IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

AARON STACY HAVENS,
Petitioner.

No. 2 CA-CR 2015-0001-PR
Filed April 3, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
Nos. CR20124451001 and CR20130108001
The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Henry Jacobs, Tucson
By Henry Jacobs
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

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

¶2 Havens pled guilty in two cause numbers to attempted sexual conduct with a minor under the age of fifteen, two counts of sexual conduct with a minor under the age of eighteen, and interfering with a judicial proceeding. The trial court sentenced him to consecutive, presumptive prison terms totaling eleven years for attempted sexual conduct and one of the counts of sexual conduct. On the remaining count of sexual conduct, the court suspended the imposition of sentence and placed Havens on lifetime probation. For Havens's conviction of interfering with a judicial proceeding, the court sentenced him to a six-month jail term, to be served consecutively to his prison terms.

¶3 Havens sought post-conviction relief, arguing trial counsel had been ineffective at sentencing because he did not present "easily available" medical reports concerning a traumatic brain injury Havens had suffered in a motorcycle accident that occurred before he had committed his offenses, did not request a neuropsychological evaluation, and did not "argue at the sentencing [hearing] about the traumatic brain injury as a mitigating factor." He suggested an evaluation would have shown "the underlying cause for [his] conduct" was the brain injury. Havens further asserted counsel's conduct "prejudiced him at sentencing" because it

"prevented the Court from learning of [his] resultant mental dysfunction and its impact on his behavior."

¶4 The trial court summarily denied relief. It noted that the mitigation report submitted by counsel included information about the accident and changes in Havens's behavior that had occurred after that accident, including that he showed "increased impulsivity, frustration, and disturbed mood" and that the brain injury "played a significant role in his extremely poor judgment in participating in the instance offenses." Thus, the court concluded, Havens had not shown resulting prejudice from counsel's failure to submit additional mitigating information. The court further concluded that counsel's decision to not discuss Havens's brain injury during argument at sentencing was tactical, particularly in light of counsel's presentation of that information in the mitigation report. This petition for review followed.

¶5 On review, Havens asserts he has presented a colorable claim and is therefore entitled to an evidentiary hearing.[1] "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). "To state a colorable claim of ineffective assistance of counsel," Havens was required to "show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced [him]." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶6 "[W]e must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting Strickland*, 466 U.S. at 689. Therefore, "disagreements about trial strategy will not support an ineffective assistance claim if 'the challenged conduct has some

[1] Havens has abandoned his argument that counsel was ineffective for failing to present various medical reports.

reasoned basis,' even if the tactics counsel adopts are unsuccessful." *Id.*, *quoting State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985).

¶7 Havens first asserts the trial court erred in concluding that counsel's decision to not address Havens's brain injury at the sentencing hearing was a strategic decision. He argues that, absent an evidentiary hearing, the court was not permitted to make that determination. But Havens overlooks that we must instead presume that counsel made a valid tactical decision, and that Havens must identify evidence that, if taken as true, suggests counsel did not do so.[2] *Id.* And counsel's decision during oral argument at sentencing to focus on certain mitigating factors instead of others plainly is a tactical decision. Absent some showing by Havens that counsel's decision had no reasoned basis, the claim is not colorable. *See id.*

¶8 Nor has Havens presented any evidence suggesting that counsel's decision to forgo pursuing a neuropsychological evaluation had no reasoned basis. *See id.* The decision whether to procure an expert is a strategic one. *Id.* ¶ 11. Havens has not identified any evidence or authority suggesting that his trial counsel fell below prevailing professional norms by declining to procure one here, when the relevant effects of Havens's brain injury[3] were

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[2] In support of this argument, Havens cites our supreme court's statement in *State v. Valdez* that "the court can determine ineffective assistance of counsel issues only after it has learned of the reasons for counsel's actions or inactions." 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995). Havens ignores the context of this statement, which the court made to support its determination that a claim of ineffective assistance of trial counsel should not be decided on appeal. *See id.* The court did not address the burden a defendant must meet in order make a colorable claim of ineffective assistance in a Rule 32 proceeding.

[3] Specifically, the mitigation report filed by counsel noted that Havens's wife had reported Havens's behavior had changed after his accident, including "an increase in impulsivity, frustration and

presented to the trial court and were apparently undisputed. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶9 For much the same reasons, we agree with the trial court that Havens has not shown resulting prejudice. *See id*. He has not shown that a neuropsychological examination would have produced evidence markedly different from or more compelling than what was already presented. The state did not dispute that Havens had suffered a brain injury that could have contributed to his actions.[4] Additionally, the presentence report concluded that the motorcycle accident, "along with his forced retirement [from] military service, may have contributed to the mental health issues he later developed."

¶10 As we understand his argument, however, Havens additionally suggests that he has shown sufficient prejudice because it is possible the trial court did not "believe[]" that evidence. In support of this argument, he cites *Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1089-90 (2014), in which the United States Supreme Court determined that a defendant was prejudiced by counsel's failure to hire a "more qualified" forensics expert to testify during the guilt phase of trial because the jury did not believe the testimony of the less qualified expert counsel did retain. But that case is inapposite. Nothing in the record suggests the court rejected or found incredible the evidence concerning Havens's changed behavior following his brain injury.

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disturbed mood," with "bouts of depression" alternating with "days of boundless and undirected energy."

[4]In support of his prejudice argument, Havens cites *James v. Schriro*, 659 F.3d 855, 882 (9th Cir. 2011), for the proposition that a defendant is prejudiced when his counsel presents no evidence of "mental dysfunction" at sentencing. But that decision was withdrawn by the Ninth Circuit Court of Appeals in *James v. Ryan*, 679 F.3d 780 (9th Cir. 2012), which, in turn, was vacated and remanded by the United States Supreme Court, *Ryan v. James*, ___ U.S. ___, 133 S. Ct. 1579 (2013). In any event, counsel did present evidence regarding the effects of Havens's brain injury.

¶11 Although we grant review, we deny relief.