IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JON MICHAEL MULLINS,
Petitioner.

No. 2 CA-CR 2020-0019-PR
Filed July 20, 2020

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NOT FOR PUBLICATION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. CR20074781
The Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Doug Clark, Assistant Attorney General, Tucson
Counsel for Respondent

Jon M. Mullins, Kingman
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Petitioner Jon Mullins seeks review of the trial court's ruling dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.[1] We will not disturb that ruling unless the court has abused its discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Mullins has not met his burden of establishing such abuse here.

¶2 After a jury trial held in his absence, Mullins was convicted of transportation of marijuana for sale and possession of marijuana for sale. The trial court imposed concurrent four-year terms of imprisonment. On appeal, this court vacated Mullins's conviction and sentence for possession of marijuana for sale as a lesser-included offense, but we affirmed his conviction and sentence for transportation of marijuana for sale. *State v. Mullins*, No. 2 CA-CR 2018-0069 (Ariz. App. Nov. 28, 2018) (mem. decision).

¶3 Mullins initiated a proceeding for post-conviction relief, and the trial court appointed Rule 32 counsel. In his subsequently filed petition, Mullins argued that his trial counsel had been ineffective in failing to file a motion to suppress the marijuana seized from his car based on an unlawful traffic stop that was prolonged without reasonable suspicion. He also asserted that his trial counsel had been ineffective in failing to object when the prosecutor improperly vouched for an officer during closing arguments by stating that the court had "qualified the officer as an expert."

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, No. 2 CA-CR 2019-0281-PR, n.1, 2020 WL 3055826 (Ariz. Ct. App. June 9, 2020) ("amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

¶4 The trial court summarily dismissed the petition, concluding that Mullins "failed to present a colorable claim that his [trial] counsel's performance fell below an objective standard of reasonableness as defined by prevailing professional norms or that any alleged deficient performance resulted in prejudice to him." With regard to the motion to suppress, the court explained that, because Mullins "chose to absent himself during the pretrial period, his trial counsel only had the facts contained in the police report" and "[t]here was no evidence available to counsel to support a motion to suppress for either the traffic stop or the length of the stop." The court also determined that "[t]he officer's observations prior to and after the traffic stop established reasonable suspicion to initiate the stop and reasonable and articulable reasons to believe criminal activity was occurring after the stop." With regard to the vouching, the court agreed with Mullins that the prosecutor's statement during closing arguments was improper. However, the court determined that "the matter was cured" by "a *sua sponte* curative instruction reminding the jurors that they were not bound by any expert testimony, were not to be swayed by anything the Court had done during the case, and were free to accept or reject any expert testimony." This petition for review followed.

¶5 On review, Mullins argues the trial court erred in rejecting his claims of ineffective assistance of counsel. He also argues the court erred in ruling on his claims without holding an evidentiary hearing.

¶6 In a proceeding for post-conviction relief, a defendant is entitled to an evidentiary hearing if he establishes a colorable claim—that is, one, that if the allegations are true, probably would 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) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.*

¶7 Mullins first argues the trial court erred "in ruling there was no evidence available to [trial] counsel supporting a motion to suppress." He maintains his counsel "should have known to read the evidence and draw conclusions from the contradicting data" in the written warning and the officer's report.

¶8 Assuming Mullins's trial counsel had copies of both the written warning and the officer's report, they do inconsistently describe how fast Mullins was driving and the posted speed limit.[2] However, in his petition below, Mullins recognized that when the officer first observed him, Mullins "had just left a construction zone," perhaps explaining that Mullins was traveling at different speeds at different locations. In any event, both the written warning and the officer's report indicate that Mullins was speeding. And nothing in the record supports Mullins's assertion that the speed limit where he was stopped was seventy-five miles per hour—information Mullins could have provided to his trial counsel had he been present during the pretrial proceedings.

¶9 Mullins also contends that he was prejudiced because, if his trial counsel had filed a motion to suppress, "the evidence would have been suppressed, pursuant to the exclusionary rule." He reasons that "[t]he officer had no suspicion that a traffic violation had occurred" and that "the additional seizure . . . was not justified by reasonable suspicion of criminal activity."

¶10 The officer noted that, not only did Mullins violate the speed limit, he also failed to move to the right to allow faster traffic to pass—a violation that Mullins does not seem to challenge. The officer therefore had authority to conduct the initial stop. *See State v. Kjolsrud*, 239 Ariz. 319, ¶ 9 (App. 2016). And the record supports the trial court's determination that during the stop the officer developed reasonable, articulable suspicion to extend it. *See id.* ¶ 10. Among other things, the officer's report indicates that during the stop he "smelled the odor of raw marijuana"; Mullins was driving a car registered to an out-of-state third party; Mullins was "vague," "evasive," and "looked away as he gave his answers"; and Mullins and his passenger "gave conflicting stories about the length of time they knew each other." *See State v. Evans*, 237 Ariz. 231, ¶¶ 8-12 (2015) (discussing standard for reasonable suspicion). The trial court therefore did not abuse its discretion in finding this claim not colorable. *See Martinez*, 226 Ariz. 464, ¶ 6.

[2]The officer's report indicates that Mullins passed his vehicle while the officer was "traveling about 55 mph in a posted 45 mph zone" and that he then "paced [Mullins's] vehicle at about 60 mph." The written warning, however, provides that Mullins was traveling "65+" mph in a posted 65 mph zone.

¶11 Mullins next argues the trial court erred in concluding "the impermiss[i]ble prosecutorial vouching was cured by a sua sponte curative instruction." He summarily maintains the officer's testimony "was used in proving the defendant had [an] intent to sell" and "[t]here was [a] reasonable probability that the verdict would have been different" but for counsel's failure to object.

¶12 Our supreme court has stated, "When improper vouching occurs, the trial court can cure the error by instructing the jury not to consider attorneys' arguments as evidence." *State v. Payne*, 233 Ariz. 484, ¶ 109 (2013). Here, after the prosecutor's closing argument, the trial court instructed the jurors that it was their responsibility to "decide the facts and apply the law" and that it was "up to [them] what [expert testimony] to accept and what to reject," regardless of why the court allowed the testimony at trial. The court also instructed the jury that the attorney's arguments were not evidence. Because we presume the jurors followed their instructions, *see State v. Manuel*, 229 Ariz. 1, ¶ 24 (2011), the court did not err in concluding that Mullins had failed to establish prejudice. The court therefore did not abuse its discretion in finding this claim not colorable. *See Martinez*, 226 Ariz. 464, ¶ 6.

¶13 Accordingly, we grant review but deny relief.