IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GARY VASKO,
Petitioner.

No. 2 CA-CR 2017-0166-PR
Filed June 29, 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NOT FOR PUBLICATION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 Navajo County
No. S0900CR20090863
The Honorable John N. Lamb, Judge
The Honorable Dale P. Nielson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Brad Carlyon, Navajo County Attorney
By Galen H. Wilkes, Deputy County Attorney, Holbrook
Counsel for Respondent

Gary Vasko, San Luis
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Howard[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Gary Vasko seeks review of the trial court's orders denying his petition for post-conviction relief 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). Vasko has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Vasko was convicted of conspiracy to manufacture methamphetamine, possession of equipment or chemicals for the purpose of manufacturing methamphetamine, and manufacturing methamphetamine. The trial court sentenced him to concurrent, twelve-year prison terms for each offense. We affirmed his convictions and sentences on appeal. *State v. Vasko*, No. 1 CA-CR 10-0556 (Ariz. App. Feb. 7, 2012) (mem. decision).

¶3 Vasko then sought post-conviction relief, arguing his trial counsel had been ineffective in failing to (1) argue statements precluded pursuant to a motion in limine were admissible under Rule 801(d)(1)(A), Ariz. R. Evid.; (2) call certain "impeachment" witnesses, including witnesses who would have testified that "the State's key witnesses were made promises in exchange for implicating" him; (3) call witnesses to testify about the condition of his home (the site of the methamphetamine laboratory) and the absence there of "any criminal or suspect operations or equipment" or "unusual or bad odors"; (4)

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[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

present evidence of environmental testing of his home; (5) adequately "discredit or challenge" a witness who described the laboratory found in his home as "one of the most complete laboratories she had seen"; (6) reassert a request for an instruction based on *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964); and (7) adequately argue a search warrant was invalid. He additionally asserted the "jury trial transcripts were altered so egregiously as to prevent any effective relief from conviction."

¶4 The trial court summarily rejected Vasko's claims related to the precluded statements, the request for a *Willits* instruction, and the search warrant, but ordered an evidentiary hearing on the remaining claims. After that hearing, the court denied relief. It concluded that, as to the bulk of counsel's purported deficiencies, counsel had acted reasonably in declining to call various witnesses or present certain evidence, either because the argument Vasko proposed would have been unsuccessful or there were tactical reasons for counsel to have opted not to pursue the matter. It also found that Vasko had abandoned two arguments—one related to potential witness testimony and his claim that the trial transcripts had been altered. The court further concluded that, in any event, Vasko had not demonstrated prejudice resulting from counsel's conduct. This petition for review followed.

¶5 On review, Vasko first asserts the trial court erred by summarily rejecting three of his claims of ineffective assistance without an evidentiary hearing. A defendant is entitled to a hearing only if he presents a colorable claim for relief, that is, if "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). "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); *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).

¶6 First, Vasko asserts he presented a colorable claim that counsel should have argued for the admission of precluded statements under Rule 801(d)(1)(A). But he does not identify the statements or develop any legal argument that they would have been admissible. He therefore has waived this claim on review, and we do not address it further. *State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review). Similarly, Vasko fails to provide any legal or record support for his claim that counsel was ineffective in pursuing a motion to suppress evidence. We thus do not address this argument. *See id.*

¶7 Vasko also argues the trial court erred by summarily rejecting his claim of ineffective assistance based on counsel's failure to "reassert his motion for a *Willits* instruction."[2] Again, however, Vasko does not meaningfully develop this claim and we need not discuss it. *See id.* In any event, we determined on appeal that he would not have been entitled to such an instruction.

¶8 Vasko next contends the trial court erred by concluding that counsel's conduct during trial did not fall below prevailing professional norms. But we need not address these arguments because, as we explain, Vasko has not demonstrated the trial court erred in concluding he had not demonstrated resulting prejudice. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) ("In deciding an ineffectiveness claim, this court need not approach the inquiry in a specific order or address both prongs of the inquiry if the defendant makes an insufficient showing on one."). To establish the prejudice required to prevail on a claim of ineffective assistance of counsel, Vasko must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"; "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985), *quoting Strickland*, 466 U.S. at 694.

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[2]A defendant is entitled to a *Willits* instruction when the state fails to preserve evidence having a tendency to exonerate the defendant. *State v. Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d 787, 795 (2009).

¶9 In addressing the trial court's conclusion, Vasko does little more than recite counsel's purported shortcomings. He does not describe the evidence presented at trial or provide any citations to the record, as required by Rule 32.9(c)(1). Notably, he does not address the court's recitation of the facts in its order denying relief that, as the court found, describe overwhelming evidence of Vasko's guilt. Notably, Vasko has not meaningfully discussed evidence that he purchased a large quantity of pseudoephedrine or that equipment and chemicals consistent with the manufacture of methamphetamine, including unfinished methamphetamine, were found in his residence.

¶10 Vasko also argues the trial court erred in concluding he had abandoned two claims raised in his petition below. The court reasoned that Vasko had abandoned the claims because he did not present relevant evidence during the evidentiary hearing. Vasko counters that he "included portions of the record in his Rule 32 petition" in support of those claims that were "not challenged by the state." But the purpose of an evidentiary hearing is to provide Vasko the opportunity to prove his claims by a preponderance of the evidence. *See* Ariz. R. Crim. P. 32.8(c). Vasko made no effort to do so. And, notably, Vasko did not address the claims in his post-hearing memorandum. We find no error in the court's determination that Vasko abandoned these claims.

¶11 Finally, Vasko contends his Rule 32 counsel was ineffective in pursuing his petition for post-conviction relief. But Vasko is not constitutionally entitled to the effective assistance of Rule 32 counsel. *See State v. Escareno–Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013). Even if he were, this claim cannot be raised for the first time in a petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues "decided by the trial court . . . which the defendant wishes to present to the appellate court for review"); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that "have obviously never been presented to the trial court for its consideration").

¶12 We grant review but deny relief.