

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

JONATHAN ELIJAH LARGE, *Petitioner*.

No. 1 CA-CR 15-0618 PRPC
FILED 7-27-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2012-137859-001
The Honorable John R. Ditsworth, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Jonathan Elijah Large, Eloy
Petitioner

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in
which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

STATE v. LARGE
Decision of the Court

C A T T A N I, Judge:

¶1 Jonathan Elijah Large petitions this court for review from the dismissal of his petition for post-conviction relief. For reasons that follow, we grant review but deny relief.

¶2 A jury found Large guilty of armed robbery. The superior court sentenced him to 10.5 years' imprisonment, flat time, considering the jury's finding of dangerousness and one aggravating factor and the court's finding that Large was on parole at the time he committed the offense. We affirmed Large's conviction and sentence on direct appeal, holding that although the court had erred by independently finding Large's parole status rather than submitting the matter to the jury, *see Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013), the error was harmless because the issue was undisputed. *State v. Large*, 234 Ariz. 274, 276, 278–80, ¶¶ 1, 12–19 (App. 2014).

¶3 Large timely filed a petition for post-conviction relief raising seven claims of ineffective assistance of counsel: (1) counsel improperly failed to pursue or engage in plea negotiations, (2) counsel failed to call a witness Large requested, (3) counsel performed an inadequate investigation by failing to visit the crime scene or look for additional eyewitnesses, and by failing to secure independent DNA and fingerprint testing, (4) counsel failed to timely disclose a potential defense witness and improperly allowed the State to introduce untimely disclosed evidence, (5) counsel failed to understand or inform Large of the sentencing provisions (no less than presumptive and flat time) applicable to his circumstances, (6) counsel improperly failed to challenge the court's (rather than jury's) role in finding parole status for sentence enhancement, and (7) cumulative error. The superior court found Large had failed to state any colorable claim and summarily dismissed his petition for post-conviction relief.

¶4 Large argues that each of these seven issues demonstrated a colorable claim of ineffective assistance, and that the superior court erred by failing to properly address his claims. We review for an abuse of discretion the court's assessment of whether a petition for post-conviction relief presents a colorable claim. *See State v. Watton*, 164 Ariz. 323, 325 (1990); *State v. D'Ambrosio*, 156 Ariz. 71, 73 (1988).

¶5 To state a colorable claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below objectively reasonable standards and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687–88, 691–92 (1984); *State*

STATE v. LARGE
Decision of the Court

v. Nash, 143 Ariz. 392, 397 (1985). Failure to establish either criterion is fatal to the claim, and obviates the need for a court to consider the other prong. *State v. Salazar*, 146 Ariz. 540, 541–42 (1985).

¶6 Here, the superior court did not abuse its discretion by concluding that Large had failed to present any colorable claim of ineffective assistance of counsel. First, there is no basis in the record for Large’s challenge to counsel’s performance during plea negotiations. The record demonstrates that trial counsel communicated with the prosecutor regarding plea negotiations and that Large rejected the only informal plea offer made to him, due to his unwillingness to accept any plea to robbery.

¶7 Furthermore, Large’s claim regarding counsel’s pretrial investigation is not colorable. Large argues that trial counsel should have investigated the crime scene, searched for eyewitnesses or surveillance tapes, and ordered fingerprinting or DNA analysis of the victim’s stolen phone. But Large did not dispute that he was present at the crime scene, did not specify that there were any parties present who had not been contacted, and did not challenge the fact that the stolen phone was found in his apartment. In this context, the record does not demonstrate how any of these lines of investigation was likely to yield relevant evidence. *See State v. Schultz*, 140 Ariz. 222, 224 (1984) (“Counsel . . . has a duty to investigate and explore all avenues leading to facts relevant to the merits of the case[.]”) (citation omitted).

¶8 Large also challenges two of his trial counsel’s decisions regarding witnesses. First, he argues that counsel should have presented a witness who was present during the aftermath of the robbery, but did not witness the actual crime. Second, he argues that counsel erred by presenting a second witness, who was disclosed late. By presenting this witness, counsel opened the door for the State to use certain rebuttal evidence.

¶9 “[T]he power to decide questions of trial strategy and tactics rests with counsel, and the decision as to what witnesses to call is a tactical, strategic decision.” *State v. Lee*, 142 Ariz. 210, 215 (1984) (citations omitted). Strategic choices made by counsel are “virtually unchallengeable.” *Strickland*, 466 U.S. at 690–91. *See also State v. Vickers*, 180 Ariz. 521, 526 (1994) (trial counsel’s strategy and tactical decisions – even if the defendant disagrees and even if the decisions are ultimately unsuccessful – do not constitute ineffective assistance “provided the challenged conduct had some reasoned basis.” (citation omitted). Neither of the challenged decisions demonstrates ineffective assistance of counsel. Counsel was

STATE v. LARGE
Decision of the Court

under no obligation to call Large's requested witness, who was not present during the commission of the crime. And there is no evidence that it was unreasonable for counsel to present the other witness after weighing all the relevant factors, including the availability of the State's rebuttal evidence (which trial counsel attempted to preclude).

¶10 Finally, Large's claims related to counsel's performance at sentencing are not colorable. Large contends that counsel did not adequately understand the sentencing range applicable to his case, but counsel's statements to the court at sentencing indicate otherwise. Trial counsel's notes indicate that they discussed sentencing ranges, and counsel filed a sentencing memorandum presenting five mitigating factors and arguing for a mitigated sentence in the event the court found Large was not on parole at the time of the crime. And although Large claims that counsel should have insisted that a jury rather than the court find his parole status, controlling Arizona precedent at the time of sentencing held that the court could properly make such a finding for purposes of increasing the mandatory minimum sentence under A.R.S. § 13-708. *State v. Flores*, 201 Ariz. 239, 241, ¶ 8 (App. 2001). Although the United States Supreme Court later held that process unconstitutional in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), that case was not decided until after Large's sentencing hearing. Moreover, this court addressed Large's *Alleyne* claim on direct appeal and expressly found the sentencing error to be harmless beyond a reasonable doubt. *Large*, 234 Ariz. at 280, ¶¶ 17-19. Thus, Large cannot show prejudice.

¶11 Accordingly, we grant review but deny relief.



AMY M. WOOD • Clerk of the Court
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