

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CHARLES ALLEN COLE III,
Petitioner.

No. 2 CA-CR 2020-0120-PR
Filed September 16, 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NOT FOR PUBLICATION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
Nos. CR20153837001 and CR20154511001
The Honorable John Hinderaker, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

STATE v. COLE
Decision of the Court

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Charles Cole III seeks review of the trial court’s ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.¹ We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Cole has not shown such abuse here.

¶2 Cole pled guilty in two cause numbers to second-degree murder and aggravated assault with a deadly weapon or dangerous instrument. The trial court sentenced him to a presumptive 7.5-year prison term for aggravated assault and a consecutive, aggravated twenty-year prison term for second-degree murder. Cole sought post-conviction relief, arguing his counsel had been ineffective because: (1) they did not develop mitigating evidence, including presenting evidence his victim was a drug dealer; (2) they did not notify him of a plea offer by the state; (3) they overlooked a photograph connecting him to the murder weapon until the second day of Cole’s trial for first-degree murder – prompting him to plead guilty in both cause numbers. In his reply to the state’s response, Cole asserted for the first time that the “insertion” of the victim’s and his family’s religion into the sentencing discussion had been improper and that counsel had failed to object.

¶3 The trial court summarily dismissed Cole’s petition. It concluded the additional mitigating factors Cole had identified were cumulative or “insignificant,” and counsel had made a tactical decision to

¹ Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The 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.” *Id.* “Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.” *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020).

STATE v. COLE
Decision of the Court

not object to references to religion at sentencing and instead argue that religious teachings “favored mercy in [Cole]’s case.” The court similarly concluded that counsel had “made a *tactical* decision not to impugn the victim’s reputation before his family, friends and the Court,” and noted it had been aware the victim had dealt drugs. The court further determined that counsel had not failed to communicate a plea offer from the state. Last, the court determined there was “no evidence that defense counsel fell below the objective standard [of] reasonableness” with regard to the photograph and Cole could not show prejudice in any event because there was “no basis whatsoever to conclude that the plea agreement [Cole] ultimately accepted would have been any different” had counsel recognized the importance of the photograph “earlier in the case.” This petition for review followed.

¶4 On review, Cole contends the trial court erred by summarily dismissing his claims and asserts he is entitled to an evidentiary hearing. He argues the “religious references” at sentencing violated his due process rights. He also repeats his claim counsel was ineffective “for failing to know the evidence in the case,” prompting his guilty plea. And he again argues counsel was ineffective at sentencing by failing to object to statements concerning religion and by failing to present certain mitigating evidence, asserting the court “failed to consider” the additional mitigation evidence he included with his petition. In a proceeding for post-conviction relief, a defendant is entitled to an evidentiary hearing upon establishing 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).

¶5 We first address Cole’s claim that comments concerning religion made by the victim’s family and in letters sent to the trial court violated his due process rights. Cole did not raise this claim in his petition below, but instead raised it for the first time in his reply to the state’s response. And, even then, it is not clear from his argument below if he intended the claim to stand alone from his related claim of ineffective assistance. Cole asked the court to treat this argument as an amendment to his petition. He claimed he could not have developed this argument until after he conducted interviews with trial counsel, which suggests Cole did not intend the argument to be independent of his claim of ineffective assistance. The court did not address it as a standalone claim, and Cole has not argued that it erred by treating it as a claim of ineffective assistance. Nor was the court required to do otherwise. *See* Ariz. R. Crim. P. 33.9(d) (allowing amendment of petition “only for good cause”); *cf. State v. Lopez*,

STATE v. COLE
Decision of the Court

223 Ariz. 238, ¶¶ 6-7 (App. 2009) (court not required to address claims raised for first time in reply brief).

¶6 But even assuming Cole’s due process claim is properly before us, it does not merit relief. At sentencing, the victim’s brother stated the victim had been “a passionate believer in biblical justice. He and I once had a long conversation about the meaning of an eye for an eye.” He also explained that his brother had died “on the same day as the Jewish New Year [wa]s about to begin,” forever staining “one of [his] favorite Jewish holidays.” Cole’s counsel noted that “virtually every letter” sent on behalf of the victim “mentioned religion,” including “various Talmudic sayings.” He noted that a “Torah scholar named Maimon[i]des” urged a different “view of forgiveness” than that expressed in those letters, stating Maimonides had advised that “we should try to forgive those who genuinely recognize their crimes, who seek to make amends and who apologize.” The trial court did not address these statements or letters in its discussion of aggravating and mitigating factors.

¶7 Cole cites numerous cases for the proposition that the state is not permitted to ground its arguments in religion and that a trial court may not sentence a defendant based on religious affiliation. *See, e.g., Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir. 1996) (“Federal and state courts have universally condemned . . . religiously charged arguments as confusing, unnecessary, and inflammatory.”); *Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (improper to mention “religious symbols” or compare defendant to “Judas Iscariot” in arguing defendant “deserved capital punishment”); *United States v. Torres*, 926 F.2d 321, 324 (3d Cir. 1991) (noting sentencing cannot be based on “such impermissible factors as race, religion, [or] national origin”). He argues, therefore, that the court improperly considered “religion” as a sentencing factor because it found emotional harm to the family as an aggravating factor, *see* A.R.S. § 13-701(D)(9), and the family members had framed their grief in terms of their religious beliefs.

¶8 We cannot agree that an otherwise permissible statement of grief becomes impermissible simply because it occasionally frames that grief in religious terms, and Cole has cited no authority that would lead to that conclusion. Indeed, victim impact statements may contain references to religion without violating due process. *See Deyton v. Keller*, 682 F.3d 340, 347 (4th Cir. 2012); *United States v. Bernard*, 299 F.3d 467, 479-80 (5th Cir. 2002). The victim’s brother—as he was constitutionally entitled to do—explained his position on sentencing. *See* Ariz. Const. art. II, § 2.1(A)(4)

STATE v. COLE
Decision of the Court

(crime victims have right to be heard at sentencing), § 2.1(B) (“A victim’s exercise of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.”), (C) (definition of “Victim” includes deceased “spouse, parent, child or other lawful representative”); A.R.S. § 13-4401(19) (definition of “Victim” includes “siblings”). Cole has not established the statements by the victim’s brother or the letters sent on the victim’s behalf violated his due process rights.

¶9 We next address Cole’s claims of ineffective assistance. “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). Thus, a defendant must identify “some factors that demonstrate that the attorney’s representation fell below the prevailing objective standards.” *State v. Herrera*, 183 Ariz. 642, 647 (App. 1995) (quoting *State v. Borbon*, 146 Ariz. 392, 399 (1985)). And, to establish prejudice under the second prong of *Strickland*, a defendant cannot meet that burden by “mere speculation.” *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999).

¶10 Cole first repeats his claim that counsel had been ineffective by failing to recognize that a photograph jeopardized his defense. But, although Cole argues competent counsel would have been more diligent, he has made no meaningful effort to show prejudice. Thus, this claim fails. *See Bennett*, 213 Ariz. 562, ¶ 21.

¶11 Cole also again argues counsel should have objected to religious references made at sentencing.² First, as we have explained, Cole

²Cole further asserts, for the first time in his petition for review, that his “capacity to appreciate the wrongfulness of his conduct” was impaired, a mitigating factor under § 13-701(E)(2). He does not support this claim. He also argues, again for the first time on review, that the trial court erred in considering the nature of his offenses because “the injury sustained was only permitted to aggravate the sentence if it were not an essential element

STATE v. COLE
Decision of the Court

has failed to establish that any such objection would have been granted. Thus, he has not shown resulting prejudice. *See id.* And, even had there been some basis to object, the trial court correctly observed that counsel's decision to forgo any objection had a reasoned tactical basis, as shown by counsel's efforts to turn the comments to Cole's advantage. *See Denz*, 232 Ariz. 441, ¶ 7.

¶12 Last, Cole repeats his argument that counsel was ineffective by failing to present certain mitigating evidence. In his petition below, Cole acknowledged that counsel had submitted sentencing memoranda and that the trial court had found six mitigating factors: Cole's youth, history of addiction, difficult childhood, remorse, lack of a criminal history, and attempts at rehabilitation.³ Cole nonetheless argued that counsel should have retained a mitigation specialist to additionally investigate Cole's history. He submitted with his petition a mitigation specialist's report and asserted, based on that report, that the court could have given more weight to the mitigation factors already found and found additional mitigating factors, including Cole's "dysfunctional family," "traumatic event[s]" he had suffered, and his "lack of proper role models." He further asserted counsel should have further developed evidence that Cole's victim had been a drug dealer.

¶13 As to the latter claim, the trial court concluded that counsel had made a tactical decision "not to impugn the victim's reputation before his family, friends and the Court." The court further noted it had been aware of the victim's history in any event. On review, Cole claims (without support) that the court never "seriously consider[ed]" that fact and—despite the court's unambiguous statement to the contrary—suggests it is "not clear" "[w]hether or not the court was familiar with information that [the victim] was a drug dealer." Cole has identified nothing to counter the court's conclusion that further information about the victim's history would not have altered Cole's sentence. Nor does he cite any evidence or authority suggesting that an attorney falls below prevailing professional standards

of the offense." We do not address arguments raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980).

³None of the mitigating factors listed in the specialist's report but not found by the trial court are enumerated mitigating factors under § 13-701(E)(1) through (5) and, thus, are applicable only under the catch-all provision in subsection (E)(6). And the bulk of factors identified fall within the court's finding that Cole's "difficult childhood" was a mitigating factor.

STATE v. COLE
Decision of the Court

by declining to attack a murder victim's character at sentencing. *See Herrera*, 183 Ariz. at 647.

¶14 As to the remaining evidence identified in the mitigation specialist's report, Cole asserts the trial court erred by failing to "consider" it in rejecting his claim of ineffective assistance. But he misstates the record—the court stated it had reviewed the evidence and had concluded it would not have changed Cole's sentence.⁴ And he cites no authority supporting his argument that it was "impossible" for the court to properly weigh that evidence without holding an evidentiary hearing. Thus, he has waived this argument. *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).

¶15 In any event, the trial court was not required to evaluate whether the additional mitigating factors were likely to have altered Cole's sentence unless it first determined that counsel's performance had been below prevailing professional standards. *See Bennett*, 213 Ariz. 562, ¶ 21. Cole has identified no evidence or authority suggesting that competent defense counsel necessarily would have conducted further investigation in these circumstances. Absent such evidence or authority, his claim fails. *See Herrera*, 183 Ariz. at 647.

¶16 We grant review but deny relief.

⁴ In his petition below, Cole noted that the initial sentencing memorandum was not included in the record but acknowledged the trial court had referred to it at sentencing and that the memorandum was contained in the file obtained from trial counsel. But Cole did not include that memorandum with his petition below or on review.