

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

VANCE EDWARD BRADLEY, *Petitioner*.

No. 1 CA-CR 17-0627 PRPC
FILED 7-12-2018

Appeal from the Superior Court in Maricopa County
No. CR2012-138001-001
The Honorable Hugh E. Hegyi, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Gerald R. Grant
Counsel for Respondent

DeBrigida Law Offices, PLLC, Glendale
By Ronald M. DeBrigida, Jr.
Counsel for Petitioner

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jennifer B. Campbell joined.

M c M U R D I E, Judge:

¶1 Vance Edward Bradley petitions this court to review the superior court's order dismissing his post-conviction relief ("PCR") proceeding commenced pursuant to Arizona Rule of Criminal Procedure 32. For the following reasons, we grant review and relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 In March 2013, Bradley failed to appear at a pretrial hearing, after which the superior court issued a bench warrant. Thereafter, Bradley failed to appear at any proceeding including his trial. In July 2013, a jury convicted Bradley *in absentia* of possession of methamphetamine, a Class 4 felony. Bradley was subsequently arrested pursuant to a bench warrant issued on August 8, 2013. At sentencing, Bradley stipulated to five prior felony convictions and was sentenced to seven years' imprisonment. Afterwards, this court affirmed Bradley's conviction and sentence as modified on appeal. *State v. Bradley*, 1 CA-CR 14-0229, 2015 WL 5167706 (Ariz. App. Sept. 3, 2015) (mem. decision).

¶3 Bradley timely sought post-conviction relief, arguing ineffective assistance of counsel ("IAC"), insufficiency of evidence, illegal arrest and search and seizure, and due process violations. The superior court summarily denied all of Bradley's claims except the claim that trial counsel was ineffective, causing Bradley's absence at trial.

¶4 At the evidentiary hearing on the IAC claim, Bradley, his wife, and his trial counsel all testified. The testimony revealed that on the morning of the initial pretrial hearing in March 2013, Bradley's trial counsel was informed that Bradley's most recent urinalysis test showed a violation of his pretrial release conditions. As a result, trial counsel informed Bradley he was likely to be taken into custody. To mitigate his positive urinalysis test, Bradley choose to leave before the hearing began and attend an inpatient substance-abuse rehabilitation program.

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¶5 Bradley testified he took his belongings to his wife's home, after which she drove him to his trial counsel's office where he informed the receptionist he would be in an inpatient substance-abuse rehabilitation program called "The Word." Bradley testified he gave the receptionist an approximate location of the program, and told her he could be contacted at his wife's address or home phone number, or on his cell phone. Afterwards, his wife dropped him off at the rehabilitation facility. Bradley also testified that he later called his trial counsel's office and gave them the address of the rehabilitation facility. Bradley's trial counsel testified that he never received any of that information from his receptionist, and therefore failed to communicate to Bradley any information regarding his trial dates. Bradley's counsel did testify that while it was his "general procedure" to send a letter to his clients anytime there was a bench warrant issued for their arrest or a minute entry was filed, he could not remember if such a communication was sent to Bradley in this case. No such letter was presented at the hearing. Bradley's trial counsel admitted he did not inform the superior court that Bradley was attending a rehabilitation program.

¶6 The superior court denied Bradley's PCR petition, finding that while Bradley's trial counsel's conduct "fell below the prevailing standard of practice," there was no "reasonable probability that the outcome of the case would have been different but for [trial counsel's] error." Bradley filed a timely *pro se* petition for review to this court.

¶7 On review, we ordered Bradley's PCR counsel and the State to file supplemental briefs regarding whether "a finding of deficient performance [for failure to inform Bradley of the trial date] give[s] rise to structural error under the second prong of the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984)." We have jurisdiction pursuant to Arizona Rule of Criminal Procedure 32.9(c).

DISCUSSION

¶8 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). It is the petitioner's burden to show that the superior court abused its discretion. *See State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011).

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¶9 On review, Bradley reasserts his ineffective assistance of counsel claim regarding his absence from trial and sentencing.¹ The superior court found Bradley's trial counsel's "conduct fell below the prevailing standard of practice for criminal defense attorneys in this jurisdiction." However, because the superior court found there was not a "reasonable probability that the outcome of the case would have been different but for [trial counsel's] error," Bradley's petition for post-conviction relief was denied.

¶10 The State first argues on review that Bradley did not sufficiently explain how the superior court's order denying his PCR petition was an abuse of discretion, and therefore pursuant to Rule 32.9(c)(1) we should summarily deny his petition for review. Bradley's petition for review to this court, and his reply to the State's response, both refer to the superior court's finding and both argue the denial of his PCR petition regarding that finding was an abuse of discretion. Accordingly, we address Bradley's claim.

¶11 To state a colorable claim of ineffective assistance of counsel, a petitioner must show counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the petitioner. *Strickland v. Washington*, 466 U.S. at 687; *State v. Nash*, 143 Ariz. 392, 397 (1985). Counsel's performance must fall outside the acceptable "range of competence" and fail to meet "an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88.

¶12 The superior court found Bradley's trial counsel's performance fell below the standard of reasonableness because he both failed to communicate to Bradley his hearing or trial dates, and failed to inform the court that Bradley was attending a rehabilitation program. After the initial pretrial hearing, Bradley communicated the address of the inpatient rehabilitation program to his trial counsel's receptionist. Despite having this information, as well as the contact information by which he had previously communicated with Bradley before the pretrial hearing,

¹ Bradley also asserts additional claims that were not presented to the superior court in his petition for post-conviction relief. Because a petition for review may not raise issues not first presented to the superior court, we do not address these claims. *See* Ariz. R. Crim. P. 32.9(c)(4)(B)(ii); *see also State v. Bortz*, 169 Ariz. 575, 577 (App. 1991).

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Bradley's trial counsel never contacted him after that date.² We agree with the superior court's finding that Bradley's trial counsel's conduct fell below reasonable standards. See Ariz. R. Sup. Ct. 42, ER 1.4(a)(3) (requiring a lawyer to keep their client "reasonably informed about the status" of their case).

¶13 In its supplemental brief, the State argues the superior court "made no definitive findings" regarding whether Bradley informed trial counsel about his whereabouts; or if counsel was informed, whether counsel failed to communicate with Bradley about the trial date. The superior court's ultimate finding, that Bradley's trial counsel's performance fell below the prevailing standard of practice, implies a finding that Bradley's trial counsel was informed of his whereabouts and failed to communicate that information to Bradley. If the superior court believed Bradley's counsel had never been informed about Bradley's whereabouts, the court's conclusion that counsel's conduct fell below professional standards would not be logical. See *Fleming v. Becker*, 14 Ariz. App. 347, 350 (1971) (we presume the superior court found every fact necessary to support its ruling). Likewise, if the court believed counsel was informed about Bradley's whereabouts and communicated the trial information to Bradley, there would not have been a professional-standard's violation. Only if counsel (or his staff) knew about Bradley's whereabouts, and failed to communicate the trial information to Bradley, would the court's finding of deficient performance be supported by the record. *Id.*

¶14 Under the second prong of *Strickland*, a petitioner must show that, but for counsel's deficient performance, there is a reasonable probability that the results of the case would have been different. 466 U.S. at 694. When making a finding regarding prejudice, the superior court found counsel's "failure to maintain contact with Defendant or to advise the Court of Defendant's whereabouts was not the reason Defendant failed to appear." Instead, the superior court found Bradley was likely not attending a rehabilitation program continuously from the date of the pretrial hearing to the date of his arrest, and because he only attempted to contact his trial counsel one other time after the date of the pretrial hearing, he "caused himself to be absent at the trial." Therefore, the superior court found no prejudice and denied Bradley's petition. We disagree with the court's legal conclusion.

² Bradley testified his trial counsel had previously called him several times.

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¶15 While a finding of ineffective assistance of counsel usually requires prejudice, if the court finds counsel’s deficient performance contributed to structural error, “reversal is mandated regardless of whether . . . prejudice is found.” *State v. Valverde*, 220 Ariz. 582, 585, ¶ 10 (2009). Stated differently, when structural error is found, prejudice is presumed. *Id.* Structural error “deprive[s] defendants of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.’” *State v. Ring (Ring III)*, 204 Ariz. 534, 552, ¶ 45 (2003) (quoting *Neder v. United States*, 527 U.S. 1, 8–9 (1999)). While a defendant’s involuntary absence from a trial proceeding may be subject to harmless error review, if the presence error “undermine[s] the integrity of the trial process” it will constitute structural error and require reversal. *State v. Garcia-Contreras*, 191 Ariz. 144, 148, ¶ 16 (1998) (quoting *Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995)) (defendant’s absence from entire jury selection was structural error); *see also State v. Ayers*, 133 Ariz. 570, 571 (App. 1982) (harmless error applies when defendant is absent from “minor portion of the [jury] selection process”).

¶16 The State argues the superior court’s finding that Bradley “caused himself to be absent,” distinguishes this case from the type of structural error found in *Garcia-Contreras*—where the defendant’s absence at trial was involuntary. 191 Ariz. at 148, ¶ 17. To the extent the superior court’s findings regarding prejudice concern the possibility that Bradley caused his failure to appear, we hold these findings to be inconsistent with the superior court’s finding that “[trial counsel’s] conduct fell below the prevailing standard of practice for criminal defense attorneys in this jurisdiction.” Under these circumstances, if there was evidence that Bradley knew of his trial dates but was still absent, or if he had been present despite counsel’s deficient performance, a finding that Bradley was not prejudiced would be supported. However, a finding that a defendant’s attorney’s deficient performance contributed to the defendant being deprived of a basic protection such as the defendant’s right to appear at their own trial, without evidence of the defendant having otherwise known about the trial date, cannot be reconciled with a finding that the defendant was voluntarily absent.

¶17 Once the superior court has found trial counsel’s conduct was deficient and contributed to a structural error at trial, relief must be granted and the verdict must be overturned. *Garcia-Contreras*, 191 Ariz. at 148, ¶ 16; *Ring*, 204 Ariz. at 552, ¶ 45. Because Bradley’s trial counsel’s deficient performance contributed to his absence from his entire jury trial, we hold the absence created structural error requiring reversal. *See Ring*, 204 Ariz.

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at 552, ¶ 45 (when structural error is found “we automatically reverse the guilty verdict entered”).

CONCLUSION

¶18 We grant review and relief, and remand to the superior court for further proceedings consistent with this decision.



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