IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Respondent*,

*v.*

CARL CHRISTOPH BUTLER,
*Petitioner*.

No. 2 CA-CR 2020-0035-PR
Filed July 8, 2020

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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NOT FOR PUBLICATION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).

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Petition for Review from the Superior Court in Cochise County
No. S0200CR201600792
The Honorable James L. Conlogue, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Cochise County Office of the Legal Advocate, Bisbee
By Xochitl Orozco
*Counsel for Petitioner*

**MEMORANDUM DECISION**

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

E S P I N O S A, Judge:

**¶1** Petitioner Carl Butler 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). Butler has not met his burden of establishing such abuse here.

**¶2** After a jury trial, Butler was convicted of transportation of a dangerous drug for sale, possession of marijuana, and nine counts of possession of drug paraphernalia. The trial court sentenced him to a combination of concurrent and consecutive, presumptive prison terms totaling twelve years. On appeal, this court vacated one of Butler's convictions for possession of drug paraphernalia because the grand jury had removed that count from the indictment as duplicative of another count. *State v. Butler*, No. 2 CA-CR 2017-0285, ¶ 10 (Ariz. App. May 7, 2018) (mem. decision). We otherwise affirmed Butler's convictions and sentences. *Id.* ¶ 12.

**¶3** Butler initiated a proceeding for post-conviction relief, and the trial court appointed Rule 32 counsel. In his petition, Butler argued that his trial counsel had rendered ineffective assistance by breaking attorney-client privilege, stipulating to elements of the offenses without Butler's consent, failing to investigate the case, failing to file pretrial motions, failing to object at trial, failing to identify the duplicative count

[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)).

presented to the jury, and failing to present mitigation evidence at sentencing. He also asserted that his appellate counsel had provided ineffective assistance by filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), when she had not obtained the entire record, incorrectly listed Butler's sentences, and failed to find fundamental error; by not obtaining additional transcripts when this court ordered supplemental briefing; and by not following up with the Arizona Department of Corrections to correct Butler's sentence.

**¶4** The trial court summarily dismissed Butler's petition, concluding that "no claim presents a material issue of fact or law which would entitle [Butler] to post-conviction relief." In part, the court explained that there was "overwhelming" evidence Butler possessed the methamphetamine, marijuana, and drug paraphernalia, and that "[t]he only real question was whether [he] possessed the methamphetamine for sale." Based on "[t]he large quantity of methamphetamine (13.8 grams) and other evidence," the court determined there was "no reasonable probability that trial counsel's actions or inactions, whether singularly or cumulatively, would have caused the jury to" acquit Butler of that charge. This petition for review followed.

**¶5** On review, Butler contends the trial court erred in dismissing his petition for post-conviction relief without an evidentiary hearing. He also reasserts most of his claims of ineffective assistance of trial and appellate counsel, which we address in turn.

**¶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.* Under the first prong of *Strickland*, "we must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). To establish prejudice under the second prong of *Strickland*, a defendant cannot meet his burden by "mere speculation." *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

**¶7** First, regarding Butler's claim that his trial counsel provided ineffective assistance by violating attorney-client privilege, Butler argues the trial court erred in concluding that he failed to establish prejudice. Butler maintains he was prejudiced because "his right to remain silent was broken by his attorney in direct contravention to his constitutional rights and in violation of the rules of professional conduct." However, he made no such argument in his petition below. *See* Ariz. R. Crim. P. 32.16(c)(2)(B) (appellate court reviews issues presented to trial court); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court will not address arguments asserted for first time in petition for review). And, in any event, Butler's assertion fails to establish that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bennett*, 213 Ariz. 562, ¶ 25 (quoting *Strickland*, 466 U.S. at 694). The court therefore did not abuse its discretion in finding this claim not colorable.

**¶8** As to Butler's claim that his trial counsel rendered ineffective assistance by stipulating to elements of the offenses, the trial court acknowledged that the stipulation exceeded the scope of Butler's pretrial consent. But the court concluded the stipulation was nonetheless consistent with "the trial strategy . . . to convince the jury the methamphetamine was not possessed or transported *for sale*."[2] On review, Butler argues it was not a matter of trial strategy because his counsel should have held the state "to the burden of proof for the elements of the case." But "[d]isagreements in trial tactics will not support a claim of ineffectiveness provided the conduct has some reasoned basis." *State v. Lee*, 142 Ariz. 210, 214 (1984). Moreover, Butler does not meaningfully address the court's additional determination that he suffered no prejudice because "the facts unnecessary to the stipulation were cumulative" or "superfluous." The record supports that determination. The court thus did not abuse its discretion in finding this claim not colorable.

**¶9** Next, Butler claims the trial court erred in rejecting his claim that his trial counsel had been ineffective in failing to investigate the case. Butler disputes the court's suggestion that counsel's conduct did not fall below objectively reasonable standards. Butler wholly fails, however, to address the court's additional conclusion that he made "no colorable showing that there would have [been] a different result but for any inadequacy." Because Butler has made no showing of prejudice—either

[2]As the trial court also pointed out, Butler was not present for trial, thereby preventing his trial counsel from discussing the scope of the stipulation with him at that point.

below or on review—we agree with that determination and find no abuse of discretion.

**¶10** Butler also challenges the trial court's rejection of his claim that his trial counsel was ineffective in failing to file a motion to suppress and a motion to preclude. The court determined, in part, that Butler suffered no prejudice as a result of his counsel's failure to file any such motions. Butler disputes that determination by proposing that, had such motions been filed, his counsel could have prepared a different defense. But he assumes such motions would have been successful, and he does not suggest, let alone establish, that a different defense would have resulted in different verdicts.[3] *See Bennett*, 213 Ariz. 562, ¶ 25. We therefore cannot say the court abused its discretion in finding this claim not colorable.[4]

**¶11** Butler contends the trial court erred in rejecting his claim that his trial counsel had been ineffective in failing to object at trial when an officer discussed Butler's prior citation for using a fictitious license plate and when that same officer used the term "incarceration syndrome" as he explained that Butler appeared to be having a "medical condition" at the time of his arrest. Although the court found it was error to admit evidence about the prior citation, it nonetheless concluded there was "no reasonable probability that the result would have been different but for the erroneous admission of this evidence" because the state "abandoned" it. On review,

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[3]Butler argues that, had his trial counsel challenged the dog sniff of his vehicle, "perhaps the jurors would have considered a different verdict." But any such challenge would have been properly raised in a motion to suppress, not presented to the jury. *See State v. Lelevier*, 116 Ariz. 37, 38 (1977) ("A motion to suppress challenges only the constitutionality of the obtaining of evidence by the state and it is made before trial begins."). And, in any event, as demonstrated by Butler's own language, the suggested prejudice is speculative. *See Rosario*, 195 Ariz. 264, ¶ 23.

[4]Several of Butler's arguments are intertwined, and he seems to suggest that the errors, when considered together, amount to ineffective assistance of trial counsel. However, our supreme court has not recognized application of the cumulative error doctrine in this context. *See State v. Pandeli*, 242 Ariz. 175, ¶¶ 69-71 (2017). And in the absence of a fully developed argument by Butler, we do not address this issue further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (claim waived where defendant cites no relevant authority and fails to develop argument in meaningful way).

Butler argues the evidence "had to have an effect on the jury" because his credibility was important to his defense. But, based on the record before us, we cannot say the court abused its discretion in concluding Butler had failed to establish that the verdicts probably would have been different had the evidence not been admitted. *See Amaral*, 239 Ariz. 217, ¶ 11. Butler admitted he possessed the drugs, and multiple officers testified that, based on the quantity of the drugs and the items of paraphernalia, the drugs were possessed for sale. *See Strickland*, 466 U.S. at 694 (defining "reasonable probability" in prejudice prong as "probability sufficient to undermine confidence in the outcome").

**¶12** As to the "incarceration syndrome" statement, the trial court found neither that trial counsel's conduct fell below objectively reasonable standards or prejudiced Butler. Butler disputes the court's determination that not objecting was a matter of trial strategy because his counsel chose instead to impeach the officer on cross-examination. Based on the record before us, we cannot say the court erred in finding the decision tactical, given that counsel thoroughly questioned the officer about the statement on cross-examination. *Cf. State v. Radjenovich*, 138 Ariz. 270, 274 (App. 1983) (rejecting claim of ineffective assistance of counsel based on failure to object to evidence of prior rape because admission could be considered tactical). Moreover, neither below nor on review has Butler meaningfully argued, let alone established, that he was prejudiced by the statement. *See Bennett*, 213 Ariz. 562, ¶ 21. The court thus did not abuse its discretion in finding this claim not colorable.

**¶13** Regarding the duplicative count, Butler has cited no authority or offered any meaningful argument on review that his trial counsel provided ineffective assistance. *See* Ariz. R. Crim. P. 32.16(c)(2)(D) (petition must include reasons why appellate court should grant petition). We therefore deem the argument waived. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013). In any event, we note that the trial court determined it, not trial counsel, had committed error in "not reading and submitting the amended count to the jury," and that this court corrected that error on appeal. Based on the record before us, we cannot say the court abused its discretion in finding this claim not colorable.

**¶14** Butler also maintains the trial court erred in rejecting his claim that his trial counsel had been ineffective in failing to present mitigation evidence at sentencing. But, again, setting aside the court's determination that his counsel's conduct did not fall below objectively reasonable standards, Butler wholly fails to address the court's determination that

Butler suffered no prejudice because it would have imposed the same presumptive sentences even after considering the suggested mitigating evidence because of Butler's extensive criminal history. *See Bennett*, 213 Ariz. 562, ¶ 21. The court noted—and Butler does not dispute—that he had eight prior felony convictions and twenty-six misdemeanor convictions. We therefore cannot say the court abused its discretion in dismissing this claim as well.

**¶15** As to his appellate counsel, Butler contends the trial court erred in rejecting his claim of ineffective assistance in filing an *Anders* brief and the supplemental brief ordered by this court. Butler again argues his counsel should have obtained the complete record, including transcripts from voir dire and closing arguments.[5] He asserts appellate counsel "could have" raised "multiple issues with juror bias," as reflected in the voir dire transcript, and also could have argued the prosecutor improperly "lumped all of the paraphernalia charges into one" during closing arguments. As he did below, Butler summarily maintains that "[t]his was prejudic[ial] to [him]." He has therefore not met his burden of establishing that the result of the proceeding would have been different. *See Bennett*, 213 Ariz. 562, ¶ 25. The court did not abuse its discretion in concluding this claim was not colorable.

**¶16** Accordingly, for all of the foregoing reasons, although we grant review, relief is denied.

[5] As he did below, Butler also contends his appellate counsel "incorrectly listed" his sentences in the *Anders* brief. But he makes no meaningful argument that this constituted ineffective assistance. We therefore do not address it further. *See Stefanovich*, 232 Ariz. 154, ¶ 16.