IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BENJAMIN SCOTT HINEMAN,
Petitioner.

No. 2 CA-CR 2013-0180-PR
Filed November 22, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24

Petition for Review from the Superior Court in Mohave County
No. CR201000904
The Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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By Gregory A. McPhillips, Deputy County Attorney, Kingman
Counsel for Respondent

Law Office of Daniel DeRienzo, P.L.L.C., Prescott Valley
By Daniel J. DeRienzo
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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Benjamin Hineman petitions this court for review of the trial court's order denying his 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). We find no such abuse here.

¶2 A summary of the facts is helpful to understand the proceedings below. In June 2010, Hineman was stopped for a traffic violation on Interstate 40 in Mohave County, Arizona. The officer issued a citation and returned Hineman's driver license to him, but based on Hineman's "nervousness" and "several discrepancies in [his] story and his body language," the officer asked Hineman if he had any drugs or explosives, and if he could search his car; Hineman said "no" to both questions. The officer then requested a K-9 unit to conduct an "exterior sniff around the vehicle"; the K-9 unit arrived eleven minutes later. At the Rule 32 evidentiary hearing, Hineman testified that he did not feel free to leave after the officer had called the K-9 unit. But the officer testified that after he had completed issuing the citation and had told Hineman he was "free to go," he did not tell Hineman he could not leave or in any way detain him, nor did Hineman ask to leave. Although Hineman testified that he told the officer there was marijuana in his car after the drug-detection dog had "scratched at" it, the officer testified that "before the dog even came out, [Hineman] said, 'I got marijuana in my car.'"

¶3 The drug dog alerted on Hineman's vehicle, and officers discovered in the center console "four individual baggies" containing "half an ounce or so" of marijuana, drug paraphernalia, and $19,000 in cash "wrapped up . . . in bundles, and put in a zip-lock bag and sealed inside [a] shaving bag." Hineman initially told

the officers he had traveled from Montana to Las Vegas, done some gambling and possibly some golfing, and was on his way to visit a friend in Phoenix. He later changed his story, telling the officers that the $19,000 was money he had "collected" from three friends, and he "was going to Phoenix to buy about 25 pounds of marijuana" to take back to Montana. He stated that this was his fourth drug-buying trip. Subsequently, in a written statement attached to the presentence report, Hineman recanted his prior statement regarding the drug purchase, and stated the $19,000 was a loan he had obtained from the family business, he had "lied to [his] father about what [he] had done" with the money, and he had intended to "spend [the] money aimlessly" with friends.

¶4 In 2011, pursuant to a plea agreement and a plea of no contest under *North Carolina v. Alford*, 400 U.S. 25 (1970), Hineman was convicted of attempted money laundering. At the change-of-plea hearing, Hineman told the trial court he understood the terms of the plea agreement, which his attorney had explained to him, and that he had not been forced or threatened to plead guilty. He also acknowledged that he understood he was entering a guilty plea pursuant to *Alford*, which the court explained as meaning "you're not going to be admitting that you actually committed [attempted money laundering]." The prosecutor provided a factual basis for attempted money laundering pursuant to A.R.S. §§ 13-2317(B) and 13-1001; Hineman was traveling to Phoenix to buy marijuana with $19,000 in cash, which belonged to him and three of his friends. The court sentenced Hineman in accordance with the stipulated sentence in the plea agreement, placing him on probation for three years and ordering him to serve twenty days in jail as a condition of his probation.

¶5 Hineman subsequently filed a petition for post-conviction relief, arguing he was actually innocent; his conviction was unconstitutional based on the corpus delicti rule[1]; and trial

[1]The corpus delicti rule prohibits the conviction of a defendant "based on an uncorroborated confession without independent proof of the corpus delicti, or the 'body of the crime.'" *State v. Morgan*, 204 Ariz. 166, ¶ 15, 61 P.3d 460, 464 (App. 2002), *quoting State v. Jones*, 198 Ariz. 18, ¶ 12, 6 P.3d 323, 327 (App. 2000). "Stated another way,

counsel was ineffective in failing to file two motions to suppress evidence, one to suppress Hineman's statement to the police of his intent to purchase drugs (based on corpus delicti), and the other to suppress evidence "resulting from the illegal second detention after the traffic stop had concluded." In an unattested affidavit filed with his petition, Hineman stated, inter alia, "[t]he money was not going to be used to purchase marijuana"; he had "lied to police" when he had told them his friends had given him the money to purchase marijuana; he had "entered into the plea agreement out of ignorance and fear"; and, trial counsel was ineffective and had induced him to plead guilty by telling him he might be charged with theft if he disclosed the true source of the money.

¶6 In a December 2011 ruling, the trial court accurately summarized the case, and, as to Hineman's claim that his conviction was unlawful based on the corpus delicti rule, the court found "[t]here is nothing about a large amount of cash, even when coupled with an amount of marijuana entirely consistent with personal use, that would suggest the crime of money laundering." The court also concluded that "the part of [Hineman's] statement regarding being given money to come to Arizona to buy marijuana" would "probably" have been suppressed, likely disposing of the money laundering charge. The court further found that, based on trial counsel's reference to the "corpus delicti" issue at sentencing, it was "obvious" counsel had recognized the issue.[2]

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the rule requires that, before a defendant's confession or incriminating statements may be admitted at trial as evidence of a crime, the state must establish with independent evidence that a crime occurred and that someone is responsible for that offense." *State v. Rubiano*, 214 Ariz. 184, ¶¶ 6, 10, 150 P.3d 271, 272-73 (App. 2007) (corpus delicti rule does not apply in context of in-court guilty pleas).

[2]At sentencing, trial counsel stated, "You . . . almost [have] the habeas corpus problem in this case, but for the money that was seized," after which the trial court clarified, "[a]nd I think [counsel] may have said habeas corpus, but I know he meant corpus delicti."

¶7 But, relying on *State v. Rubiano*, 214 Ariz. 184, ¶ 14, 150 P.3d 271, 275 (App. 2007) (corpus delicti rule does not apply in context of guilty plea proceeding), the court concluded that "*Rubiano* stands for the proposition that a defendant who pleads guilty, even as an *Alford* plea at a hearing where he is not required to make an actual admission, cannot have his conviction vacated solely on the basis that there was no other independent corroboration of the crime under the corpus delicti rule." Finally, the court concluded that although Hineman had not raised a colorable claim of actual innocence, he had raised colorable claims of ineffective assistance of trial counsel for failing to file the two suppression motions. The court thus set an evidentiary hearing to address those claims.

¶8 At the February 2012 evidentiary hearing, the trial court directed the parties to address "why [Hineman] pled guilty, and whether he would have decided to not plead guilty under different circumstances." Hineman acknowledged that he had spoken with trial counsel before he pled guilty, and counsel had indicated there were "legal issues" with the traffic stop and "the statements." When asked what trial counsel had told him, Hineman testified: "[B]asically, I was told nothing about [corpus delicti], really, and that this was a good plea to take; that . . . they were going to look at this in trial and basically throw it out; and . . . he made it seem that was my only option, really." Acknowledging that he had been afraid the "lie that [he had] told the police[] was going to come in against [him]" at trial, Hineman nonetheless testified, "[b]ut now that time [has] passed, I feel that I could have won." Hineman further acknowledged that he had told his attorney he was not guilty of money laundering before he had pled guilty, and that if he had understood he could make the money laundering charge "go away," he would have been and still was willing to go to trial on the drug-related charges; he further testified he now wants to go to trial on the money laundering charge rather than plead guilty to that offense. He stated, "I was going to pay [the $19,000] back. But I just told my father a lie, that I was going to pay bills with it; but I didn't end up doing that." He testified that he had entered the guilty plea out of "ignorance" and "fear," and he "was afraid of . . . the outcome of the trial . . . [and that trial counsel] just seemed insufficient."

¶9 Hineman's trial attorney testified that on "[s]everal occasions" he had discussed with Hineman problems related to the traffic stop and his detention, and that he had discussed with Hineman and his father that "the evidence of money laundering was very flimsy" and that he believed there was a "corpus [delicti] problem." Counsel conceded he could not recall having discussed corpus delicti "at length" with Hineman, and acknowledged he had led Hineman to believe the money might be independent evidence that could be used to allow his statement to be admitted. Counsel also testified he had "discussed litigating the issues throughout the course of representation," and explained that he had not filed a motion to suppress Hineman's statements because Hineman had "directed [him] to negotiate a plea agreement." Notably, counsel testified that Hineman ultimately had "directed" him to "reopen the plea negotiations," and "specifically asked [counsel] to see if the previous [plea] offer could be reinstated."

¶10 In its March 2012 ruling, which followed the evidentiary hearing, the trial court focused on the following issue: "whether the trial attorney was ineffective for not [filing the motions to suppress] if the reason he did not do [so] was that his client instructed him to negotiate a plea agreement, he did as directed, and [Hineman] pled guilty before any motions were ever filed." Addressing the corpus delicti issue, the court reiterated that, because "[t]here was no independent evidence of Money Laundering beyond" Hineman's statements, those "statement[s] would have been suppressed." However, the court reasoned, "[t]he common theme running through all the above issues is [Hineman's] credibility." Summarizing the "several occasions" on which Hineman had lied, the court found his testimony "confusing" and noted "[i]t is hard to avoid the conclusion that [he] has lied in order to avoid the consequences of his behavior." The court further concluded it had "a hard time accepting" Hineman's explanation of what had occurred, and noted, "[i]t is up to the Court to determine whether [Hineman] is now lying at the evidentiary hearing to avoid the consequences of having pled guilty, a decision that he has now obviously come to regret."

¶11 The trial court summarized the law regarding traffic stops and detentions, and then concluded the "factors known to the

officer . . . [here fell] short of a justification for a further detention" under *State v. Sweeney*, 224 Ariz. 107, ¶¶ 15, 33, 227 P.3d 868, 872, 876 (App. 2010) (circumstances did not form "particularized and objective basis for the second seizure, the absence of consent rendered that seizure and subsequent search unlawful"). The court nonetheless concluded "that a reasonable person in [Hineman's] situation would not have felt that he was being detained against his will and that he was not free to leave." Therefore, the court determined, "a motion to suppress would not have been granted as to the stop and the evidence seized as a result thereof and that the failure to file such [a] motion was not ineffective on the part of trial counsel." The court further noted, to the extent it was relevant, it did "not find credible [Hineman's] testimony to the effect that he felt he had to remain at the scene and did not have the ability to get into his vehicle and leave."

¶12 The trial court addressed the question whether Hineman was "credible in saying that he would not have pled guilty and that he was coerced by his trial attorney into doing so." The court noted that "[e]ven under [Hineman's] version of what happened, it sounds like [he] was not coerced by any undue pressure or tactics on the part of his attorney so much as he was advised that it would be to his benefit" to plead guilty. The court then concluded it had "no reason to question trial counsel's credibility or identify a motive for him to misrepresent the circumstances under which [Hineman] entered a plea," but had "significant concerns about [Hineman's] believability." The court thus determined it did "not believe [Hineman]'s testimony and [found] as a matter of fact that after being advised of certain challenges to the State's case that could be made [Hineman] instructed his attorney to get a plea offer which he eventually accepted of his own volition."

¶13 On review, Hineman first contends the corpus delicti rule applies to his case and the trial court erred by finding *Rubiano* applies to defendants like him who plead guilty pursuant to *Alford*. *Rubiano*, 214 Ariz. 184, ¶ 14, 150 P.3d at 275. He contends that, without "independent evidence of guilt and no in-court admission," he should be permitted to withdraw from the plea agreement, and criticizes the court's reliance on his credibility in its ruling.

¶14 The entry of an *Alford* plea waives all non-jurisdictional defects. *State v. Zunino,* 133 Ariz. 117, 118, 649 P.2d 996, 997 (App. 1982); *c.f. State v. Alford,* 98 Ariz. 124, 128, 402 P.2d 551, 554 (1965) (defendant waives challenge to voluntariness and admissibility of confession by guilty plea). And Hineman has not argued that he did not waive the corpus delicti rule by entering his plea. Rather, he argues that insufficient evidence supports his plea because his statements are inadmissible based upon the corpus delicti rule. But the general rule is that a trial court is not limited to considering only legally admissible evidence when examining the factual basis for a guilty plea. *Haring v. Prosise,* 462 U.S. 306, 316 (1983) ("Neither state nor federal law requires that a guilty plea in state court be supported by legally admissible evidence where the accused's valid waiver of his right to stand trial is accompanied by a confession of guilt."); *see also State v. Salinas,* 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994) (Factual basis for guilty plea "may be derived from any part of the record including presentence reports, preliminary hearing transcripts, or admissions of the defendant."); *State v. Hamilton,* 142 Ariz. 91, 93, 688 P.2d 983, 985 (1984) (evidence of guilt to support *Alford* guilty plea may be derived from record as a whole or any part thereof). And, again, Hineman has failed to argue that the corpus delicti rule is somehow exempt from this general rule. *See, e.g., G.E.G. v. State,* 54 So.3d 949, 956 (Ala. 2010) (issue of admissibility of defendant's confession without corroboration waived by guilty plea). Therefore, he has failed to adequately support his claim that the corpus delicti rule applies to his case.

¶15 However, even if we review the merits of Hineman's claim, sufficient evidence exists to overcome any potential corpus delicti problem and support the guilty plea. The corpus delicti rule requires corroboration of a confession before the confession can be used to prove the crime. *State v. Morgan,* 204 Ariz. 166, ¶ 15, 61 P.3d 460, 464 (App. 2002). "'[O]ne available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused.'" *Id.* ¶ 18, *quoting Smith v. United States*, 348 U.S. 147, 156 (1954). Arizona follows this "trustworthiness" approach. *Id.*

¶16 Here, the officer found marijuana and drug paraphernalia, along with $19,000 in cash in Hineman's vehicle. Additionally, Hineman, with the assistance of counsel and after being fully informed of his rights, entered an *Alford* plea. A plea of no contest "is an admission of guilt for the purposes of the case." *State v. Anderson*, 147 Ariz. 346, 350, 710 P.2d 456, 460 (1985), *quoting Hudson v. United States*, 272 U.S. 451, 455 (1926). We conclude Hineman's out of court confession is sufficiently corroborated and trustworthy to establish his guilt. Therefore, even if Hineman did not waive the right to raise a corpus delicti claim, because corpus delciti nonetheless was established, Hineman's statements were admissible to prove his guilt.

¶17 Hineman additionally claims trial counsel was ineffective for failing to file a motion to suppress his confession based on the corpus delicti rule. Because the trial court believed trial counsel that Hineman had directed him to obtain a plea agreement on his behalf despite potential weaknesses in the state's case, we conclude counsel's failure to file a motion to suppress based on corpus delicti was not prejudicial.

¶18 We will not interfere with the judge's discretionary assessment of the witnesses' credibility. After the evidentiary hearing, the trial court expressly found it did not believe Hineman, as it was empowered to do. *See State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995) (trial court resolves factual disputes underlying ineffective assistance of counsel claim); *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbitrator of witness credibility in post-conviction proceeding). "We examine a trial court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous." *State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994). Accordingly, to the extent Hineman asserts the court improperly considered his credibility in denying relief, we reject his argument.

¶19 And, to state a colorable claim of ineffective assistance of counsel, a petitioner must establish that counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *See State v. Bennett,* 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington,* 466 U.S. 668, 687-88 (1984).

To demonstrate the requisite prejudice, the defendant must show there is 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. Accordingly, in the absence of a showing of prejudice, the trial court's rejection of Hineman's claim of ineffective assistance of counsel for failing to file a motion to suppress based on corpus delicti was not an abuse of discretion.[3]

¶20 Hineman next argues the trial court improperly found it would have denied a motion to suppress the legality of the search of his vehicle, and similarly erred in finding trial counsel was not ineffective by failing to file the related motion to suppress. Relying on the fact that the court found the officer lacked reasonable suspicion to detain him and that the officer testified Hineman "was not free to leave" after he called the K-9 unit, Hineman argues the court erred by finding that "a reasonable person in the Defendant's situation would not have felt that he was being detained against his will and that he was not free to leave." He maintains that "[a] reasonable person who is told that a drug dog is being called to the scene would certainly not feel free to leave," rendering the detention "neither consensual nor de minimis." He contends, therefore, that the search was "clearly illegal" and a motion to suppress would have been granted. But the court found a reasonable person in Hineman's position, having been told by the officer he was free to leave, would have felt he was free to leave. The evidence supports this conclusion.

¶21 Furthermore, as we previously noted, the trial court believed trial counsel that Hineman had directed him to obtain a plea agreement on his behalf despite potential weaknesses in the state's case. We thus conclude that, because the court also did not believe Hineman would have gone to trial, the merits of a motion to suppress related to the detention are not relevant and we do not address them.

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[3]Moreover, in the absence of a corpus delicti problem, we see no need to address Hineman's extensive argument regarding the propriety of the court's application of *Rubiano* to him.

¶22 For the reasons stated, although review is granted, relief is denied.