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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OF ARIZONA, Respondent, v. JOE MICHAEL RODRIGUEZ, Petitioner.	2 CA-CR 2013-0283-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20010935

Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

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K E L L Y, Presiding Judge.

¶1 Joe Rodriguez petitions this court for review of the trial court's order summarily denying his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court's ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Rodriguez has not met his burden of demonstrating such abuse here.

¶2 Rodriguez was arrested in Yavapai County in November 2000 for aggravated driving under the influence while his driver's license was suspended or revoked, but apparently was released without being charged. He was indicted in December 2001 on two counts of aggravated driving under the influence but was not arrested until 2007. Following a jury trial, Rodriguez was convicted of both counts and sentenced to concurrent, ten-year prison terms. In 2010, he sought, and the trial court granted, leave to file a delayed appeal pursuant to Rule 32.1(f). We affirmed Rodriguez's convictions and sentences on appeal, rejecting his argument that the trial court should have dismissed the indictment sua sponte for violations of the time limits in Rule 8, Ariz. R. Crim. P., and of his constitutional right to a speedy trial. *State v. Rodriguez*, No. 1 CA-CR 10-1025 (memorandum decision filed Nov. 17, 2011).

¶3 Rodriguez then sought post-conviction relief, arguing that trial counsel had been ineffective in failing to seek dismissal based on the state's purported violation of Rule 8, Ariz. R. Crim. P., time limits and his constitutional right to a speedy trial. The trial court summarily denied relief, noting that we had concluded on appeal that

Rodriguez had not identified prejudice resulting from any delay and finding that nothing in the record "supports a ruling that a motion to dismiss would have been granted if filed." This petition for review followed the court's denial of Rodriguez's motion for rehearing.

¶4 On review, Rodriguez argues the trial court erred in relying on our previous memorandum decision in rejecting his claim of ineffective assistance of counsel and he is entitled to an evidentiary hearing on his claims. "A defendant is entitled to an evidentiary hearing on a colorable claim—one that, 'if defendant's allegations are true, might have changed the outcome.'" *State v. Donald*, 198 Ariz. 406, ¶ 8, 10 P.3d 1193, 1198 (App. 2000), *quoting State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006).

¶5 Rodriguez asserts counsel had a viable basis to seek dismissal on Rule 8 grounds because the state could not demonstrate due diligence in effecting service upon him. But we determined on appeal that there was no Rule 8 violation because, under the then-applicable version of the rule, the time limit ran from Rodriguez's arrest following his indictment and not from the time of his indictment or initial arrest, and thus we did not need to decide whether the state had been diligent in attempting to serve the summons on

Rodriguez. *Rodriguez,* No. 1 CA-CR 10-1025, ¶¶ 8-9. Consequently, Rodriguez cannot demonstrate his counsel fell below prevailing professional norms by failing to seek dismissal on Rule 8 grounds or resulting prejudice because there would have been no basis to grant such a motion. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶6 Rodriguez additionally claims his counsel should have filed a motion to dismiss based on his constitutional right to a speedy trial. We find no basis to disturb the trial court's summary rejection of this claim. The United States and Arizona Constitutions guarantee the right to a speedy trial. U.S. Const. amend. VI; Ariz. Const. art. II, § 24. Neither provision, however, requires that the trial be held within a specific time period. *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997). In determining whether post-indictment delay requires dismissal a court considers: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has demanded a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). None of these factors have "talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.* at 533. However, in weighing the factors, length of the delay is the least important and prejudice to the defendant is the most significant. *Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71.

¶7 The six-year delay here is "presumptively prejudicial," but that does not necessarily mean Rodriguez is entitled to relief. *See Doggett v. United States*, 505 U.S. 647, 652 n.1, 655-56 (1992). Presumptive prejudice merely triggers a speedy trial

analysis, although very long delays may eliminate the need for a defendant to show "particularized prejudice" because "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* But even excessive delay "cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria." *Id*. at 656.

¶8 Rodriguez has not demonstrated a reasonable likelihood a motion to dismiss on constitutional speedy-trial grounds would have succeeded, even if we assume that the six-year delay absolves him of any obligation to show particularized prejudice[1] and that effective counsel would have prompted him to raise his speedy trial rights immediately upon his arrest in 2007. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. The second *Barker* factor requires a court to examine whether the state was diligent in avoiding delay. *See Doggett*, 505 U.S. at 652. Rodriguez insists that, had counsel investigated this issue, counsel could have shown that "[a]ny reasonable investigation following the failure to effect service . . . would have disclosed [Rodriguez's] location" and police simply "did nothing to investigate [his] location." He claims, without evidentiary support, that he "relocated his residence to Maricopa County" in December 2000 and resided "in Maricopa County" until his 2007 arrest. The documents Rodriguez provided show only

[1]Rodriguez apparently conflates the showing of prejudice required to prevail on a speedy-trial claim and the prejudice he must show to obtain relief for ineffective assistance of counsel. The only prejudice he describes is that purportedly stemming from counsel's decision not to seek dismissal on this ground; he describes no prejudice resulting from the delay.

that he had been on supervised release in December 2000 and was satisfactorily discharged in May 2001, and that he underwent drug screening in Maricopa County in early 2001.

¶9 We agree the evidence provided by Rodriguez supports an inference that, had police officers contacted the Arizona Department of Corrections while Rodriguez was on supervised release, they likely could have ascertained his whereabouts. But Rodriguez was not indicted until after he had been discharged. To the extent Rodriguez bases his argument on any pre-indictment delay, he is required to demonstrate—and plainly has not—that the state "intentionally delayed proceedings to gain a tactical advantage over [him] or to harass him, and that [he] has actually been prejudiced by the delay." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988) (emphasis omitted).

¶10 And Rodriguez has not provided evidence supporting a claim that he stayed at the same residence following his discharge from supervised release, asserting only (and again without evidentiary support) that he stayed within the generous confines of Maricopa County. Accordingly, he has not demonstrated any basis for a court to conclude the state failed to exercise due diligence in attempting to locate him after his indictment. *See Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201 (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). Consequently, even assuming counsel fell below prevailing professional norms in

declining to seek dismissal on speedy-trial grounds, Rodriguez has not shown resulting prejudice because he has not demonstrated any likelihood that motion would have been granted. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

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