

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 14 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0446-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BRIAN WILLIAM MANUEL,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083625

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Lori J. Lefferts, Pima County Public Defender
By Kristine Maish

Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Brian Manuel seeks review of the trial court’s order denying his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Manuel has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Manuel was convicted of two counts of aggravated driving under the influence of intoxicating liquor (DUI) and two counts of aggravated driving with an alcohol concentration (AC) of .08 or greater. The trial court sentenced him to concurrent, eight-year terms of imprisonment. This court affirmed his convictions and sentences on appeal. *State v. Manuel*, No. 2 CA-CR 2010-0303, ¶ 13 (memorandum decision filed July 26, 2011).

¶3 Manuel timely initiated a proceeding for post-conviction relief, raising two claims in his petition. First, that he had received ineffective assistance of counsel because neither trial nor appellate counsel argued A.R.S. § 28-939 requires only one functioning brake lamp and his initial traffic stop, which had been based on an inoperative brake lamp, therefore was unlawful. And, second, that *State v. Fikes*, 228 Ariz. 389, ¶ 11, 267 P.3d 1181, 1184 (App. 2011), in which this court ruled as a matter of first impression that § 28-939 requires only one functioning break lamp, was a significant change in the law entitling him to relief. The trial court summarily denied relief.

¶4 On review Manuel contends the court “erred in denying [his] ineffective assistance of counsel claim,” essentially reasserting his arguments made below.¹ The trial court, however, correctly and thoroughly identified and addressed Manuel’s claims in a well-reasoned minute entry, and “[n]o useful purpose would be served by this court rehashing the trial court’s correct ruling in a written decision.” *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We therefore adopt it.

¶5 Additionally, we note that although Manuel contends on review “it is not and cannot be known what other lawyers have or have not done in the way of challenging stops on the basis of [§ 28-939],” it was his burden to establish that his counsel’s performance fell below an objectively reasonable professional standard of care. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Yet Manuel failed to provide the trial court with an affidavit or other extrinsic support for his assertion that counsel’s failure to raise the proposed statutory argument constituted deficient performance and fell below prevailing norms. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (colorable claim of ineffective assistance requires demonstration that counsel’s representation “fell below the prevailing objective standards”); *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim

¹Manuel does not address on review the court’s ruling that *Fikes* was not a significant change in the law. We therefore do not address that ruling. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain “[t]he reasons why the petition should be granted” and “specific references to the record”); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (“Failure to argue a claim on appeal constitutes waiver of that claim.”).

“must consist of more than conclusory assertions”). Therefore, although we grant the petition for review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.