IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MARK ANGEL MARRERO JR.,
Petitioner.

No. 2 CA-CR 2019-0152-PR
Filed November 12, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20141507001
The Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Jacob Amaru, Tucson
By Jacob Amaru
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Mark Marrero Jr. seeks review of the trial court's order summarily 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 abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Marrero has not shown such abuse here.

¶2 After a jury trial, Marrero was convicted of sixteen counts of kidnapping, six counts each of aggravated and armed robbery, eight counts of aggravated assault, seven counts of aggravated assault of a minor under fifteen, two counts of burglary, and two counts of impersonating a police officer. The charges stemmed from his participation in two home invasions. The trial court sentenced him to concurrent and consecutive prison terms totaling 269.5 years. We affirmed his convictions and sentences on appeal. *State v. Marrero*, No. 2 CA-CR 2015-0199 (Ariz. App. April 19, 2017) (mem. decision).

¶3 Marrero sought post-conviction relief, arguing his first appointed counsel was ineffective for inadequately investigating the legality of the window tinting on his vehicle that had formed the basis of the traffic stop leading to his arrest and for advising him to engage in a "free talk." He claimed his second appointed counsel had failed to adequately advise him with regard to a plea offer by the state, investigate the legality of the window tint, and prepare for and conduct trial. Last, Marrero asserted *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206 (2018), is a significant change in the law applicable to his case. The trial court summarily dismissed the proceeding. This petition for review followed.

¶4 On review, Marrero repeats his claims and asserts he is entitled to an evidentiary hearing. A defendant is entitled to a hearing 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 (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 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 We first address Marrero's claim that both his appointed attorneys were ineffective in failing to adequately investigate whether the window tinting of his vehicle was illegal. This argument rests on the faulty premise that, if the window tint were legal, the traffic stop leading to his arrest was improper and his motion to suppress would have been granted. But, as this court explained in *State v. Moreno*, when an officer stops a vehicle based on the mistaken belief that vehicle's window tint is illegal, the stop is improper only if the officer's belief is unreasonable, irrespective of whether that belief is grounded in a mistaken view of the facts or of the governing law. 236 Ariz. 347, ¶¶ 9-11 (App. 2014). Marrero has not suggested that additional investigation could have uncovered evidence to establish the officer's belief was unreasonable, instead of merely mistaken. Thus, he has not established a colorable claim of prejudice on this point. *See Bennett*, 213 Ariz. 562, ¶ 21.

¶6 Marrero also contends his first trial counsel was ineffective in recommending that he engage in a free talk with the state. He asserts, essentially, that his decision to do so was involuntary because counsel was not adequately informed about the evidence against him. But, even taking his assertions as true, Marrero's claim fails. He has not identified any evidence or authority suggesting that no competent attorney would have recommended that Marrero engage in a free talk in these circumstances.[1] *See id.*

¶7 We next address Marrero's claim that second counsel failed to inform him, in relation to a plea agreement, that the prosecutor "did not anticipate asking for more than 7 years at . . . Sentencing," the minimum available sentence under an agreement calling for an aggregate term of

[1]Marrero makes much of his allegation that trial counsel, at the time of the free talk, told him the state had forensic evidence linking him to stolen weapons found in his vehicle. He does not identify evidence, however, suggesting that it would have been unreasonable at the time to believe the state would have such evidence, given the weapons had been found in Marrero's car. Nor has Marrero suggested he would have, or could have, denied having possessed those weapons, which linked him to a home invasion.

between seven and sixty-three years. "[A] defendant may obtain post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary." *State v. Banda*, 232 Ariz. 582, ¶ 12 (App. 2013). A defendant must show not only that his counsel was ineffective, but that he would have accepted the plea and forgone trial except for his attorney's error. *See id.* Marrero has not avowed that he would have accepted the plea had he been aware of the prosecutor's comment about the state's sentencing position. This claim therefore is not colorable. *See id.*

¶8 In Marrero's remaining claim of ineffective assistance, he asserts his second counsel was not prepared for trial. But, in his petition for review, he has identified no specific conduct by counsel during trial that suggests her preparation fell below prevailing professional norms. We need not address this argument further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim).

¶9 Marrero also reurges his claim that *Carpenter* is a significant change in the law applicable to his case. Rule 32.1(g) permits post-conviction relief when "there has been a significant change in the law that, if applied to the defendant's case, would probably overturn the defendant's conviction or sentence." "Rule 32 does not define 'a significant change in the law.'" *State v. Shrum*, 220 Ariz. 115, ¶ 15 (2009). "But plainly a 'change in the law' requires some transformative event, a 'clear break from the past.'" *Id.* (quoting *State v. Slemmer*, 170 Ariz. 174, 182 (1991)).

¶10 In *Carpenter*, the Supreme Court determined the government must obtain a warrant to access "historical cell phone records that provide a comprehensive chronicle of the user's past movements." 138 S. Ct. at 2211, 2220-21. The Court described its decision as "narrow," declining to address other sources of cell phone location information, such as "'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)." *Id.* at 138 S. Ct. at 2220.

¶11 First, Marrero has made little effort to establish that the cell phone evidence in his case falls within the narrow type discussed in *Carpenter*—his only citation to the trial record is a cite to his counsel's motion to suppress which, in turn, contains no evidence supporting his claim; he does not cite trial testimony or other evidence explaining the type of records presented to the jury. His claim warrants summary rejection on this basis alone. *See Stefanovich*, 232 Ariz. 154, ¶ 16. Second, he has not

developed any argument that, even assuming *Carpenter* was relevant to an issue in his case, it should be given retroactive effect. *See State v. Poblete*, 227 Ariz. 537, ¶ 12 (App. 2011) ("New constitutional rules generally are not applicable to cases already final when the rule is announced."). Finally, he does not address the trial court's conclusion that, in any event, suppression would not be warranted in his case under the good-faith exception to the exclusionary rule. *See State v. Weakland*, 246 Ariz. 67, ¶ 9 (2019) (exclusion inappropriate when state conduct was based on objectively reasonable reliance on binding precedent). In short, Marrero has not established the court erred in summarily rejecting this claim.

¶12 We grant review but deny relief.