IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

HUBERT JORDAN JR. II,
Petitioner.

No. 2 CA-CR 2021-0062-PR
Filed November 18, 2021

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201703215
The Honorable Patrick K. Gard, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Thomas C. McDermott, Bureau Chief-Criminal Appeals, Florence
Counsel for Respondent

Law Offices of Thomas E. Higgins P.L.L.C., Tucson
By Thomas E. Higgins
Counsel for Petitioner

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vàsquez concurred.

B R EA R C L I F F E, Judge:

¶1 Hubert Jordan Jr. II 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. We will not disturb that ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Jordan has not shown such abuse here.

¶2 In November 2017, Jordan was charged with transportation of marijuana for sale, possession of marijuana for sale, and possession of drug paraphernalia. At his initial appearance in January 2018, he rejected a plea offer that contained a stipulated 6.5-year prison term. Following a settlement conference in March 2018 and a pretrial conference in June 2018, Jordan rejected a five-year plea offer with a probation tail.

¶3 The state obtained a new indictment in November 2018, adding an additional count of unlawful use of a wire or electronic communication in a drug-related transaction.[1] In December 2019, Jordan pleaded guilty to transportation of marijuana for sale and conspiracy to transport marijuana for sale and was sentenced to a stipulated ten-year prison term, to be followed by a seven-year term of probation.[2] Jordan then sought post-conviction relief, raising multiple claims of ineffective assistance of several of the seven attorneys[3] who had represented him

[1]In May 2019, the state alleged the offenses were committed with the intent to promote, further or assist a criminal street gang. *See* A.R.S. § 13-714.

[2] Based on the increased sentencing range following the 2018 indictment and the street-gang allegation, Jordan faced a sentencing range of 15.5 to forty years, with a presumptive prison term of 20.75 years.

[3]Two of the seven attorneys were removed at the same hearing at which they were appointed, based on asserted conflicts of interest. Rafael Gallego, Jordan's second attorney, represented him from December 2017

throughout the proceedings, and asserting his arrest and related search were unlawful. He asked the trial court to "put [him] back in the position he would have been in" prior to the plea agreement or "to reinstate the 5-year plea" offer he had rejected in June 2018. The court summarily dismissed Jordan's petition in a detailed ruling, discussed below. This petition for review followed.[4]

¶4 On review, Jordan reasserts many of his claims of ineffective assistance of counsel, arguing his successive attorneys should have litigated several motions filed by his second attorney, Rafael Gallego, including the motion to suppress. "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)). 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] Whether counsel's performance fell below objectively

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until January 2019, including the time during which Jordan rejected the five-year plea agreement; Richard Scherb, Jordan's fourth attorney, represented him from January 2019 until May 2019, when he withdrew based on a purported conflict of interest; Jordan's sixth attorney, Morgan Alexander, represented him from May 2019 until October 2019; and, Jordan's seventh attorney, Joshua Wallace, who negotiated the plea agreement Jordan accepted in December 2019, began representing him in October 2019.

[4] Counsel purportedly attached thirty-one exhibits to Jordan's petition for review, which contains 277 pages including the exhibits. Some of those exhibits are mislabeled in the index of exhibits, several are missing entirely, at least one is incomplete, and another is present, but is not listed in the index of exhibits. In addition, one of Jordan's exhibits consists of a ten-page statement of facts, which also contains multiple footnotes referring to his exhibits. We admonish counsel to carefully check the accuracy and clarity of pleadings he submits to this court in the future.

[5]The trial court did not conduct an evidentiary hearing (nor did Jordan request one), instead summarily dismissing Jordan's claims and concluding they were not colorable. However, the court stated Jordan had not established his claims by a "preponderance of the evidence," which does not apply to summary dismissal. But the court also referred to the

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.

Ineffective Assistance of Gallego

¶5 We initially note, to the extent Jordan asserts in his reply to the state's response to his petition for review that "his claims against attorney Gallego were not related to ineffective assistance," the record belies that claim. Jordan specifically refers to Gallego's "deficient performance" in his Rule 33 petition and to his "IAC claim against counsel Gallego" in his reply to the state's response thereto. Jordan also argues the trial court erroneously "conflat[ed]" his ineffective assistance claims against several of his other attorneys, specifically, Richard Scherb, Morgan Alexander, and Joshua Wallace, with his claims against Gallego, whom he asserts wrongfully induced him to reject the five-year plea offer in June 2018. However, it is clear from the court's ruling that it understood and correctly resolved Jordan's claims against Gallego, as well as the other attorneys.

¶6 The trial court made the following relevant findings regarding Gallego, which are amply supported by the transcripts of the March and June 2018 hearings, the latter of which included an advisement pursuant to *State v. Donald*, 198 Ariz. 406 (App. 2000).

> Petitioner[] claims that Attorney Gallego provided ineffective assistance of counsel by advising Petitioner to reject the 5-year plea offer due to an error in the priors on the written plea agreement and a vague, unfulfilled promise of a better plea offer by going to the trial attorney's supervisor. Petitioner's claims are supported solely by the Petitioner's Affidavit (Petitioner Exhibit 2.1) and completely contradicted by the record. Petitioner participated in a settlement

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correct standard in concluding Jordan's claims were not colorable, and it does not appear it improperly weighed the evidence in dismissing Jordan's petition.

conference with Attorney Gallego, Judge Lawrence Wharton, and Respondent's attorney John Sullivan on March 27, 2018 (State's Exhibit C). During this hearing, the Court explained to Petitioner his exposure if he proceeded to trial, explicitly stating that Respondent was alleging that Petitioner was a category 3 offender facing a minimum term if imprisonment of 10.5 years. The Court also had Respondent explain the plea agreement currently available at the time, which was the aforementioned 5-year plea offer. [footnote omitted] Additionally, the Court discussed with Petitioner the possibility of filing pretrial motions, such as a motion to suppress, and the impact that may have on the case. The Court even went as far as to explain that the decision to accept a plea agreement was Petitioner's decision, and Petitioner's decision alone. Petitioner stated that he had no questions as to his exposure or the plea agreement, and raised no issues as to the allegedly incorrect avowals.[3] [Footnote 3: Petitioner points out in his petition that the priors listed in the 5-year plea offer were in fact his priors, something Petitioner should have been aware of himself. Petitioner's claim that Attorney Gallego advised him not to accept the plea offer due to incorrect priors is not supported by the actual plea agreement.] Respondent agreed to make the plea offer available until the next court date in front [of] the assigned trial judge, Judge Joseph R. Georgini, on June 15, 2018.

At that hearing, Respondent asked to complete the Donald advisement and stated the terms of the plea agreement and Petitioner's exposure on the record (State's Exhibit D). The Court inquired whether Petitioner understood the terms of the plea agreement and his exposure if he lost at trial. The Court inquired of both Attorney Gallego[] and Petitioner whether they had conferred on the plea agreement, and both answered in the affirmative. The Court asked

> Petitioner if he wished to reject the plea offer and the Petitioner stated that he did. During the same hearing, the Court set the case for trial. After negotiations broke down between the parties, counsel Gallego pursued a strategy of litigation and filed several motions on behalf of Petitioner, including a motion to suppress based on an illegal search. However, the record is clear that Petitioner made a knowing rejection of the 5-year plea offer on the record. Petitioner has failed to show by a preponderance of the evidence that Attorney Gallego's representation fell below the standard of the professional norms of the relevant legal community.

¶7 The record fully supports the trial court's finding that Jordan knowingly rejected the five-year plea offer, understood the role a motion to suppress played in the process of plea negotiations, and that that the five-year offer would no longer be available once he rejected it. Therefore, the court did not abuse its discretion by dismissing Jordan's claims related to Gallego.

Ineffective Assistance of the other Attorneys

¶8 In a series of interrelated arguments, Jordan maintains the trial court failed to recognize the "vertical privity" between the attorneys who represented him after Gallego withdrew as his attorney and the cumulative impact of their conduct. Jordan specifically points to their failure to refile the motions Gallego had originally filed, particularly, the motion to suppress, and their failure to respond to motions filed by the state. He further maintains the failure of his attorneys to adopt Gallego's motions, ones he asserts were "moot" after the 2018 indictment, resulted in the "gratuitous forfeiture of the 5-year plea" he had rejected in June 2018.

¶9 When Jordan accepted the ten-year plea offer, he told the trial court he had read, understood, and agreed to the terms in the plea agreement, and that he had met with his then-attorney, Wallace, who had answered his questions. Notably, Jordan did not inform the court that he wanted to pursue the previously filed motion to suppress instead of pleading guilty, or that his attorneys had failed to pursue the other motions Gallego had filed. Although Jordan's attorneys may not have litigated the evidentiary matters in the proactive manner Jordan would have liked, and even assuming without finding that their conduct fell below objectively

reasonable standards, Jordan has failed to establish resulting prejudice or that their conduct impacted his decision to plead guilty.[6] *See State v. Banda*, 232 Ariz. 582, ¶ 12 (App. 2013) (defendant may obtain post-conviction relief on basis counsel's ineffective assistance led defendant to make uninformed decision to accept or reject plea bargain, thereby making decision involuntary). A defendant must show he would have acted differently absent counsel's error. *See id*. ¶¶ 11-12. To warrant an evidentiary hearing and avoid summary dismissal, a claim of ineffective assistance of counsel "must consist of more than conclusory assertions." *Donald*, 198 Ariz. 406, ¶ 21. Put simply, Jordan has not established, nor does the record show, that counsel's conduct led him to make an uninformed or misinformed decision to accept the ten-year plea agreement, thereby making his decision involuntary. *See Banda*, 232 Ariz. 582, ¶ 12.

¶10 Jordan also argues he was essentially unrepresented or did not know who his attorney was at times after Gallego withdrew as his attorney.[7] In an affidavit submitted with his Rule 33 petition below,[8] Jordan asserted he did not know who his attorney was after he had filed a motion for new counsel in December 2018. However, the record belies this assertion, as set forth in detail in footnote three, above. Finally, to the extent Jordan argues that all of these purported instances of deficient conduct, when considered together, amount to ineffective assistance, we note that our supreme court has not recognized the cumulative error doctrine in this context, a fact Jordan seemed to acknowledge in his petition below. *See State v. Pandeli*, 242 Ariz. 175, ¶ 69 (2017).

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[6]We reject Jordan's argument that we should presume prejudice from attorney Scherb's conduct because he withdrew due to a conflict of interest. Jordan did not meaningfully assert that Scherb's purported conflict of interest adversely affected his performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) (if counsel has actual conflict of interest, defendant must show conflict "actually affected the adequacy of his representation" before prejudice presumed); *see also State v. Jenkins*, 148 Ariz. 463, 466-67 (1986).

[7]Jordan asserts he was "unrepresented" at an August 16, 2019 hearing, at which Alexander failed to appear. Although Alexander was not present at that hearing, attorney Ian Service represented Jordan on Alexander's behalf.

[8]Jordan erroneously states in his affidavit that it was prepared for his petition for review, rather than his Rule 33 petition.

Motion to Suppress

¶11 Insofar as Jordan presents additional arguments regarding the merits of the motion to suppress filed by Gallego, and successive counsel's failure to refile or adopt that motion, the trial court correctly found that he had waived that claim. As a pleading defendant, Jordan waived his constitutional claims, including the legality of any search and seizure, *see State v. Lopez*, 99 Ariz. 11, 13 (1965), and related claims of ineffective assistance of counsel, *see State v. Leyva*, 241 Ariz. 521, ¶ 18 (App. 2017). In addition, to the extent Jordan's claims regarding counsel's failure to pursue the motion to suppress and the other motions Gallego had filed are a challenge to his convictions, they too are waived because he has not shown that they relate to the validity of his plea. *Banda*, 232 Ariz. 582, ¶ 12; *State v. Quick*, 177 Ariz. 314, 316 (App. 1993).

¶12 Moreover, contrary to Jordan's assertion, the record supports the trial court's conclusion that Scherb and Alexander's decisions not to refile Gallego's motions, including the motion to suppress, or to contact certain witnesses, were based on a reasoned, strategic decision to pursue "renegotiation rather than litigation." *See State v. Goswick*, 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."). As the court pointed out, all of the motions were still pending when Jordan pled guilty, and the court had reminded counsel of their existence, further supporting the conclusion counsel had not failed to consider them, but had instead decided not to pursue them.[9] In any event, as we previously stated, Jordan has failed to establish that counsel's conduct related to the validity of his guilty plea, which is ultimately the question before us. *Banda*, 232 Ariz. 582, ¶ 12.

¶13 Finally, Jordan asserts we should grant review "[t]o thwart law enforcement's repeated delay in issuance of warning tickets/citations during otherwise completed traffic stops, deliberately designed to bypass *Rodriguez* [*v. United States*, 575 U.S. 348 (2015)], and investigate unrelated matters, without reasonable suspicion." To the extent this argument is even cognizable under Rule 33, because Jordan did not raise it in his petition

[9]The trial court further noted that it likewise had not ruled on the pending motions the state had filed when Jordan pled guilty, and that he similarly had not suffered any prejudice by counsel's failure to respond to those motions.

below, we do not address it. *See State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 33.16(c)(2)(B) (petition for review must contain "issues the trial court decided that the defendant is presenting for appellate review").[10]

Disposition

¶14 Accordingly, we grant review but deny relief.

[10]Concomitantly, although Jordan argued below that Alexander was ineffective for failing to inform him of the plea offer providing for a 6-8 year prison term, other than a fleeting reference to that argument in the conclusion to his petition for review, he does not meaningfully develop it on review. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (defendant waives claim on review where he fails to provide relevant authority or meaningfully develop argument). And, although we decline to address that argument further, we note that the trial court correctly determined that the record did not contain any "evidence that [an additional] 6-8-year plea offer was ever formally extended."