IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JULIAN EARL TOHE,
Petitioner.

No. 2 CA-CR 2015-0463-PR
Filed January 21, 2016

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NOT FOR PUBLICATION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 Coconino County
No. CR201200162
The Honorable Dan R. Slayton, Judge

REVIEW GRANTED; RELIEF DENIED

Julian E. Tohe, Florence
In Propria Persona

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Petitioner Julian Tohe 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). Tohe has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Tohe was convicted of attempted sexual assault and sexual abuse. The trial court sentenced him to seven years' imprisonment on the assault charge and suspended the imposition of sentence on the abuse charge, placing Tohe on a lifetime term of probation to commence upon his release from confinement.

¶3 Tohe thereafter initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating he had reviewed the matter and found no claims "that can be raised under Rule 32.1." In a pro se supplemental petition, however, Tohe claimed he had received ineffective assistance in that counsel "did not utilize other mitigating factors," specifically asserting counsel failed to investigate information in the presentence report, DNA[1] and other evidence relating to the victim's injuries, the issue of consent, and previous accusations made by the victim. Tohe contended he would have received a presumptive or mitigated

[1]Deoxyribonucleic acid.

sentence had such evidence been presented.[2] He further maintained counsel was ineffective in failing to review the presentence report with him and in not specifically arguing for a shorter term of probation, instead asking the court to impose a 5.25-year prison sentence for assault "followed by whatever term of probation [the court] feels is appropriate." The trial court summarily denied relief, as well as Tohe's subsequent motion for rehearing.

¶4 On review, Tohe sets forth multiple "Questions for this Court," but he does not develop any argument in relation to many of them. We therefore do not address those claims, and turn to the sole claim supported by argument on review. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "[t]he reasons why the petition should be granted" and "specific references to the record"); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

¶5 Tohe argues counsel was ineffective in failing to specifically request "the lowest probationary term possible" and because he "did not go over [Tohe's presentence report] with him." "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). To show prejudice, a defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at

[2]Tohe also contended his Rule 32 counsel was ineffective in filing a notice stating he had found no arguable issues. Such a claim must, however, be raised in a separate, subsequent proceeding, and we do not address it. *See State v. Petty*, 225 Ariz. 369, ¶ 9, 238 P.3d 637, 640 (App. 2010).

694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶6 In this case, Tohe's plea agreement required a prison term for the assault charge but probation for the sexual abuse charge "between three years and life, at the court's discretion." In the presentence report, the probation officer indicated that a term of probation "[b]etween 3 years and Lifetime Probation" was appropriate. The report writer recommended that Tohe be placed on five years of probation, but be required to register as a sex offender for the remainder of his life.

¶7 At sentencing, defense counsel asked for the "minimum sentence available under the plea," which was more than the statutory presumptive term, and stated "we believe that aggravated sentence takes into account the aggravation in this case, at least when it is weighed against the mitigation, which we feel is pretty extreme." Counsel also pointed out Tohe's extensive family support, exhibited by the family members who spoke at sentencing, and noted the probation report erroneously indicated Tohe had been in a gang. In closing his argument for the minimum prison term, counsel again stated Tohe had "already pled to" a term "over the presumptive" and "a probation tail to follow," and asked the court to impose the minimum prison term "followed by whatever term of probation [it] fe[lt] [wa]s appropriate." In his statement to the court, Tohe himself asked that any term of probation be imposed concurrent to the prison term so that he would "have no probation upon [his] release."

¶8 The state asked that the court impose a seven-year prison term and "a lifetime probation tail." The trial court ordered the minute entry for the sentencing to show "that the issue regarding gang affiliation was inaccurate." The court also found various mitigating and aggravating circumstances. In mitigation, the court found Tohe's family support, his "prior abuse as a child," and his "impaired capacity at the time of the offense by reason of his alcohol intoxication." In aggravation, the court found one prior felony conviction, severe emotional harm to the victim, and Tohe's "significant criminal history," which included multiple

misdemeanor convictions. On that basis the court imposed sentence and the lifetime term of probation.

¶9 Tohe provided no affidavits or other evidence in the trial court suggesting counsel's argument at sentencing fell below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."). He cites no authority in his petition for review, nor did he below, showing similar decisions by counsel have been found to constitute ineffectiveness. His bald assertion that counsel erred is insufficient to sustain his burden of demonstrating the first requirement of the *Strickland* test. *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶10 Furthermore, there is "[a] strong presumption" that counsel "provided effective assistance," *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), and we will presume "that [a] challenged action was sound trial strategy under the circumstances," *State v. Stone*, 151 Ariz. 455, 461, 728 P.2d 674, 680 (App. 1986). "Disagreements as to trial strategy or errors in trial [tactics] 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). Tohe has not established counsel's failure to expressly request a minimum term of probation was anything other than a tactical decision, intended to focus the court's attention on Tohe's acceptance of a longer prison term as a satisfactory means of aggravation.

¶11 We also cannot say the trial court abused its discretion in rejecting Tohe's claim that counsel was ineffective in relation to the presentence report. Other than its having included information that he had been involved with a gang, Tohe has specified no other errors in the report that would have been corrected by additional review. Nor, in light of the court's having stricken the gang reference in the report, has he identified how any failure in regard to that reference prejudiced him in relation to the term of probation and sentence ultimately imposed. Tohe has therefore failed to

establish prejudice resulting from any arguably deficient performance. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant fails to make sufficient showing on one element of *Strickland* test, court need not address other).

¶12 For these reasons, although we grant the petition for review, relief is denied.