IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

PETER DAVID MAASSEN,
Petitioner.

No. 2 CA-CR 2015-0425-PR
Filed December 9, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2008173009001SE
The Honorable Rosa Mroz, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton, Deputy County Attorney, Phoenix
Counsel for Respondent

Peter D. Maassen, Tucson
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Peter Maassen seeks review of the trial court's order dismissing his 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). Maassen has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Maassen was convicted of shoplifting and trafficking in stolen property and was sentenced to concurrent prison terms, the longer of which was fourteen years. His convictions and sentences were affirmed on appeal. *State v. Maassen*, No. 1 CA-CR 10-0673 (memorandum decision filed Mar. 27, 2012).

¶3 Maassen sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no colorable claims to raise in a Rule 32 proceeding. Maassen filed a pro se petition arguing: (1) an "original" thrift store receipt, a copy of which counsel had attempted to admit at trial, constituted newly discovered evidence; (2) the state failed to disclose before trial an edited version of surveillance footage that was shown to the jury; and (3) trial counsel had been ineffective in failing to "renew his objection" to presentation of the edited surveillance footage and in failing to successfully admit the thrift store receipt into evidence. He further asserted that evidence "obtained pursuant to an unlawful arrest, entry and seizure" had been admitted at trial and that the trial court had erred in precluding the thrift store receipt from evidence. The trial court summarily denied relief. This petition for review followed the court's denial of Maassen's motion for reconsideration.

¶4 On review, Maassen repeats his claims. We agree with the trial court that summary rejection was warranted. First, Maassen's claims that the state should not have been permitted to show the edited surveillance footage, that evidence was obtained pursuant to an "unlawful arrest, entry and seizure," and that the court erred in precluding the thrift store receipt are precluded because they were raised or could have been raised on appeal. Ariz. R. Crim. P. 32.2(a)(2), (3). Second, Maassen's claim that the "original" thrift store receipt is newly discovered evidence pursuant to Rule 32.1(g) fails because he has not demonstrated the receipt could not have been discovered before trial in the exercise of reasonable diligence. *See State v. Saenz*, 197 Ariz. 487, ¶ 7, 4 P.3d 1030, 1032 (App. 2000). Indeed, Maassen acknowledges he had the receipt before trial. Moreover, the only copy of the receipt he has provided is illegible and thus cannot support an argument that it "would have changed the verdict" in his case. Ariz. R. Crim. P. 32.1(g).

¶5 Third, to present a colorable claim of ineffective assistance of counsel, Maassen was required to show both that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced him. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

¶6 Maassen claims counsel was ineffective in failing to properly object to the admission of purportedly edited surveillance footage. During trial, counsel asked to review the footage to see if it was consistent with what had been disclosed, but the trial court rejected that request. Maassen asserted in his petition that he had informed counsel when the footage was played for the jury that it was not the same version of the footage that had been disclosed and contends that should have prompted counsel to object again. He claimed the disclosed version of the footage included portions he describes as "exculpatory."

¶7 But whether to object was, presumptively, a tactical decision made by counsel that cannot support a claim of ineffective assistance of counsel. *See generally State v. Moreno*, 153 Ariz. 67, 69-70, 734 P.2d 609, 611-12 (App. 1986) (discussing tactical decisions by counsel involving objections and witnesses). "[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. And "[d]isagreements as to trial strategy . . . 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). Counsel may well have concluded the exculpatory value of any additional footage was negligible when weighed against the possibility that the unedited footage might also include additional inculpatory evidence or the risk that additional viewings would overemphasize the surveillance footage.

¶8 In any event, Maassen has not established any likelihood that an objection would have altered the outcome of his trial. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. As noted in the decision on appeal, the surveillance footage showed Maassen cutting open plastic clamshell packaging and removing the merchandise. *Maassen*, No. 1 CA-CR 10-0673, at ¶ 2. The "exculpatory" portions of the footage, according to Maassen, showed him placing still-packaged merchandise on a shelf and bypassing security sensors to get a drink of water. This evidence does not meaningfully dissipate the inculpatory effect of the surveillance footage.

¶9 We also reject Maassen's claim that counsel was ineffective in failing to obtain admission of the thrift store receipt. Maassen seemed to suggest in his petition below that, had counsel submitted the original receipt, it would have been admitted. But, as we noted above, the receipt he provided with his petition is illegible and, therefore, cannot support his argument that the original receipt would have been admitted into evidence. Maassen also claims counsel was ineffective because he did not "locate the store owners," of the then-defunct thrift store to obtain authentication of the receipt.

See generally Ariz. R. Evid. 803(6)(A)-(C); 902(11). To the extent Maassen raised that claim in his petition below, he identified no evidence suggesting counsel would have been successful in authenticating the receipt by contacting the thrift store's owners.

¶10 Maassen additionally contends, for the first time in his petition for review, that appellate counsel should have raised various issues on appeal and that trial counsel was ineffective in litigating a motion to suppress evidence. We do not address claims not first raised in the trial court. *See State v. Vera*, 235 Ariz. 571, ¶ 8, 334 P.3d 754, 756-57 (App. 2014); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review "shall contain . . . issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

¶11 Although we grant review, we deny relief.