IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BRYAN THEODORE STRELSKI,
Petitioner.

No. 2 CA-CR 2020-0193-PR
Filed November 23, 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NOT FOR PUBLICATION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 Maricopa County
Nos. CR2018002793001 and CR2017134641001
The Honorable Joseph P. Mikitish, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Allister Adel, Maricopa County Attorney
By Daniel Strange, Deputy County Attorney, Phoenix
Counsel for Respondent

Rosemarie Peña-Lynch, Maricopa County Legal Advocate
By Grace M. Guisewite, Deputy Legal Advocate, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

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

E C K E S R T R O M, Judge:

¶1 Bryan Strelski seeks review of the trial court's ruling summarily dismissing, in part, 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). Strelski has not shown such abuse here.

¶2 In two cause numbers, Strelski pled guilty to misconduct involving weapons, second-degree escape, and interference with a monitoring device. The plea agreements stated the sentences for all offenses would run consecutively. The trial court sentenced Strelski to consecutive prison terms of 4.5 years for weapons misconduct, 4.5 years for escape, and 1.5 years for interfering with a monitoring device.

¶3 Strelski sought post-conviction relief, arguing that the sentence imposed for escape "exceed[ed] the statutory range" and that his consecutive sentences for escape and interfering with a monitoring device violated A.R.S. § 13-116 because they "constitute[d] double punishment for singular conduct." He also argued trial counsel had been ineffective in failing to recognize and raise these issues. The state agreed that the sentence for escape exceeded the statutory maximum, and the trial court ordered Strelski be resentenced for that count. The court rejected Strelski's claim under § 13-116, however, concluding consecutive sentences were

[1] Our supreme court amended the post-conviction relief rules, effective January 1, 2020. 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.'" *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (quoting Ariz. Sup. Ct. Order R-19-0012). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *Id.*

proper. It also rejected Strelski's claim of ineffective assistance. This petition for review followed.

¶4 On review, Strelksi repeats his argument that consecutive sentences for escape and tampering with a monitoring device were improper under § 13-116 because they were "a single course of conduct." "Under § 13-116, a trial court may not impose consecutive sentences for the same act." *State v. Urquidez*, 213 Ariz. 50, ¶ 6 (App. 2006). To determine whether the defendant's conduct constitutes a single act:

> First, we must decide which of the two crimes is the "ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." Then, we "subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge." If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether "it was factually impossible to commit the ultimate crime without also committing the secondary crime." Finally, we consider whether the defendant's conduct in committing the lesser crime "caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime."

Id. ¶ 7 (alteration in *Urquidez*) (internal citations omitted) (quoting *State v. Gordon*, 161 Ariz. 308, 315 (1989).

¶5 The facts, based on the factual basis given at the change-of-plea hearing and the extended record, are undisputed. Strelksi was on pretrial release but confined to his home and required to wear an electronic monitoring device. He removed the device and left his home. We agree with the trial court and the parties that the ultimate crime here is second-degree escape, despite it being the less serious offense. *See State v. Alexander*, 175 Ariz. 535, 537 (App. 1993) ("The ultimate crime will usually be the primary object of the episode."); *see also* A.R.S. §§ 13-2503(A)(2), (B); 13-3725(B).

¶6 Relevant here, a person commits second-degree escape by "[e]scaping or attempting to escape from custody imposed as a result of having been arrested for, charged with or found guilty of a felony." § 13-2503(A)(2). A person who is "required to be on electronic monitoring or global position system monitoring" commits interfering with a monitoring device by "removing or bypassing any device or equipment that is necessary for the electronic monitoring or global position system monitoring." § 13-3725(A)(1). The facts necessary to convict Strelski of escape were that he left his home after being placed on house arrest. *See* § 13-2503(A)(2). The remaining facts—his removal of the monitoring device—violates § 13-3725(A)(1). Thus, the first *Gordon* factor is met.

¶7 Strelksi seems to assert, however, that the factual basis of the plea was limited to the removal of the device which, in his view, constitutes escape since he attempted to leave custody. The factual basis described at the change-of-plea hearing was that he "removed the GPS monitoring device that had been assigned to him as part of his pretrial release in his other pending matters. He then lost contact with pretrial services." Strelski claims the conduct beyond removing the monitoring device—losing contact with pretrial services—"does not constitute an Escape." But, in evaluating the factual basis of a plea, we may consider the extended record, *State v. Sodders*, 130 Ariz. 23, 25 (App. 1981), which shows Strelksi left his residence, therefore leaving custody. Strelksi has cited no authority, and we find none, suggesting we may not consider the extended record in evaluating whether consecutive sentences are proper under § 13-116. And, as Strelksi acknowledges, it is undisputed that he left his home. The fact he facilitated that escape by removing the device—thereby committing an additional crime—does not alter the analysis under § 13-116 or *Gordon*.

¶8 And, it is factually possible for Strelski to have committed escape without removing the monitoring device, so the second *Gordon* factor has been met. Strelski's contrary argument seems to rest on his position that he may have *also* committed escape by removing the monitoring device in the first place. But nothing about removing the device changes the fact that he then proceeded to leave custody. And, although he insists his actions in removing the device and leaving his home were "a singular course of conduct, with a singular purpose," he has not explained the legal significance of that characterization. The issue, instead, is whether he committed a "single act" under § 13-116 by removing the device and

then leaving his home. Our analysis under *Gordon* demonstrates that conduct is two separate acts.[2]

¶9 We need not address the third *Gordon* factor if the first two are met, as they are here. *State v. Roseberry*, 210 Ariz. 360, ¶ 58 (2005) (evaluation of third factor required only when "factual impossibility exists" under second *Gordon* factor). And, because consecutive sentences are proper, we need not reach Strelksi's related claim of ineffective assistance of counsel.

¶10 We grant review but deny relief.

[2]In support of his argument, Strelksi cites *In re Brittany Y.*, 214 Ariz. 31, ¶ 10 (App. 2006), and *State v. Williams*, 186 Ariz. 622, 623 (App. 1996), because we described the removal of a device and subsequent departure as "an act" constituting departure from custody. These cases do not address consecutive sentences and are of no analytical value here.