IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SANTIAGO RENE RODRIGUEZ,
Petitioner.

No. 2 CA-CR 2017-0001-PR
Filed March 27, 2017

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NOT FOR PUBLICATION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. CR20113997001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Harold L. Higgins, P.C., Tucson
By Harold Higgins
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Howard and Judge Vásquez concurred.

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

¶1 Petitioner Santiago Rodriguez 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 that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Following a jury trial, Rodriguez was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI). The trial court imposed enhanced, concurrent, seven-year prison terms. We affirmed Rodriguez's convictions and sentences on appeal. *State v. Rodriguez*, No. 2 CA-CR 2013-0561 (Ariz. App. Oct. 22, 2014) (mem. decision). We rejected Rodriguez's argument that the court had erred by denying his motion to suppress the evidence resulting from the traffic stop. *Id.* ¶ 1. We concluded that "despite any procedural irregularities below," to wit, that the state did not present any evidence before the court ruled on the question of reasonable suspicion at the suppression hearing, the court correctly determined there was reasonable suspicion to stop the vehicle. *Id.* ¶¶ 1, 7. In our de novo review, *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996), we determined that the 9-1-1 call from an identified caller who had reported gunshots being fired from a "fairly distinct vehicle" in the nearby area had provided reasonable suspicion for the stop. *Id.* ¶¶ 2, 5, 7.

¶3 In July 2015, Rodriguez filed a notice of post-conviction relief. He raised three claims of ineffective assistance of trial counsel in his petition, which the trial court summarily denied. On review, Rodriguez first asserts trial counsel was ineffective in failing to

present evidence at the suppression hearing by essentially conceding the facts presented by the state and in erroneously stating that the original driver, Rodriguez's brother, had "fled" from the vehicle.[1] Rodriguez also maintains trial counsel should have moved to sever the two counts that required proof of prior misdemeanor DUI convictions, and he suggests the court improperly relied on the related limiting instruction it gave to the jury. Finally, Rodriguez asserts trial counsel failed to call Aaron Rivera, the other passenger in the vehicle, as a witness at trial. Relying on his own and Rivera's affidavits, attached as exhibits to the petition below, Rodriguez argues that after the driver exited the vehicle, Rodriguez "took over the wheel of the still moving vehicle and drove it briefly around the corner . . . until stopped by police." Rodriguez contends that if the jurors had heard this evidence, "it was very likely they would have concluded that [Rodriguez] drove the vehicle a very short distance to a safe stop, and had no other choice [but] to do so."

¶4 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 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, 687-88 (1984). The failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985); *see also Strickland*, 466 U.S. at 697 (recognizing ineffective assistance claims may be resolved "on the ground of lack of sufficient prejudice").

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[1]In support of this argument, Rodriguez maintains trial counsel should have pointed out that the descriptions provided by the 9-1-1 callers were "very different" from one another and were "'general'" in nature. The record fails to support this argument, nor does it support Rodriguez's assertion that the 9-1-1 callers were anonymous. Moreover, to the extent Rodriguez is challenging this court's ruling on direct appeal by asserting we "ignored" or failed to "recognize" certain issues in that ruling, he may not do so in a Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.9(c).

¶5 We find no error in the trial court's determination that Rodriguez failed to state a colorable claim of ineffective assistance of counsel. We therefore adopt the court's thorough analysis. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly rules on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision"). We additionally note that Rodriguez does not point to any deficiency in the limiting instruction regarding the prior DUI convictions; rather, he appears to argue that the better practice would have been for counsel to file a motion to sever the two counts that required proof of prior misdemeanor DUI convictions. However, such an argument, without more, fails to establish a colorable claim of ineffective assistance. In addition, Rodriguez does not address the court's finding that, even if Rivera had testified, his testimony would not have created a reasonable probability that the outcome at trial would have been different. As the court correctly found, "calling Mr. Rivera would have only confirmed that [Rodriguez] drove the car" while impaired, the very offense with which he was charged and convicted.

¶6 Accordingly, we grant review but deny relief.