

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

WALTER JOHN BELCHER, *Petitioner*.

No. 1 CA-CR 16-0286 PRPC
FILED 7-6-2017

Petition for Review from the Superior Court in Mohave County
No. S8015CR201101352
The Honorable Derek C. Carlisle, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mohave County Attorney's Office, Kingman
By Matthew J. Smith
Counsel for Respondent

Walter John Belcher, Eloy
Petitioner

MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jennifer B. Campbell joined.

NORRIS, Judge:

¶1 Walter John Belcher petitions this court for review from the superior court's dismissal of his petition for post-conviction relief. We grant review, but deny relief.

¶2 In 2013, a jury convicted Belcher of dangerous drugs for sale, possession of drug paraphernalia, possession of dangerous drugs, possession of narcotic drugs, and possession of marijuana. The superior court sentenced Belcher to 10.5 years' imprisonment, and this court affirmed his convictions and sentences on direct appeal.¹

¶3 Belcher filed a timely notice of post-conviction relief, and the superior court appointed counsel to represent Belcher in the post-conviction proceeding. Appointed counsel examined the record and other "documentation received that was outside the record," which counsel did not identify, and found no colorable claim to present to the superior court. Belcher then filed a pro per petition for post-conviction relief.

¶4 In his petition for post-conviction relief, Belcher argued his trial counsel was ineffective for failing to investigate and present mitigating evidence of Belcher's medical and mental health history, his history of drug usage and its effect on his mental status at the time he committed the offenses, and military service. He also argued his trial counsel was ineffective in failing to contest the reliability and veracity of a confidential informant who provided information to police.

¶5 In addition to his ineffective assistance of counsel arguments, Belcher also argued the grand jury that indicted him and the petit jury that convicted him were not representative cross-sections of the community (the "jury arguments"). He additionally alleged his trial counsel, his appellate

¹*State v. Belcher*, 1 CA-CR 13-0149, 2014 WL 2566115, at *1, ¶ 1 (Ariz. App. June 5, 2014) (mem. decision).

STATE v. BELCHER
Decision of the Court

counsel, and his appointed post-conviction relief counsel were all ineffective in failing raise the jury arguments.

¶6 The superior court dismissed the petition, explaining, first, it “had been presented [with] evidence of Defendant’s medical issues and need to use illegal drugs for pain management” and it had “specifically rejected that mitigating factor with respect to count one and considered it as a mitigating factor with respect to the remaining counts.” The court also noted the presentence investigation report highlighted his military service. The court next explained Belcher failed to present any basis for trial counsel to challenge the reliability of the confidential informant. Finally, the court stated Belcher could have raised his jury arguments on direct appeal and, therefore, was now precluded from doing so.

¶7 In his petition for review, Belcher argues, first, the superior court abused its discretion in denying his petition for post-conviction relief by applying mitigating factors to the possession of dangerous drugs charge but not on the other charges. The superior court was not required to apply the mitigating evidence to all charges equally, however. As long as the superior court considers mitigating evidence at sentencing, “the judge is not bound to conclude that the evidence calls for leniency.” *State v. Mata*, 185 Ariz. 319, 331 n.6, 916 P.2d 1035, 1047 n.6 (1996) (citations omitted).

¶8 Relatedly, Belcher also argues the superior court did not have adequate evidence of his history of drug use and his mental health. In support of this argument, Belcher attached various medical records to his petition for review showing his use of prescription drugs. He did not, however, present this information to the superior court. A party may not supplement the record with any matters not first considered by the superior court. *See State v. Martinez*, 134 Ariz. 119, 120, 654 P.2d 53, 54 (App. 1982) (“Appellate courts will review only those matters which appear in the records of the trial court.”) (citations omitted). We have, therefore, not considered these records. In any event, the superior court considered the presentence investigation report, which noted Belcher’s history of drug use and PTSD.

¶9 Next, Belcher argues his trial counsel should have subpoenaed the confidential informant during the pretrial hearings on Belcher’s motion to suppress. Disagreements in trial strategy, however, will not support a claim of ineffective assistance of counsel, provided the challenged conduct has some reasoned basis. *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) (citations omitted). Further, Belcher has not shown a reasonable likelihood that, had trial counsel examined the

STATE v. BELCHER
Decision of the Court

confidential informant at the suppression hearing, the superior court would have ruled differently on his motion to suppress.

¶10 Finally, Belcher reiterates the jury arguments he initially raised in his petition for post-conviction relief – the grand and petit juries failed to represent a fair cross-section of the community. Belcher has, however, failed to make any showing of the composition of the juries. He also argues his trial, appellate, and his court appointed post-conviction counsel were ineffective in failing to raise the jury arguments. Because, as discussed, he has made no showing of the composition of the juries, trial and appellate counsel were not ineffective in failing to raise the jury arguments. And, Belcher was not entitled to effective assistance of post-conviction relief counsel because he was not pursuing an “of-right” proceeding. *See State v. Pruett*, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995) (right of effective assistance of counsel only extends to a petition for post-conviction relief filed by pleading defendant). Belcher was not a pleading defendant.

¶11 For the foregoing reasons, although we grant review, we deny relief.



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