

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

KEVIN EDWARD NAZARIO, *Petitioner*.

No. 1 CA-CR 16-0643 PRPC  
FILED 10-17-2017

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Petition for Review from the Superior Court in Maricopa County  
No. CR2014-001113-001  
The Honorable Margaret R. Mahoney, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

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

Kevin Edward Nazario, Florence  
*Petitioner*

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**MEMORANDUM DECISION**

Chief Judge Samuel A. Thumma delivered the decision of the court in  
which Presiding Judge Kenton D. Jones and Judge Jon W. Thompson joined.

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**T H U M M A**, Chief Judge:

¶1 Petitioner Kevin Edward Nazario seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1 (2017).<sup>1</sup> Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). Because Nazario has shown no such error, this court grants review but denies relief.

¶2 Nazario was indicted on three counts of sexual exploitation of a minor involving digital images alleged to have occurred in January 2014, each Class 2 felonies and Dangerous Crimes Against Children (DCAC). In October 2014, pursuant to a written plea agreement, Nazario pled guilty to one count of sexual exploitation of a minor, a Class 2 felony and a DCAC. The plea agreement stipulated that Nazario would be sentenced to 20 years in prison and that counts 2 and 3, and the State's allegation of prior historical felony convictions, would be dismissed. Nazario entered the plea agreement after a full colloquy and after an evidentiary hearing on his unsuccessful motion to suppress, which arose from a probation search of his home. Nazario was sentenced to a 20-year prison term as stipulated in the written plea agreement, and his probation was re-instated in an unrelated matter.

¶3 Nazario filed a timely petition for post-conviction relief raising two claims of ineffective assistance of counsel. He alleged that his attorney had been ineffective (1) in failing to prevail on the motion to suppress and (2) at sentencing by failing to object to the use of prior felony convictions as aggravators. After full briefing, the superior court summarily dismissed the petition, finding counsel had not been ineffective. The court found Nazario expressly waived any claims relating to the search by accepting the plea agreement. The court also determined that the State had not breached its obligations pursuant to the plea agreement and that the sentence was lawful. Nazario's claim that his sentence was illegally based on prior felony convictions that were over ten years old was not considered, as the claim was raised for the first time in his reply brief. Nazario's timely petition for review by this court followed.

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<sup>1</sup> Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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¶4 The superior court was not obligated to consider the sentencing claim first raised by Nazario in his reply. A court may refuse to consider new issues and arguments first raised in a reply in support of a petition for post-conviction relief. *State v. Lopez*, 223 Ariz. 238, 240 ¶ 7 (App. 2009).

¶5 To state a colorable claim of ineffective assistance of counsel, Nazario was required to show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985). To show prejudice, he was required to show that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶6 Nazario's claim that the search of his residence was illegal and that counsel was ineffective for failing to prevail on the motion to suppress fails. A plea agreement waives all non-jurisdictional defenses, errors and defects that occurred before the plea. *State v. Moreno*, 134 Ariz. 199, 200 (App. 1982). The waiver of non-jurisdictional defects includes deprivations of constitutional rights. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). This includes claims of ineffective assistance of counsel that do not relate directly to the validity of the plea. *State v. Quick*, 177 Ariz. 314, 316 (App. 1993). It is unnecessary for this court to analyze defense counsel's performance, as the claim has been waived. Moreover, this court finds no error in the superior court's reasoning on this issue.

¶7 Nazario also claims that his sentence was illegal, and his attorney was ineffective for failing to object to the use of aggravators at sentencing. Nazario was sentenced to the specific term of years stipulated to in the written plea agreement. The superior court was correct in finding that the State's allegation of historical priors had been dismissed and that the sentence had not been enhanced. The sentence did not exceed the maximum sentence allowed by law and the sentencing court did not improperly consider his felony convictions.<sup>2</sup> Nazario has failed to show prejudice in receiving the sentence agreed to in the written plea agreement. Accordingly, his ineffective assistance of counsel claim fails. *State v. Salazar*,

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<sup>2</sup> Had Nazario been facing an enhanced sentence based on prior felony convictions, he would have been facing a sentence of life in prison with a minimum of 35 years served, an issue discussed at a settlement conference.

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146 Ariz. 540, 541 (1985) (“this court need not . . . address both prongs of the inquiry if the defendant makes an insufficient showing on one.”).

¶8 For these reasons, this court grants review but denies relief.



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