

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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STATE OF ARIZONA, *Respondent*,

*v.*

MICHAEL DEVAUGHN JOHNSON, *Petitioner*.

No. 1 CA-CR 16-0102 PRPC  
FILED 8-29-2017

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Petition for Review from the Superior Court in Maricopa County  
No. CR2011-114400-003  
The Honorable Pamela Hearn Svoboda, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Maricopa County Attorney's Office, Phoenix  
By Lisa Marie Martin  
*Counsel for Respondent*

Michael DeVaughn Johnson, Eloy  
*Petitioner*

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**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.

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C A T T A N I, Judge:

¶1 Michael DeVaughn Johnson petitions this court for review from the summary dismissal of his consolidated third and fourth post-conviction relief proceedings. For reasons that follow, we grant review but deny relief.

¶2 A jury found Johnson guilty of possession of dangerous drugs for sale, possession of narcotic drugs for sale, and possession of marijuana. The superior court sentenced him to an aggregate term of 15.75 years' imprisonment, and Johnson appealed. While the appeal was pending, Johnson initiated his first two post-conviction relief proceedings. The superior court dismissed both proceedings, and this court later denied relief on review in each case. *See State v. Johnson*, 2 CA-CR 2015-0410-PR, 2015 WL 7759772 (Ariz. App. Dec. 2, 2015) (mem. decision); *State v. Johnson*, 2 CA-CR 2016-0066-PR, 2016 WL 1407881 (Ariz. App. Apr. 11, 2016) (mem. decision). This court also affirmed Johnson's convictions and sentences on direct appeal. *State v. Johnson*, 1 CA-CR 13-0584, 2015 WL 161174 (Ariz. App. Jan. 13, 2015) (mem. decision).

¶3 After this court issued its decision on direct appeal, Johnson filed his later-consolidated third and fourth petitions for post-conviction relief asserting ineffective assistance of trial counsel and ineffective assistance of appellate counsel. The superior court found Johnson had failed to present any colorable claim, summarily dismissed the consolidated petitions, and denied Johnson's subsequent request for rehearing. This petition for review followed.

¶4 We deny relief. First, Johnson argues his trial counsel was ineffective for failing to challenge the legality of his arrest. But Johnson could have raised this issue in one of his prior post-conviction relief proceedings, so the claim is now precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). None of the exceptions to preclusion under Rule 32.2(b) apply.

¶5 Because Johnson's claims asserting ineffective assistance of appellate counsel could not have been raised until after conclusion of his direct appeal, these claims are not precluded. *See* Ariz. R. Crim. P. 32.2(a)(3). Johnson argues his appellate counsel was ineffective for failing to raise issues regarding (1) an alleged denial of the right to counsel during trial, (2) sufficiency of the evidence to support Johnson's convictions, and (3) the superior court's denial of Johnson's motion to vacate judgment premised on newly discovered evidence. We deny relief on this claim of ineffective assistance of appellate counsel because it is meritless.

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¶6 To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel’s performance fell below objectively reasonable standards and that the deficient performance caused him prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a “reasonable probability” – that is, “a probability sufficient to undermine confidence in the outcome” of the trial – that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. As regards a claim of ineffective assistance of appellate counsel, counsel on appeal is not required to “raise every possible or even meritorious issue on appeal.” *State v. Herrera*, 183 Ariz. 642, 647 (App. 1995). Instead, the “strategic decision to ‘winnow out weaker arguments on appeal and focus on’ those more likely to prevail is an acceptable exercise of professional judgment.” *State v. Febles*, 210 Ariz. 589, 596, ¶ 20 (App. 2005) (citation omitted). “Once the issues have been narrowed and presented, appellate counsel’s waiver of other possible issues binds the defendant.” *Id.* at ¶ 19 (citation omitted).

¶7 Johnson’s assertion that appellate counsel improperly failed to argue that he was temporarily wrongfully deprived of trial counsel is not colorable. The underlying issue with trial counsel’s availability and the composition of the jury was the subject of Johnson’s direct appeal. *See Johnson*, 2015 WL 161174, at \*1, ¶ 2. Trial began with a 12-person jury and 3 alternates because Johnson faced more than 30 years’ imprisonment, but Johnson’s attorney suffered a serious injury on the 10th day of trial and could not resume the trial until the following week, a week in which only 9 of the jurors were available. *Id.* Although Johnson’s counsel was not present and although Johnson expressly objected and asked for his lawyer’s advice on the matter, the superior court “decided to resume trial the following week with an eight-person jury and one alternate – on the condition that the court would not impose a sentence of 30 years or more.” *Id.*

¶8 Our decision on direct appeal acknowledged that the superior court rendered this decision without Johnson’s counsel present and over Johnson’s personal objection, but nevertheless concluded that no constitutional error had occurred. *Id.* at ¶¶ 1, 2. Moreover, although Johnson argues that counsel’s presence was necessary to assert the argument “that the state must reduce petitioner’s exposure to under 30 [years] in order to have an 8-person jury deliberate the charges,” the superior court reached this determination even without the aid of counsel. *Id.* at \*2, ¶ 7. Accordingly, Johnson’s first assertion of ineffective assistance of appellate counsel is not colorable.

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¶9 Johnson's assertion regarding appellate counsel's failure to challenge the sufficiency of the evidence is similarly unavailing. Although Johnson argues that the evidence presented was consistent with his mere presence at an apartment where drugs were being sold rather than as an accomplice, the jury was not required to reach that conclusion, and instead was tasked with weighing the evidence and determining the credibility of the witnesses. *State v. Cid*, 181 Ariz. 496, 500 (App. 1995). Johnson was seen behaving in a manner consistent with acting as a lookout for the drug operation, and when he was arrested the next day inside the apartment, he was within reaching distance of drugs, a drug ledger, and a gun. Under the circumstances, appellate counsel was not ineffective for failing to contest the sufficiency of the evidence.

¶10 Finally, regarding appellate counsel's failure to challenge the denial of Johnson's motion for new trial based on newly discovered evidence, the superior court held an evidentiary hearing on the motion and found that Johnson's proffered evidence was not credible. *See State v. Jeffers*, 135 Ariz. 404, 426 (1983) (post-trial motion properly denied if trial court finds proffered testimony not credible). The failure to raise an issue on appeal under these circumstances did not fall below objectively reasonable standards.

¶11 Accordingly, we grant review but deny relief.



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