IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SEAN CONLEY YOUNG,
Petitioner.

No. 2 CA-CR 2017-0040-PR
Filed April 19, 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NOT FOR PUBLICATION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. CR20123045001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Dean Brault, Pima County Legal Defender
By Alex D. Heveri, Assistant Legal Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Sean Young seeks review of the trial court's orders summarily denying his petition for post-conviction relief and motions for rehearing filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those rulings unless the court clearly abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Young has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Young was convicted of aggravated driving under the influence (DUI) and aggravated driving with an alcohol concentration (BAC) of .08 or greater. The trial court sentenced him to concurrent, ten-year prison terms. We affirmed his convictions and sentences on appeal. *State v. Young*, No. 2 CA-CR 2015-0073 (Ariz. App. Mar. 1, 2016) (mem. decision). On appeal, we described the facts underlying his convictions as follows:

> When Tucson Police officers stopped Young just after he had begun to drive, they observed that he had an odor of alcohol and bloodshot, watery eyes, his face was flushed, and he had a noticeable sway while standing. Young admitted drinking three shots of whiskey over an hour before driving, but denied he was intoxicated. He agreed to submit to a breath test, along with field sobriety tests. In two separate readings taken six minutes apart, the breath testing machine reported his blood alcohol concentration at .085 and .082.

¶3 Young sought post-conviction relief, arguing his trial counsel had been ineffective for failing to: (1) present evidence of a partial amputation of his left foot that purportedly affected his performance on a walk-and-turn field sobriety test; (2) present evidence of a chronic eye condition causing his eyes to be bloodshot; (3) cross-examine an officer about the effectiveness of agility-based field sobriety tests on certain subjects; (4) object to the officer's testimony suggesting "she has the ability to detect a certain clear and distinct scent from alcohol that emanates from an intoxicated person's breath and pores"; and (5) have the criminalist who testified for the defense "fully explain" that, due to the breathalyzer's margin of error, it was "impossible" to determine "with scientific certainty" that Young's "true" BAC was above .08. The trial court summarily denied relief, concluding Young had not demonstrated prejudice.[1] Young filed a motion for rehearing pursuant to Rule 32.9(a), which the court denied. He then filed a second motion for rehearing, including with that motion an affidavit by an attorney avowing that trial counsel's conduct fell below prevailing professional norms. The court denied that motion, and this petition for review followed.

¶4 On review, Young asserts the trial court erred by "denying a hearing" on his claims of ineffective assistance. A defendant is entitled to a hearing only if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would probably have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11, 368 P.3d 925, 927-28 (2016) (emphasis omitted). "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);

---

[1]For the first time in his reply to the state's response, Young argued counsel had been ineffective in failing to seek suppression of the breath test results based on his "involuntary 'consent'" to those tests and that *State v. Valenzuela*, 239 Ariz. 299, 371 P.3d 627 (2016) constituted a significant change in the law pursuant to Rule 32.1(g). The trial court denied those claims and Young does not raise them on review.

accord State v. Kolmann, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "To establish deficient performance, a defendant must show that his counsel's assistance was not reasonable under prevailing professional norms, 'considering all the circumstances.'" *Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d at 64, *quoting Hinton v. Alabama*, ___ U.S. ___, ___, 134 S. Ct. 1081, 1088 (2014). "To establish prejudice, a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*, *quoting Hinton*, ___ U.S. at ___, 134 S. Ct. at 1089.

¶5 We agree with the trial court that, even assuming counsel fell below prevailing professional norms, [2] Young has not demonstrated resulting prejudice. Young first repeats his claim that trial counsel should have presented evidence that his performance on a walk-and-turn field sobriety test was due to a partial amputation of his left foot. As the court pointed out and Young acknowledges, however, Young performed well on both agility-based field sobriety tests administered by the officers. Evidence that the slight defects in his performance were a result of a physical disability is unlikely to have changed the verdict in light of his having exhibited four of six cues of intoxication in a horizontal gaze nystagmus test, his having backed his vehicle into a mobile home when he began to drive, his subsequent failure to obey instructions from police, and the statutory presumption that he was impaired due to the results of his breath test, *see* A.R.S. § 28-1381(G)(3). For the same reason, we agree with the trial court that Young did not demonstrate prejudice resulting from

[2]Young's assertion that counsel's conduct was deficient is based largely on the affidavit he included with his second motion for rehearing filed pursuant to Rule 32.9(a). Nothing in Rule 32.9(a) permits a petitioner to submit additional evidence in a motion for rehearing; instead, that rule allows a petition to seek rehearing based on an alleged error by the trial court. And a trial court is not required to consider arguments raised for the first time in a motion for rehearing. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). Accordingly, to the extent it is relevant to the issues addressed in this decision, we decline to consider that affidavit.

counsel's failure to cross-examine a police officer about the efficacy of agility-based field sobriety tests.

¶6 Young also repeats his claim that counsel should have objected to testimony by a police officer that "there's a certain scent" that emanates from "an intoxicated person." He asserts this testimony was "contradicted by scientific literature" and constituted improper opinion testimony about the "ultimate issue" in the case. *See Fuenning v. Superior Court*, 139 Ariz. 590, 605, 680 P.2d 121, 136 (1983) (cautioning against "opinion evidence" concerning "whether the defendant committed the crime with which he was charged," such as, in a DUI case, "whether the defendant was driving while intoxicated").

¶7 We agree the officer's testimony was imprecise. But, a short time earlier, the trial court had required the state to clarify a similar statement by another officer, who testified on direct and cross-examination that the odor of intoxicants could not indicate "how much somebody drank" or "what they drank." Based on that testimony, it is unlikely the jury would believe the second officer had some unique ability to detect intoxication by smell, particularly given that, during cross-examination, that officer also acknowledged the odor of alcohol did not indicate how much alcohol a person had consumed. Moreover, as we noted above, there was ample evidence of Young's intoxication. The court was correct that the verdict was unlikely to have changed had counsel objected to the officer's testimony.

¶8 Young next claims trial counsel was ineffective because she did not "have her expert fully explain that it is impossible to know, with scientific certainty, based on the breath testing machine's margin of error, whether [his] true breath alcohol concentration was above a .072 and [a] .075 respectively." In support, she relies on a letter drafted by a criminalist, in which he claims, based on his review of the record, that "no scientist can know, to a scientific certainty . . . that the true breath reading was even above a [].08."

¶9 But Young presented testimony similar to the criminalist's statement in the letter. A criminalist called to testify by

Young extensively discussed the margin of error of the breathalyzer used to examine Young's breath sample, and opined there was "no difference scientifically between an 078 and 082." We can see no reasonable likelihood that a more direct statement by the criminalist would have altered the jury verdict in this case. In any event, trial counsel asked the criminalist whether it was "possible scientifically to conclude that Mr. Young had a B.A.C. above the .08 or that he was impaired." The witness, however, declined to address the first portion of counsel's question, noting "the second part of your question is easier to answer." Young has not suggested that counsel should have repeated the question in hopes of receiving a different response.

¶10 We grant review but deny relief.