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

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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THE STATE OF ARIZONA, Respondent, v. SONNY TURNER, Petitioner.	2 CA-CR 2013-0304-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007116619001DT

Honorable Steven K. Holding, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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M I L L E R, Judge.

¶1 Petitioner Sonny Turner 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). Turner has not sustained his burden of establishing such abuse here.

¶2 After a jury trial in absentia, Turner was convicted of possession of marijuana and possession of narcotic drugs. The trial court imposed a mitigated, eight-year prison sentence on the narcotic drug charge and a concurrent, presumptive, 3.75-year sentence on the marijuana charge. Turner's convictions were affirmed on appeal, but his case was remanded for the trial court to determine if Turner had been prejudiced by an error in the Rule 17 colloquy it had given relating to admission of prior convictions. *State v. Turner*, No. 1 CA-CR 08-1022 (memorandum decision filed June 22, 2010). On remand, Turner stipulated to having two historical prior felony convictions, and the court affirmed its earlier sentences.

¶3 Turner thereafter initiated a proceeding for post-conviction relief, arguing in his petition that his trial counsel had rendered ineffective assistance by failing to file a motion to suppress and failing to prepare and call Turner's wife as a witness at trial. The trial court summarily denied relief.

¶4 On review, Turner repeats his arguments made below and contends the trial court abused its discretion in concluding he had not stated a colorable claim. We disagree. To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). "A

colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶5 "'[T]he power to decide questions of trial strategy and tactics,' including what witnesses to call at trial, 'rests with counsel.'" *State v. Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007), *quoting State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). Indeed, there is a presumption "that the challenged action was sound trial strategy under the circumstances." *State v. Stone*, 151 Ariz. 455, 461, 728 P.2d 674, 680 (App. 1986). Counsel must be given "'wide latitude . . . in making tactical decisions.'" *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228, *quoting Strickland*, 466 U.S. at 689. Thus, "[d]isagreements as to trial strategy or errors in trial [tactics] will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984). And courts are particularly "reluctant to second-guess the attorney" "when the question is whether or not to call a particular witness." *State v. Workman*, 123 Ariz. 501, 503, 600 P.2d 1133, 1135 (App. 1979).

¶6 In this case, at trial, counsel questioned whether the state had proven that Turner knowingly possessed the drugs alleged, and he specifically challenged the voluntariness of Turner's statement to police officers that he had just purchased the drugs, whether or not the substances officers found were the drugs alleged, and whether the car in which Turner and the drugs were found was his car. Two police officers

testified at trial about the events surrounding Turner's arrest. Turner's wife has submitted an affidavit contesting some of the facts in their testimony, claiming she and Turner had been looking for a lost dog on the night Turner was arrested, were not parked illegally as the arresting officers claimed, and Turner did not have any drugs. Turner contends counsel was ineffective in not calling his wife to testify.

¶7 We cannot say the trial court abused its discretion in rejecting Turner's claim of ineffective assistance. Turner has not shown that counsel's decision not to call Turner's wife and to pursue the defense he did was the result of "ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). And the decision, which appears reasonable in light of the evidence presented, Turner's absence from trial, and the likelihood that the jury would have viewed Turner's wife's testimony with some degree of suspicion, cannot support a claim of ineffective assistance. Indeed, Turner provided no affidavits or other evidence in the trial court suggesting this decision fell below prevailing professional norms.[1] *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it.").

[1]The state argues that it is likely trial counsel was unable to call Turner's wife as a witness because she shared an address and phone number with Turner and he was not found for trial, suggesting she could not be found either. Indeed, at a pretrial conference, counsel disclosed Turner's wife as a witness. But we must accept as true Turner's wife's assertion that she was "available" to testify at trial. *State v. Jackson*, 209 Ariz. 13, ¶ 6, 97 P.3d 113, 115-16 (App. 2004) (in evaluating whether claim colorable, trial court "obligated to treat [petitioner's] factual allegations as true").

¶8 As to his claim that counsel was ineffective in failing to file a motion to suppress, Turner attached to his petition a letter from another attorney suggesting that he might "be able to raise a claim of ineffective assistance of counsel for [trial counsel's] failure to file a Motion to Suppress." But, even assuming arguendo that this was sufficient to establish a colorable claim that counsel's performance was deficient, Turner was also required to establish prejudice. *See Strickland*, 466 U.S. at 687. And to show prejudice from counsel's failure to file a motion to suppress, Turner was required to show a reasonable likelihood that the motion would have succeeded. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *State v. Kasten*, 170 Ariz. 224, 228-29, 823 P.2d 91, 95-96 (App. 1991).

¶9 In this case, Turner's wife's affidavit contradicts the officers' testimony that Turner's car had been parked facing the wrong direction on the street. But the officers also testified that Turner's car was parked in front of a known drug house, at which one officer testified he had executed warrants in the past. And based on either the officers' or Turner's wife's account, Turner apparently was at the house only briefly.

¶10 Even accepting Turner's wife's statement as true, *see State v. Jackson*, 209 Ariz. 13, ¶ 6, 97 P.3d 113, 115–16 (App. 2004), and assuming a trial court would have credited it over the testimony of the officers, Turner has not shown a reasonable likelihood that a motion to suppress would have been successful. Although her statement, offered in support of a motion to suppress, might have undermined some of the officers' stated reasons for the traffic stop, the evidence above constitutes other grounds

for reasonable suspicion of criminal activity—nighttime activity consistent with drug-buying behavior at a known drug house—making it unlikely that a motion to suppress would have succeeded. *See State v. O'Meara*, 198 Ariz. 294, ¶¶ 7-10, 9 P.3d 325, 326-27 (2000) (court looks at "totality of the circumstances" in determining reasonable suspicion); *cf. State v. Fornof*, 218 Ariz. 74, ¶ 17, 179 P.3d 954, 958-59 (App. 2008) (reasonable suspicion based on hand-to-hand transaction at night in area known for drug related activity).

¶11 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