

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

THOMAS GLENN MORGAN, *Petitioner*.

No. CR 15-0093 PRPC
FILED 4-27-2017

Appeal from the Superior Court in Maricopa County
Nos. CR2008-129836-001DT, CR2010-161928-001DT
The Honorable Christine E. Mulleneaux, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane Meloche
Counsel for Respondent

Thomas Glenn Morgan, Buckeye
Petitioner

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MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kent E. Cattani joined.

K E S S L E R, Judge:

¶1 Petitioner Thomas Glenn Morgan petitions this court for review from the dismissal of his petition for post-conviction relief. Morgan asserts that (1) his counsel provided ineffective assistance by failing to present medical records to explain Morgan's absences at trial; (2) he is entitled to additional presentence incarceration credit; and (3) his counsel for his post-conviction petition was biased by an association with the victim. For the reasons that follow, we grant review but deny relief.

¶2 Morgan was on probation after pleading guilty to a possession of dangerous drugs charge when a jury found Morgan guilty of theft. The superior court sentenced Morgan to 3.75 years' imprisonment for theft and credited him with 248 days of presentence incarceration. Because of this conviction, the court also revoked Morgan's probation and sentenced him to a consecutive term of 2.5 years' imprisonment for the original drug charge. This Court affirmed Morgan's convictions and sentences in both cases on direct appeal, but awarded him an additional 132 days of presentence incarceration credit on the original drug charge. *State v. Morgan*, 1 CA-CR 13-0241, 2014 WL 890325 (Ariz. App. Mar. 6, 2014).

¶3 Several portions of Morgan's trial for theft proceeded in absentia. In his petition for review, Morgan argues his counsel was ineffective when he failed to provide medical records to the court that would have established Morgan's absences on the first, second, and fourth days of trial were involuntary due to his medical condition.¹ Morgan argues

¹ Defense counsel provided the court medical information to explain Morgan's absence on the third day of trial. The court did not proceed in absentia that day because the court spoke with one of Morgan's physicians and believed at that time that Morgan's absence was involuntary. Morgan's counsel also requested a continuance on the fourth day because of an alleged medical procedure. Morgan was present when the superior court denied his request for a continuance, but did not return after the subsequent recess.

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the court would have continued the trial rather than try him in absentia if it knew this information.

¶4 To present a colorable claim of ineffective assistance of counsel, a defendant must show not only that counsel's performance fell below objectively reasonable standards, but that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We deny relief on the claim of ineffective assistance of counsel because Morgan failed to present a colorable claim for relief.

¶5 We held on direct appeal that the record supported the superior court's finding that Morgan was voluntarily absent from the proceedings and that he did so to delay the trial. *Morgan*, at *2-4, ¶¶ 6-18. The medical records Morgan attached to his petition for post-conviction relief show Morgan was treated for myriad medical problems before, during, and after his trial. None of those records suggest, however, that Morgan's absences from trial during the relevant periods were involuntary due to a medical condition that required or otherwise caused his absence. In fact, Morgan or someone on Morgan's behalf falsified correspondence from one of Morgan's physicians and faxed it to the court in an effort to delay the trial. The trial court spoke directly to that physician the third day of trial and verified that the documents were not faxed from the physician's office and that Morgan himself attempted to persuade the physician's office to fax the correspondence to the court using the physician's fax machine. Even if Morgan's counsel had presented these records, it is unlikely the court would have continued the trial.² Thus, Morgan is unable to demonstrate either that his counsel's conduct was below reasonable standards or that he was prejudiced thereby.

¶6 Morgan further argues he is entitled to an additional 248 days of credit for presentence incarceration in the drug case. However, the superior court awarded Morgan 248 days of presentence incarceration credit for the theft conviction and on direct appeal, we awarded him 132 days of credit on the drug case. "When consecutive sentences are imposed,

² We also note that the court that dismissed the petition for post-conviction relief is the same court that presided over Morgan's trial. We do not speculate when we conclude the superior court would not have ruled any differently even in light of additional medical records. Despite the records Morgan presented in his petition, the same court held in denying his petition that Morgan's claim of ineffective assistance of counsel based on the failure to present these records at trial was "unsubstantiated and without merit."

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a defendant is not entitled to presentence incarceration credit on more than one of those sentences, even if the defendant was in custody pursuant to all of the underlying charges prior to trial.” *State v. McClure*, 189 Ariz. 55, 57 (App. 1997) (emphasis and citations omitted). To allow otherwise would give a defendant an impermissible “double credit windfall.” *State v. Cuen*, 158 Ariz. 86, 87 (App. 1988).

¶7 Finally, Morgan also argues counsel appointed to represent him in this post-conviction relief proceeding had once worked with the victim in the theft case. We decline to address this issue because Morgan did not raise it in the petition he filed below.³ A petition for review may not present issues not first presented to the trial court. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii); *State v. Bortz*, 169 Ariz. 575, 578 (App. 1991) (citation omitted).

¶8 For the reasons stated above, we grant review but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA

³ Morgan raised this new issue in the reply he filed below but the superior court did not consider it.