IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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STATE OF ARIZONA, *Respondent*,

*v.*

WILLIAM JAMES FRANK, *Petitioner*.

No. 1 CA-CR 19-0405 PRPC
FILED 4-30-2020

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Appeal from the Superior Court in Maricopa County
No. CR2015-114707-001
The Honorable Christopher A. Coury, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Maricopa County Attorney's Office, Phoenix
By Amanda M. Parker
*Counsel for Respondent*

William James Frank, Eloy
*Petitioner*

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**MEMORANDUM DECISION**

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Jennifer B. Campbell joined.

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**C A T T A N I**, Judge:

**¶1** William James Frank petitions for review of the superior court's dismissal of his petition for post-conviction relief. For reasons that follow, we grant review but deny relief.

**¶2** In 2017, Frank was convicted of possession of dangerous drugs (methamphetamine). Because he had two prior felony convictions and was on probation when he committed the crime, Frank was sentenced to a presumptive term of ten years in prison. Frank appealed, and this court affirmed his conviction and sentence. *See State v. Frank*, 1 CA-CR 17-0251, 2018 WL 3387322 (Ariz. App. July 12, 2018) (mem. decision). Following Frank's direct appeal, his post-conviction counsel filed a notice of completion with the superior court, stating that she had not found any colorable issues to submit to the court. Frank then filed a *pro se* petition for post-conviction relief, claiming that the attorneys representing him at trial, on appeal, and in post-conviction proceedings were ineffective, and that the substance he was convicted of possessing was not actually methamphetamine.

**¶3** The superior court dismissed Frank's petition, finding that it failed to present a colorable claim. We review the superior court's dismissal of a petition for post-conviction relief based on lack of a colorable claim for an abuse of discretion. *State v. Amaral*, 239 Ariz. 217, 219, ¶ 9 (2016).

## I. Ineffective Assistance of Counsel.

### A. Rule 15.8 Motion.

**¶4** Frank's petition alleged that trial counsel was ineffective for failing to request the production of evidence under Arizona Rule of Criminal Procedure ("Rule") 15.8 before Frank declined the State's first plea offer. However, by its own terms, Rule 15.8 applies only "[i]f the State has filed an indictment or information in superior court." In Frank's case, no indictment or information had been filed at the time of Frank's first plea offer, so Rule 15.8 was inapplicable.

**¶5** Frank contends that this "letter-of-the-law" reading of Rule 15.8 is inconsistent with its purpose and urges us to conclude that Rule 15.8 applied to his pre-information plea offer. Because the meaning of Rule 15.8 is clear on its face, we decline to do so. *See Am. Asphalt & Grading Co. v. CMX, L.L.C.*, 227 Ariz. 117, 118, ¶ 6 (2011) ("We use rules of statutory construction to interpret court rules. And we do not look beyond a rule's language if it is clear and unambiguous.") (citation omitted).

**¶6** Accordingly, the superior court did not abuse its discretion by determining that Frank's counsel was not ineffective for failing to file a futile motion beyond the scope of Rule 15.8.

**B. Failure to Adequately Advise.**

**¶7** Frank also argued that his trial counsel "fail[ed] to properly advise [him] about the evidence against him, the state's minimal statutory requirements and fail[ed] to develop a defense." Frank asserted that if he had been properly advised, he would have agreed to take a plea.

**¶8** "To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea." *State v. Donald*, 198 Ariz. 406, 413, ¶ 16 (App. 2000). "To establish prejudice in the rejection of a plea offer, a defendant must show a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer and declined to go forward to trial." *Id.* at 414, ¶ 20 (quotation omitted).

**¶9** The superior court did not abuse its discretion by rejecting Frank's argument. Frank asserted that there was "not much discussion regarding the evidence that [would] be used against him." But at his pre-trial settlement conference, the State provided a detailed description of the evidence that would be introduced against Frank were the case to proceed to trial.

**¶10** Frank also asserted that he did not understand that his case was based on constructive rather than actual possession. But Frank failed to establish a colorable claim that this lack of understanding was due to counsel's purported ineffectiveness. At the trial management conference, counsel stated, in Frank's presence, that "[o]ne of the issues Mr. Frank seems to be having is this is not an actual possession case, it's more of constructive." This statement indicated that counsel at least attempted to explain the difference to Frank and informed Frank that the case was based on a theory of constructive possession. In any event, at the same trial management conference, the superior court explained to Frank that "this constructive possession business is broad. If the jurors believe you knew it was there and had access to it, then that meets the requirement of constructive possession." And at a later trial management conference, the superior court again informed Frank that "possession and ownership are not the same" and that the State did not "have to prove that the drugs were [Frank's]," only that he "had access to them." Frank confirmed his

understanding to the court and maintained that he wanted to proceed to trial.

**¶11** Frank also argued that counsel did not make clear to him that the State had a "slam dunk case" against him. However, while discussing his plea offer at a trial management conference, counsel for the State stated:

> [W]hen I look at [the evidence] and I say, how are we going to lose this case at trial and why would the Defendant want to go to trial and get 11 years? So . . . this is a really fair offer and the stakes are just not very good for the Defendant, if he goes to trial. That's my observation.

**¶12** Frank's counsel responded that the State's "points are all very well taken. They are exactly what [counsel] had already advised [Frank] . . . ." And this occurred after the evidence was already laid out for Frank at his settlement conference. Accordingly, the superior court did not abuse its discretion by denying Frank's request for an evidentiary hearing on this point.

**¶13** Frank also argued that counsel did not communicate to him that counsel would not be presenting evidence to challenge the voluntariness of his statement to officers or the fact of his fingerprints on the bag of methamphetamine found at the scene. Frank asserted that he was consequently left with "no reasonable defense" at trial. At its core, Frank's claim was that counsel did not make him aware of the strategy he would be using at trial. But Frank has not shown that he did not have enough information to make an informed decision as to whether to accept a plea. *See id.* at 413, ¶ 16. As discussed above, Frank was told about the relative strength of his case and the evidence that would be presented against him, and he was informed his sentence would likely be much longer than if he had accepted the State's plea offer. In light of the information Frank did have, his assertion that he did not know how to procure evidence did not establish that he was not provided with enough information to make an informed decision. Accordingly, the superior court did not abuse its discretion by determining that Frank failed to establish a colorable claim of ineffective assistance of counsel regarding evidentiary issues.

### C. Failure to Investigate.

**¶14** Frank's post-conviction petition further asserted that counsel was ineffective by failing to seek independent testing of the methamphetamine found in his possession. Frank argues that the superior court erred by characterizing counsel's decision not to look for an

independent expert as a "strategic decision" because "there is not one shred of evidence . . . that could support a finding that [counsel's] . . . decision was made with reasonable information."

**¶15** Frank's argument misconstrues his burden of proof in post-conviction proceedings. There is a strong presumption that counsel's decisions are strategic and "fall[] within the wide range of reasonable professional assistance." *State v. Nash*, 143 Ariz. 392, 398 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Frank had the burden to overcome this strong presumption by showing that counsel's actions were the result of "ineptitude, inexperience or lack of preparation." *See State v. Varela*, 245 Ariz. 91, 94, ¶ 8 (App. 2018) (citation omitted); *State v. Stone*, 151 Ariz. 455, 461 (App. 1986).

**¶16** Here, Frank only provided unsupported assertions that the tests performed for trial could not have shown that the substance at issue was real rather than imitation methamphetamine. But "[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation." *State v. Meeker*, 143 Ariz. 256, 264 (1984).

**¶17** *State v. Denz*, 232 Ariz. 441 (App. 2013), the case on which Frank primarily relies, demonstrates this point. In *Denz*, before the superior court granted the petitioner an evidentiary hearing, the petitioner submitted an affidavit of an expert who stated that he would have provided testimony contrary to the State's expert if he was asked, thereby creating a colorable claim. *See id.* at 443, ¶ 3. Frank provided no such evidence here.

### D. Failure to File a Motion to Suppress.

**¶18** Frank also argued that his counsel was ineffective for failing to file a motion to suppress his statements to police and argue that his *Miranda* waiver was invalid. Frank claimed that his statements were involuntarily obtained because an officer told him that he would not be charged if he told the officer what he knew. The superior court correctly noted that this court decided on direct appeal that Frank's statements were made voluntarily, *see Frank*, 1 CA-CR 17-0251, at *4–5, ¶¶ 18–22, and we will not reconsider that decision here. Further, we reject Frank's alternative argument that he entered a "verbal contract" with officers and is entitled to specific performance. *See In re Parham*, 6 Ariz. App. 191, 193 (App. 1967) (addressing "whether the petitioner [was] entitled to . . . specific performance of his 'bargain' with . . . officers" and holding "that such promises, if made by police officers are unenforceable, as being beyond the scope of authority of such officers").

**E. Appellate and Post-Conviction Counsel.**

**¶19** Frank argued that his appellate and post-conviction counsel were ineffective for filing an *Anders* brief and a notice of completion without raising any specific issues for the court to consider. The superior court ruled that Frank failed to identify any legal issues that counsel should have raised and thus failed to carry his burden.

**¶20** Frank correctly noted that *Anders v. California*, 386 U.S. 738 (1967), took steps to ensure that defendants have a fair chance at an appeal. However, it also considered counsel's obligation not to raise frivolous claims:

> Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. . . . [T]he court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires.

*Id.* at 744.

**¶21** Neither *Anders* nor its Arizona counterpart, *State v. Leon*, 104 Ariz. 297 (1969), supports Frank's argument that appellate counsel is necessarily ineffective by finding no non-frivolous issues to raise on appeal. Here, Arizona's *Anders*-compliant procedure was followed. Frank's appellate counsel certified that she reviewed the record and found no arguable, non-frivolous grounds for appeal. This court then conducted an independent review of the record and similarly found no arguable issues or fundamental error. *See Frank*, 1 CA-CR 17-0251, at *5, ¶¶ at 23–24.

**¶22** As the superior court correctly noted, "[a] strong presumption exists that appellate counsel provided effective assistance." *State v. Bennett*, 213 Ariz. 562, 567, ¶ 22 (2006). Frank fails to overcome that presumption simply by speculating that different counsel may have identified a non-frivolous issue to raise on appeal.

**¶23** Similarly, Frank also relies on *Marshall v. Schriro*, 219 F. App'x. 689 (9th Cir. 2007), to argue that he was "constructively denied counsel" in his post-conviction relief proceeding because counsel did not identify any issues to raise. As a preliminary matter, Arizona courts are not bound by a

federal circuit court's interpretation of constitutional protections. *See State v. Allen*, 216 Ariz. 320, 325, ¶ 21 n.4 (App. 2007). Nor are we bound by unpublished decisions. *See* Ariz. R. Sup. Ct. 111(c)(1)(C), (d).

**¶24** Moreover, *Marshall* does not support Frank's position. In that case, the court held that the defendant's right to counsel was violated because "the procedure followed in the state court was constitutionally inadequate." 219 F. App'x at 690. In contrast, here, this court reviewed the record on direct appeal and determined no arguable issues existed on appeal. *See id.* at 691. And unlike the petitioner in *Marshall*, Frank was given the opportunity to file a brief on his own behalf to raise any issues. *See id.* at 692.

**¶25** Finally, Frank argues that the superior court should have conducted an independent *Anders* review of the record. We have previously rejected the argument that the superior court is required to do so. *See State v. Chavez*, 243 Ariz. 313, 314, ¶ 1 (App. 2017).

## II. Challenge to Methamphetamine Evidence.

**¶26** Frank also argued below that the substance he was convicted of possessing was not methamphetamine. But the superior court correctly ruled that substantial evidence supported the conclusion that the substance was, in fact, methamphetamine and that the argument was precluded because it could have been raised at trial or on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).

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


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