaughter and of aggravated driving with an illegal drug or its metabolite in his body. Frasquillo argues, and we agree, that the manslaughter conviction was the ultimate offense. *See Gordon*, 161 Ariz.

at 315, 778 P.2d at 1211 (ultimate charge "is at the essence of the factual nexus and . . . will often be the most serious of the charges"). To convict Frasquillo of that charge, the state needed to prove he had "[k]nowingly or recklessly caus[ed] the death of an unborn child by any physical injury to the mother." A.R.S. § 13-1103(A)(5). Because the fact of an illegal drug in Frasquillo's body was unnecessary to convict him of manslaughter, we do not eliminate it when determining whether sufficient facts remained to support his DUI conviction. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

¶7 Frasquillo's DUI conviction required proof he had driven or been in "actual physical control of a vehicle" with "any drug . . . or its metabolite in [his] body," while his "driver license or privilege to drive [wa]s suspended, canceled, revoked or refused" or under a restriction. *See* A.R.S. §§ 28-1381(A)(3), 28-1383. Actual physical control of a vehicle in this context is a strict-liability offense, established by consideration of "the totality of the circumstances." *State v. Zaragoza*, 221 Ariz. 49, ¶¶ 20, 21, 209 P.3d 629, 634 (2009). Among factors to be considered in determining if a defendant is in actual physical control of a vehicle are whether the vehicle is running, where the keys are located, whether the vehicle's lights are on, and where the driver was found in the vehicle. *Id.* ¶ 21. Here, Frasquillo took actual physical control of his vehicle with a drug or its metabolite in his body once he entered the vehicle with the drug in his body and "posed a threat to the public by the exercise of present or imminent control of the vehicle." *See id.* ¶ 21; *see also* § 13-1381(A)(1). Thus, contrary to Frasquillo's assertion that the fact of "Frasquillo's driving itself" must be subtracted in analyzing the first *Gordon* factor, his actually driving the vehicle was unnecessary to sustain his conviction. *See State v. Rivera*, 207 Ariz. 69, ¶ 9, 83 P.3d 69, 72 (App. 2004) ("[B]y including 'actual physical control,' the legislature intended to extend the [driving-under-the-

influence] statutes to encompass those situations in which a person who is not actually driving nonetheless poses an equivalent risk."). Subtracting the evidence necessary to support Frasquillo's manslaughter conviction leaves sufficient facts remaining to support his conviction on the DUI charge. *Cf. State v. Cruz*, 127 Ariz. 33, 36, 617 P.2d 1149, 1152 (1980) (consecutive sentences permissible for possession of deadly weapon by prisoner and deadly assault by prisoner where possession completed before assault committed); *State v. Devine*, 150 Ariz. 507, 508, 724 P.2d 593, 594 (App. 1986) (consecutive sentences permissible when "each felonious act, although occurring on the same occasion, was committed independent of the others and was completed prior to the beginning of the next act").

¶8 As to the second step of the *Gordon* analysis, Frasquillo argues "[t]he transaction that led to the ultimate offense, manslaughter, essentially included [his] control of the automobile" and that without his controlling that automobile "he could not have been convicted of manslaughter." But Frasquillo's having recklessly caused the death of S.P.'s unborn baby, thereby committing manslaughter, could have been supported solely by his driving recklessly as he fled the officer, rather than by his having a drug or its metabolite in his body. Based on that theory of the evidence, it was possible for Frasquillo to have committed manslaughter without having committed the DUI offense. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. As the trial court pointed out,

> [T]he jury did not find that [Frasquillo] was impaired even to the slightest degree. Had [he] not ingested or inhaled marijuana, leading to the metabolite being in his blood, he would not have been subject to the [DUI conviction,] . . . [but] he still would have been subject to the Manslaughter charge due to his reckless driving as he fled from police.

¶9 Last, Frasquillo argues his driving with an illegal drug or its metabolite in his body did not cause "the unborn child to suffer an additional risk of harm beyond its death." But, if analysis of *Gordon*'s first two factors indicates the defendant committed separate acts, we need not consider the third factor. *State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993). We therefore conclude Frasquillo's conduct did not constitute a single act and thus the trial court's imposition of consecutive sentences did not violate § 13-116. *See Gordon,* 161 Ariz. at 315, 778 P.2d at 1211. Consequently, neither trial nor appellate counsel was ineffective in failing to challenge the consecutive sentences. Accordingly, although we grant the petition for review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge