IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOE MERANDA LOPEZ,
Petitioner.

No. 2 CA-CR 2013-0380-PR
Filed December 2, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2007121325002DT
The Honorable Teresa Sanders, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Shaheen P. Torgoley, Deputy County Attorney, Phoenix
Counsel for Respondent

Joe Meranda Lopez, Tucson
In Propria Persona

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Petitioner Joe Lopez 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). Lopez has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Lopez was convicted of burglary, unlawful flight from a law enforcement vehicle, and two counts of first-degree murder, all arising from events in which he committed a burglary, fled from police, and hit another vehicle when he ran a red light, killing its two occupants. The trial court sentenced Lopez to life imprisonment without possibility of release for twenty-five years on each murder count, 2.5 years' imprisonment for burglary, and 1.5 years for unlawful flight. The court ordered the sentences for murder and unlawful flight be served concurrently with each other, but consecutive to the burglary sentence. Lopez's convictions and sentences were affirmed on appeal, but his presentence incarceration credit was modified. *State v. Lopez*, No. 1 CA-CR 10-0087 (memorandum decision filed Dec. 22, 2011).

¶3 In 2012, Lopez initiated a proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of trial counsel based on counsel's having failed "to timely disclose a key witness," thereby "compromis[ing] his defense." The trial court summarily denied relief.

¶4 On review, Lopez essentially repeats the argument he raised below and asserts the trial court abused its discretion in dismissing his petition. As below, Lopez claims his trial counsel should have (1) provided Harry Ryon, a retired police officer who served as an accident reconstruction expert, with "all of the necessary reports to review," (2) timely disclosed that Ryon would also testify as to whether Lopez could have heard police sirens, or (3) moved for a continuance in relation to Ryon's testimony about the sirens.

¶5 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). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541-42, 707 P.2d 944, 945-46 (1985).

¶6 Before trial, Lopez disclosed Ryon "as an expert in accident reconstruction and police procedure." During trial, the prosecutor informed the court that Lopez was "trying to use [Ryon] as an expert with regard to . . . sirens, and what the defendant could have heard." He objected to such testimony from Ryon because it had "never been disclosed" and he had "never heard of [Ryon] being an expert in sirens, or the speed of sound."

¶7 Trial counsel informed the court that he had not received certain interviews when the attorney who had previously represented Lopez had transferred the file to him. According to counsel, those missing interviews included statements that the officers who had pursued Lopez had turned their sirens on and off, and thus had "create[d] the whole issue of the sirens." Counsel proposed that Ryon would testify "in general" about "certain speeds

and distances," particularly high speeds, at which "sirens fade" and cannot be heard by the individual being chased. The trial court indicated it was inclined to allow Ryon to testify about the sirens generally and ordered trial counsel to give the prosecutor an opportunity to talk to Ryon during the lunch hour the next day.

¶8 The next day, the prosecutor renewed his motion to preclude Ryon from testifying about the sirens. He argued Ryon had changed his "entire opinion" since the prosecutor previously had interviewed him and was "clearly not an expert in sound and whether people could hear sound." The trial court granted the motion, and ordered that Ryon was "not permitted to discuss his expert opinions that were not previously disclosed."

¶9 Even assuming arguendo that counsel's performance was deficient in relation to Ryon's proposed testimony, Lopez has not established that any error prejudiced his defense. Viewed in the light of the rest of the evidence presented at the trial, Lopez has not established a reasonable probability[1] that the result would have been different had Ryon's testimony about the sirens been admitted. *See Strickland*, 466 U.S. at 694-95.

¶10 First, evidence related to siren noise was presented at trial. An investigating officer for the state conceded that different people may hear or not hear sirens at differing distances. Additionally, in his closing argument, trial counsel pointed out that some witnesses had not heard sirens at certain points during the pursuit and noted the officer's testimony about the variables relevant to whether one hears sirens.

¶11 Moreover, there was substantial evidence that Lopez had been aware of the officers' presence during the pursuit. Ryon himself testified that "[b]ased on the slow speeds and the fact that [officers] were in close proximity to [Lopez]," there was "every

[1] A reasonable probability is defined as one "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

indication that he knew they were behind him" at least one point during the pursuit.

¶12 According to one of the officers involved in the pursuit, when he had initiated his siren, Lopez "sharply accelerate[d]." When Lopez did not stop, the officer turned off his lights and sirens, but continued to follow Lopez through a residential neighborhood. Lopez entered a cul-de-sac, and the officer assumed he intended "to leave the vehicle . . . and then flee on foot." Instead, Lopez made a hard turn through the cul-de-sac and came "directly at" the officer's car. Lopez cleared the officer's car, and the officer put his lights and siren back on, continuing to follow Lopez. Lopez ultimately passed seven marked police cars during the pursuit, three of them twice.

¶13 It was later determined that Lopez's windows were down and his air conditioner and radio were turned off. And although Lopez ultimately collided with the victims' vehicle at over sixty miles per hour, a speed consistent with the speeds of pursuit about which Ryon apparently proposed to testify, some of the pursuit took place at slower speeds. Nothing in the record suggests Ryon's proposed testimony would have indicated Lopez could not hear the sirens at the lower speeds.

¶14 In view of the totality of this evidence, Lopez has not established a reasonable probability that Ryon's proposed general testimony—about whether or not one might hear a siren—would have changed the jury's verdict on his flight conviction or, thereby, on the related felony murder charges. We therefore cannot say the trial court abused its discretion in determining Lopez did not state a colorable claim. Although we grant the petition for review, relief is denied.