IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSHUA JONATHAN HILAIRE,
Petitioner.

No. 2 CA-CR 2021-0041-PR
Filed October 4, 2021

Petition for Review from the Superior Court in Pima County
No. CR20182031001
The Honorable Kathleen Quigley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Laura Conover, Pima County Attorney
By Amy S. Ruskin, Deputy County Attorney, Tucson
Counsel for Respondent

Harold L. Higgins PC, Tucson
By Harold L. Higgins
Counsel for Petitioner

MEMORANDUM DECISION

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

E S P I N O S A, Presiding Judge:

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

¶2 Pursuant to a plea agreement, Hilaire was convicted of second-degree murder. The victim was Hilaire's girlfriend, who purportedly had planned to break up with him. The plea agreement provided a sentencing range of sixteen to twenty-five years' imprisonment, eliminating the possibility of a mitigated or minimum sentence. Before sentencing, defense counsel submitted a memorandum, as well as a supplement, requesting the presumptive sentence—sixteen years—based on Hilaire's "acceptance of responsibility and remorse," "age and relative immaturity at the time of the offense," "difficult childhood," and "mental health and IQ," among other things. Attached to the memorandum was a mitigation report prepared by a specialist, as well as a neuropsychological report prepared by Dr. James Sullivan. Sullivan opined that Hilaire "has pronounced and authentic neuropsychological impairment" and that he was likely suffering from post-traumatic stress disorder. After considering "the facts and circumstances of the case, the interest of the community, [and] the input of the parties and counsel," the sentencing court determined that the aggravating factors outweighed the mitigating factors and imposed a partially aggravated prison term of twenty years.

¶3 Hilaire thereafter sought post-conviction relief. In his petition, he raised three claims: (1) trial counsel was ineffective in "failing to make a complete presentation of [his] mitigating circumstances, in particular mental health deficiencies and limitations, at sentencing," (2) trial counsel was ineffective in "failing to address the issue of [his] competence prior to entering a plea of guilty," and (3) he had been "sentenced pursuant to an impermissibly vague statutory procedure." He attached to his petition a report from Dr. Alicia Pellegrin, a forensic psychologist, who had

reviewed Dr. Sullivan's report and opined that Hilaire "likely acted impulsively" when his girlfriend "told him that she was ending the relationship," given his "extremely low level of functioning." She also reviewed the sentencing transcript and, "[b]ased on [Hilaire's] verbal repetitions" and "the evidence of marked brain and cognitive impairment," explained that there was a "valid reason" to have requested a competency evaluation.

¶4 The trial court summarily dismissed Hilaire's petition. As to his claim of ineffective assistance at sentencing, the court pointed out that counsel had provided a memorandum, as well as a supplement, which asserted that Hilaire's "diminished cognitive ability" should be considered a mitigating factor. The court determined that "[i]t was entirely reasonable for [counsel] to highlight [at the sentencing hearing] the reasons a mitigated sentence was requested without restating what the [sentencing] court had already read and considered" in the written materials. Even assuming counsel's presentation had been deficient, however, the court further concluded that Hilaire had suffered no prejudice because the sentencing court had "appropriately considered both mitigating and aggravating circumstances, specifically finding difficulties with intellectual capacity to be a mitigating factor."

¶5 As to Hilaire's claim of ineffective assistance concerning competency, the trial court determined that counsel's conduct did not fall below an objective standard of reasonableness. Specifically, the court noted that counsel had secured the psychological report from Dr. Sullivan prior to the change of plea, and counsel reasonably relied on that report, which did not raise a concern about Hilaire's competence. In addition, the court observed that Hilaire had failed to establish prejudice, explaining that the state had made clear it would not have offered a different plea, "leaving [Hilaire] in the same predicament after competency was evaluated and resolved." Finally, the court rejected Hilaire's claim of an impermissibly vague sentencing scheme, pointing out that the sentencing court had "considere[d] and balance[d] the mitigating and aggravating factors." This petition for review followed.

¶6 On review, Hilaire reasserts his claims of ineffective assistance of counsel.[1] To state a colorable claim of ineffective assistance,

[1] Hilaire does not raise on review his claim that the sentencing scheme is impermissibly vague. We therefore do not address it. *See* Ariz. R. Crim. P. 33.16(c)(4) ("A party's failure to raise any issue that could be

"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)). Whether counsel's performance fell below objectively reasonable standards requires consideration of the prevailing professional norms. *State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016). And a defendant establishes prejudice if he can show a "reasonable probability 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). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* ¶ 21.

¶7 Hilaire first challenges the trial court's "general[] conclu[sion] that the defense presentation at sentencing was adequate." As he did below, he identifies "important factors" that he contends should have been presented to the sentencing court but were not, including statements about "the effect of [his] significant mental health deficiencies on his behavior," his "seriously impaired upbringing," and the effect of his brothers' deaths on him. In addition, he again maintains that "[o]ther issues, presented in written materials, bore no mention in court."

¶8 At the beginning of the sentencing hearing, the trial court stated it had reviewed the presentence report, defense counsel's sentencing memorandum and supplement, the mitigation report, and Dr. Sullivan's neuropsychological report. The memorandum and Sullivan's report discussed Hilaire's mental impairment, including intellectual and developmental delays. The memorandum specifically asserted that Hilaire's "limited mental acuity impaired his ability to make the right choice in this matter," and he asked the court "to consider that his capacity to appreciate the wrongfulness of his conduct . . . was significantly impaired." The memorandum also detailed the circumstances of his birth and childhood development, the deaths of his brothers, his age, his lack of criminal history, and his potential for rehabilitation. Thus, contrary to Hilaire's assertion, the court was aware of the precise factors that he contends should have been presented.

¶9 Moreover, the trial court correctly observed that counsel made a reasoned, strategic decision to forgo rehashing the written filings that the sentencing court had acknowledged reviewing. *See State v. Goswick*,

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raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue.").

142 Ariz. 582, 586 (1984) ("Unless the defendant is able to show that counsel's decision was not a tactical one but, rather, revealed ineptitude, inexperience or lack of preparation, . . . we will not find that counsel acted improperly."). Indeed, counsel explained his decision at the hearing: "I'm tempted, obviously, to go over a lot of the mitigation, I know Your Honor has read it and considered it, . . . so I won't do that, I'll just highlight a few things."

¶10 Even assuming counsel's conduct fell below objectively reasonably standards, however, Hilaire has failed to establish prejudice, as the trial court determined. The sentencing court found "acceptance of responsibility, expression of remorse, difficulties with intellectual capacity and age" as mitigating factors. But the court further found the aggravating circumstances—most notably, the "emotional impact upon both of the decedent['s] surviving parents"—were "very severe." Hilaire has failed to show had counsel offered additional evidence of mitigation, or presented it in a different manner, the court would have found it outweighed the significant aggravating factors. *See State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999) (petitioner carries burden of showing ineffective assistance and must be provable reality, not mere speculation). The trial court therefore did not err in summarily dismissing this claim. *See Roseberry*, 237 Ariz. 507, ¶ 7.

¶11 Second, Hilaire repeats his claim that counsel "was ineffective in failing to have a . . . competency evaluation conducted." He seems to suggest that, contrary to the trial court's determination, counsel should have been on notice of competency issues based on Dr. Sullivan's report. But that report identified no issues with Hilaire's competency. Indeed, in the report, Sullivan noted that, although Hilaire "had some apparent difficulty comprehending" an informed consent form administered before the evaluation, his counsel was present and Hilaire asked questions. Sullivan further observed that Hilaire seemed to adequately understand the form after some discussion. We fail to see how this should have put counsel on notice of competency issues. *See State v. Delahanty*, 226 Ariz. 502, ¶ 8 (2011) (when determining competency, critical inquiry is whether defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960))).

¶12 Moreover, Hilaire has failed to meaningfully challenge the trial court's prejudice determination on review. We could therefore deem any such argument waived. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013). In any event, even assuming a competency evaluation were done,

Hilaire has offered no evidence that he would have been found incompetent or that the outcome of the proceeding would have been different as a result. *See Rosario*, 195 Ariz. 264, ¶ 23. The trial court therefore did not err in summarily dismissing this claim. *See Roseberry*, 237 Ariz. 507, ¶ 7.

¶13 Accordingly, although we grant review, relief is denied.