IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

PIER ALESSA BERCIA,
Petitioner.

No. 2 CA-CR 2015-0409-PR
Filed December 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NOT FOR PUBLICATION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 Mohave County
Nos. CR201100561; CR201201096
The Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Marc J. Victor, P.C., Chandler
By Marc J. Victor
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 Pier Bercia seeks review of the trial court's order denying her petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Bercia has not met her burden of demonstrating such abuse here.

¶2 Pursuant to a plea agreement resolving outstanding charges in two cause numbers, Bercia pled guilty to two counts of possession of a dangerous drug for sale.[1] The trial court sentenced her to concurrent and consecutive prison terms totaling ten years. Bercia then sought post-conviction relief, arguing her trial counsel had been ineffective because he did not file a motion to suppress drug evidence obtained as a result of a canine sniff of her vehicle while it was parked in a public parking lot. She reasoned that, had counsel adequately investigated the legal bases for that motion, he would have discovered they were viable, and had he told Bercia he would pursue that motion, she would not have pled guilty. Bercia further argued that *Florida v. Jardins*, ___ U.S. ___, 133 S. Ct. 1409 (2013), constituted a significant change in the law applicable to her case. The trial court summarily denied relief, and this petition for review followed.

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[1]In CR-2011-00561, Bercia was also convicted after a jury trial of possession of drug paraphernalia, but the court declared a mistrial on the charge of possession of a dangerous drug for sale to which Bercia ultimately pled guilty.

¶3 On review, Bercia claims only that the trial court erred in rejecting her claim of ineffective assistance of counsel. "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); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). By pleading guilty, however, Bercia has waived all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the validity of her plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). Thus, Bercia is only entitled to relief if she can demonstrate both that competent counsel would have advised her there was a viable legal theory supporting a motion to suppress and that she would have rejected the plea in those circumstances.

¶4 Bercia's claim fails on both counts. Bercia attached to her petition an unsigned and unsworn document titled "Affidavit of Pier Alessa Bercia" stating that, had she been aware of the existence of "legal grounds" for a motion to suppress the drug evidence, she would not have pled guilty. A petition for post-conviction relief must include "[a]ffidavits . . . or other evidence" supporting the allegations in a petition, including those "[f]acts within the defendant's personal knowledge." Ariz. R. Crim. P. 32.5. Unsworn statements do not take the place of the affidavit or other sworn statement required to establish a colorable post-conviction claim warranting an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *State v. Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements). A bare allegation of prejudice without supporting evidence is insufficient to create a colorable claim. *See Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d at 1200.

¶5 And Bercia is not entitled to relief even were we to accept as true her unsworn assertion that she would have rejected the state's plea offer. Bercia contends that counsel should have argued the canine sniff of a car parked in public parking lot was an

impermissible search, and suggests "[t]here is no case law addressing the unique issues raised in a dog sniff unsupported by probable cause of a parked car in a public parking lot."[2]

¶6 The Supreme Court, however, has flatly rejected the notion that a canine sniff constitutes an impermissible search, even in the absence of any basis for suspicion. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) ("The fact that officers walk a narcotics-detection dog around the exterior of each car at the . . . checkpoints does not transform the seizure into a search."); *see also State v. Box*, 205 Ariz. 492, ¶ 15, 73 P.3d 623, 627-28 (App. 2003) ("[A] dog sniff is not a search for Fourth Amendment purposes when, as here, it is conducted on the exterior of a car in a public place at which the police have a right to be present."), *abrogated in part on other grounds by State v. Driscoll*, No. 2 CA-CR 2014-0086, ¶¶ 12-13, 17, 2015 WL 6847774 (Ariz. Ct. App. Nov. 6, 2015). And recent Arizona case law further establishes such an argument would stand little chance of success. *State v. Foncette*, 238 Ariz. 42, ¶¶ 12-17, 356 P.3d 328, 331-32 (App. 2015) (warrantless canine sniff outside hotel room door permissible). Further, even if a court were to adopt the extension of existing law that Bercia proposes, it is unlikely the exclusionary rule would apply in any event. *See Davis v. United States*, ___ U.S. ___, ___, 131 S. Ct. 2419, 2429 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."). Bercia does not provide evidence regarding trial counsel's conduct and there is no reason to conclude based on case law that counsel fell below prevailing professional norms for not advising his client of a legal strategy that was almost certain to fail.

¶7 Although we grant review, we deny relief.

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[2]Bercia apparently has abandoned the contention made in her petition below that counsel should have sought to suppress the evidence by attacking the canine's drug-detection qualifications.