IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STEVEN SCOTT CAPLINGER,
Petitioner.

No. 2 CA-CR 2015-0101-PR
Filed July 23, 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NOT FOR PUBLICATION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
No. CR20120138001
The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Renee J. Waters, Deputy County Attorney, Florence
Counsel for Respondent

Steven R. Sonenberg, Interim Pima County Public Defender
By David J. Euchner, Deputy Public Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

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

¶2 Caplinger pled guilty to armed robbery and third-degree burglary and was sentenced to consecutive, aggravated prison terms totaling 16.25 years. He sought post-conviction relief, claiming his trial counsel had been ineffective because he did not investigate and present mitigating evidence and did not object to the court's imposition of an aggravated sentence without first "inform[ing] all of the parties before sentencing occurs of its intent to increase . . . a sentence to the aggravated . . . sentence" as required by A.R.S. § 13-702(E).

¶3 Caplinger included with his petition a recently prepared mitigation report that described Caplinger's health problems, social history, substance abuse history, and mental health issues. He also included an affidavit from defense attorney Rebecca McLean, in which she avowed "the standard of practice" for sentencing preparation included "preparing a sentencing memorandum, obtaining a report from a mitigation specialist where appropriate, assisting the defendant with writing a letter to the judge, and collecting letters of support from family and friends and other members of the community." McLean also stated that defense counsel "is required to request a continuance of the sentencing date" if a case is reassigned to counsel "too close to the sentencing date for

the newly-assigned attorney to be fully prepared to proceed with sentencing."

¶4 The trial court summarily denied relief, concluding Caplinger had "failed to show" that counsel "performed deficiently under prevailing professional norms" in preparing for sentencing or presenting evidence in mitigation. It also rejected Caplinger's argument that it would have been precluded from imposing the aggravated sentence had counsel objected to the court's failure to inform the parties it intended to impose that sentence, as required by § 13-702(E). It further determined that, even had counsel objected, Caplinger had not shown resulting prejudice because he "was sentenced to a range contemplated by the plea and [counsel's] objection to the lack of notice would not have changed that." Thus, the court concluded, Caplinger had "failed to state a colorable claim for relief on any basis."

¶5 On review, Caplinger repeats his claims and contends the trial court's ruling is "unsupported by fact and law." He asks this court to remand the case for an evidentiary hearing. To be so entitled, a defendant must present a colorable claim, *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988), "'one that, if the allegations are true, might have changed the outcome.'" *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). To state a colorable claim of ineffective assistance of counsel, Caplinger was required to show that trial counsel's performance fell below reasonable professional norms and that he was prejudiced thereby. *Id.*, *citing Strickland v. Washington*, 466 U.S. 668 (1984). And to demonstrate prejudice, Caplinger was required to show there is a reasonable probability that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶6 Caplinger details what he contends are factual and reasoning errors made by the trial court and argues "the facts undeniably show[] that [counsel] gave deficient performance here." But we need not address Caplinger's arguments related to counsel's

preparation for sentencing because he has not established a colorable claim of prejudice.

¶7 As noted above, Caplinger included with his petition an affidavit from McLean, avowing the "standard of practice" for trial counsel preparing for sentencing includes "preparing a sentencing memorandum, obtaining a report from a mitigation specialist where appropriate, assisting the defendant with writing a letter to the judge, and collecting letters of support from family and friends and other members of the community." Trial counsel did none of these things in preparation for Caplinger's sentencing hearing. The court concluded, however, that counsel did not fall below prevailing professional norms because it was not necessary for counsel to have produced additional materials to adequately present the relevant mitigation evidence or for the court to give that evidence proper consideration. The court also noted that "[m]any of the factors urged by [trial counsel] are the same as those" Caplinger urges in post-conviction relief.

¶8 We acknowledge that the trial court did not expressly discuss prejudice resulting from counsel's purported lack of preparedness.[1] But many of its observations regarding competence apply with equal force to that determination. Notably, the court rejected the notion that the mitigation evidence would have carried more weight had it been presented in the form of a mitigation report, sentencing memorandum, or letter.

¶9 Further, as the trial court observed, the majority of the mitigation evidence Caplinger identifies had already been presented in some form at sentencing. The presentence report and trial

[1]The trial court was required, however, to accept as true McLean's avowal that counsel fell below prevailing professional norms. *See State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). But, because Caplinger has not established prejudice, and because we may affirm the court's ruling for any reason supported by the record, *see State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007), Caplinger is nonetheless not entitled to relief on review.

counsel both noted that Caplinger suffered from mental health problems and liver disease, as well as a history of substance abuse. Indeed, contrary to Caplinger's argument, counsel provided detail about Caplinger's mental health issues and emphasized the seriousness of his "advanced" liver disease. The court found at sentencing that Caplinger's mental health issues were a mitigating factor. And Caplinger spoke at length at sentencing, showing remorse for his conduct and sympathy for his victims. But the court also found numerous aggravating factors, specifically that Caplinger had caused trauma to the victims, had committed the offenses for pecuniary gain, and had a prior criminal history involving "many acts of violence." Although Caplinger's mitigation report includes some additional details, nothing in the record suggests those details would have tipped the scale toward imposition of a lesser sentence. Thus, we conclude Caplinger has not demonstrated a reasonable probability he would have received a different sentence, and his claim of ineffective assistance of counsel on this basis necessarily fails. *See Strickland*, 466 U.S. at 694; *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (failure of one part of *Strickland* test results in failure of claim).

¶10 And we conclude the trial court was correct to summarily reject Caplinger's argument that counsel had rendered ineffective assistance by not objecting to the court's failure to comply with § 13-702(E). That provision states: "The court shall inform all of the parties before sentencing occurs of its intent to increase or decrease a sentence to the aggravated or mitigated sentence pursuant [to] this section. If the court fails to inform the parties, a party waives its right to be informed unless the party timely objects at the time of sentencing." § 13-702(E).

¶11 Caplinger asserts, as he did below, that had counsel objected the court would have been "limited to imposing the maximum terms for both counts" instead of the aggravated term. He reasons that, if counsel objected, "[t]he statute's reference to 'before sentencing occurs' would have compelled the court to proceed with sentencing but without imposing the aggravated terms."

¶12 "'Our primary task in interpreting statutes is to give effect to the intent of the legislature.'" *State v. Lee*, 236 Ariz. 377, ¶ 16, 340 P.3d 1085, 1090 (App. 2014), *quoting In re Estate of Winn*, 214 Ariz. 149, ¶ 8, 150 P.3d 236, 238 (2007). "The best indicator of that intent is that statute's plain language." *Id.* Caplinger offers no support for his reading of the statute, and we find none. Nothing in the provision suggests that a sentencing court's failure to inform the parties of its intent forever limits its sentencing discretion.[2] Nor does any interpretation of the statute's language indicate the court would have no choice but to proceed with sentencing rather than address any objections a defendant might raise.

¶13 Instead, the far more sensible reading of § 13-702(E) is that a sentencing court cannot proceed immediately with sentencing if it failed to inform the parties of its intent, and a party objects. Rather, to avoid surprise at the imposition of sentence, the court must allow the defendant the opportunity to offer a specific and tailored argument that the contemplated aggravated sentence is inappropriate before that sentence is actually imposed. *See State v. Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d 1099, 1101 (App. 2011) (recognizing some sentencing claims "d[o] not become apparent until the court's pronouncement of the sentence"). We conclude the notification requirement in § 13-702(E) simply serves to provide a defendant with that opportunity, and we see no evidence the legislature intended to otherwise limit the sentencing court's discretion. *See id*. ¶ 15 (noting our deferential review of discretionary sentencing matters). Accordingly, the trial court did not abuse its discretion in concluding that, even if counsel fell below prevailing professional norms by failing to object to the absence of advance notice of an aggravated sentence, Caplinger has not established prejudice resulting from counsel's omission.

¶14 Although we grant review, we deny relief.

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[2]Indeed, if Caplinger were correct, a sentencing court would similarly be precluded from imposing the statutory mitigated sentence if it failed to announce before sentencing that it intended to do so.