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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JOSHUA LEE SPITERI, Petitioner.	2 CA-CR 2013-0226-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. V1300CR820090387

Honorable Tina R. Ainley, Judge

REVIEW GRANTED; RELIEF DENIED

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M I L L E R, Judge.

¶1 Petitioner Joshua Spiteri seeks 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). Spiteri has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Spiteri was convicted of one count each of possession of dangerous drugs and possession of drug paraphernalia. The trial court imposed enhanced, concurrent sentences, the longest of which was five years. His convictions and sentences were affirmed on appeal. *State v. Spiteri*, No. 1 CA-CR 10-0506 (memorandum decision filed July 28, 2011). Spiteri then initiated a proceeding for post-conviction relief, arguing in his petition that the trial court had imposed an illegal sentence and that he had received ineffective assistance of trial counsel in relation to sentencing.[1] Concluding Spiteri's claims were precluded, the trial court summarily denied relief.

¶3 On review, Spiteri maintains the trial court abused its discretion in determining his claims were precluded. He first argues that because the sentencing claim presented in his petition for post-conviction relief was not raised on appeal, and therefore was not "adjudicated on the merits," it is not precluded. At sentencing, defense counsel argued that a 2006 California conviction for possession of methamphetamine, although initially charged against Spiteri as a felony, had been reduced to a misdemeanor. In

[1]Spiteri also asserted in his petition that he was entitled to relief on the ground that newly discovered evidence showed the prosecutor had violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1936). Spiteri does not argue on review that the trial court abused its discretion in denying relief on this claim, and we therefore do not address it. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "the reasons why the petition should be granted"); *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); *cf. 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.").

support, Spiteri offered a computer printout noting the conviction as a misdemeanor. The trial court weighed the printout against other evidence relied on by the state that the conviction remained a felony and found the conviction was a historic prior felony conviction for purposes of sentencing enhancement. This ruling was affirmed on appeal.

¶4 In his petition for post-conviction relief, however, Spiteri contended counsel should have asserted that, as a legal matter, under California Penal Code § 17(b)(1), his conviction would automatically have been designated a misdemeanor because he was not sentenced to imprisonment in either the state prison or county jail. He therefore argues the claim presented in his Rule 32 petition was distinguishable from that decided on appeal. But, under Rule 32.2(a)(3), a claim is precluded not only if actually adjudicated, but also if it has been waived on appeal. Accepting arguendo that the claim is distinct from that presented on appeal, Spiteri could have raised it there. The court therefore did not abuse its discretion in concluding this claim was precluded.

¶5 Spiteri also contends the trial court abused its discretion in denying relief on his related claim of ineffective assistance of counsel. We agree with Spiteri that his claim of ineffective assistance is not precluded, as it could not have been raised on appeal. *State v. Sprietz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (claims of ineffective assistance of counsel must be raised in petition for post-conviction relief pursuant to Rule 32). But, we disagree with Spiteri's contention that his 2006 conviction necessarily was converted to a misdemeanor by operation of law under California Penal Code § 17(b)(1). Section 17(b)(1) provides that "[w]hen a crime is punishable . . . either by imprisonment in the state prison or . . . in a county jail," "it is a misdemeanor" "[a]fter a judgment

imposing a punishment other than imprisonment in the state prison or . . . [in] county jail" under certain provisions. Generally, that section does not apply when a court suspends the imposition of sentence and places a defendant on probation, because no "judgment" has been imposed. *Ceron v. Holder*, 712 F.3d 426, 432 (9th Cir. 2013); *People v. Battin*, 143 Cal. Rptr. 731, 747 (Ct. App. 1978), *superseded by statute on other grounds as stated in People v. Connor*, 193 Cal. Rptr. 148, 151 (1983). Indeed, § 17(b)(3) addresses how a felony may be designated a misdemeanor after probation is granted.

¶6 Spiteri, however, relies on *People v. Glee*, 97 Cal. Rptr. 2d 847 (Ct. App. 2000), in which the California Court of Appeal determined Glee's conviction had been a misdemeanor because the trial court had granted Glee "summary probation" and ordered him to serve one year in the county jail, after which probation would be terminated, thereby evincing no "intention to impose a felony sentence" and "render[ing] the crime a misdemeanor." *Id.* at 851-52. In this case, the record is clear that Spiteri was placed on probation and his sentence was suspended. He thereafter violated the terms of his probation, probation was "terminated unsuccessfully," and the California court ordered that Spiteri was "released on this case only," as he was still facing charges in another cause. Neither party cites anything in the record to show that a judgment was entered, and Spiteri contends "the only 'sentence' [he] received was the imposition of [a] $200 restitution fine."

¶7 The record does show, however, that the 2006 offense was charged as a felony and Spiteri's plea agreement listed it as such. His plea agreement provided that the maximum penalty he faced included three years in prison. Likewise, the California

probation department provided a letter in this matter stating the conviction was a felony. Thus, we cannot say this is a case, as in *Glee*, in which the record suggests the sentencing court intended to impose something other than a felony sentence. And, although California court documents in the record indicate Spiteri was released, apparently after entering an admission to a probation violation, and stated "all sentence modifications for this proceeding entered," Spiteri does not direct us to anything in the record that is dispositive that a "judgment" within the meaning of § 17(b)(1) was entered on the 2006 conviction or what "sentence modifications" were entered.

¶8 That being so, even had defense counsel presented the legal argument Spiteri now advances, the trial court would have had to make essentially the same factual determination it did at sentencing in light of the arguments then made. As noted above, the court weighed the evidence presented about the nature of the conviction and determined it had not been reduced to a misdemeanor. That determination was affirmed on appeal. Nothing Spiteri cites in the record would change the trial court's analysis if conducted in view of the law he now cites. Spiteri therefore has not established he was prejudiced by counsel's failure to raise the argument. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (to establish colorable claim of ineffective assistance defendant must show counsel's performance deficient under prevailing professional norms and deficient performance prejudiced defense). Thus, we cannot say the court abused its discretion in denying Spiteri relief. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court is obliged to affirm trial court's ruling if result was legally correct for any reason).

¶9 For these reasons, although we grant the petition for review, relief is denied.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

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

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge