IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICHAEL HUNTOON,
Petitioner.

No. 2 CA-CR 2022-0021-PR
Filed June 28, 2022

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NOT FOR PUBLICATION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. S1100CR201503282
The Honorable Lawrence M. Wharton, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

The Law Offices of Stephanie K. Bond P.C., Tucson
By Stephanie K. Bond
Counsel for Petitioner

MEMORANDUM DECISION

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

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

¶1 Michael Huntoon seeks review of the trial court's ruling summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Huntoon has shown no such abuse here.

¶2 Following an August 2016 settlement conference, which included an advisement pursuant to *State v. Donald*, 198 Ariz. 406 (App. 2000), Huntoon failed to accept the state's plea offer permitting him to plead guilty to one count of sexual exploitation of a minor with a sentencing range of ten to twenty-four years.[1] This plea would not have included charges in a related federal matter, over which the trial court explained it had no control.[2] After a jury trial, Huntoon was convicted of ten counts of sexual exploitation of a minor under the age of fifteen. The trial court sentenced him to consecutive prison terms totaling 280 years to be served consecutively with the term he was currently serving in a federal matter. We affirmed his convictions and sentences on appeal. *State v. Huntoon*, No. 2 CA-CR 2019-0030 (Ariz. App. Jan. 9, 2020) (mem. decision).

[1]Although it is not entirely clear from the record, the plea offer also apparently contemplated a lifetime probation tail.

[2]At the *Donald* hearing, the trial court advised Huntoon that if he rejected the state's plea offer, he faced consecutive sentences exposing him to a minimum prison term of 210 years, in addition to the sentence in the federal case. Huntoon told the court he could not serve "18 years," which "might as well be a life sentence," stated that even if he received a ten-year sentence, his wife "probably [wouldn't] be there," which is "all that matters," and added that he did not want to give up his right to appeal by pleading guilty.

¶3 In April 2020, Huntoon sought post-conviction relief, and after appointed counsel filed a notice of no colorable claim, Huntoon filed a pro se Rule 32 petition. He asserted trial counsel had been ineffective for failing to inform him of a purported ten-year plea offer from the state, which he alleged would have "settle[d] both matters for 10 years in each case." He further argued counsel had been ineffective for failing to challenge the state's violation of A.R.S. § 13-3920 by illegally sharing information from Huntoon's laptop computer with the federal government. He also claimed appellate counsel was ineffective for failing to challenge the trial court's denial of his motion to suppress, and asserted that his convictions for counts two through ten are multiplicitious. The court summarily dismissed his petition, and this petition for review followed.[3]

¶4 On review, Huntoon argues trial counsel was ineffective for failing to inform him of "the status of the ongoing plea negotiations and the State's proposal of a 10-year plea offer."[4] He also contends the trial court applied an incorrect evidentiary standard in determining he was not entitled to an evidentiary hearing. He reasons that a hearing "was necessary to present further testimony" from the attorneys "regarding the meaning of the emails" between the attorneys, which he had attached as exhibits to his Rule 32 petition, "and the offers made by the State."

¶5 "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)). 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." *Id*. ¶ 25

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[3]Although the record does not show that attorney Stephanie Bond was appointed to represent Huntoon on review, we infer that occurred.

[4]To the extent Huntoon specifically argues, apparently for the first time on review, that because "'counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing,'" *United States v. Cronic*, 466 U.S. 648, 659 (1984), a presumption of prejudice applies, we do not consider that argument. *See* Ariz. R. Crim. P. 32.16(c)(2)(B) (petition for review must contain "a statement of issues the trial court decided that the defendant is presenting for appellate review"); *see also State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980) (appellate court does not consider issues raised for the first time in petition for review).

(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. We review de novo the legal questions of whether counsel fell below prevailing professional norms and whether the defendant was prejudiced. *State v. Smith*, 244 Ariz. 482, ¶ 9 (App. 2018).

¶6 We initially note that in his reply to the state's response to his petition for review, Huntoon criticizes the state for mischaracterizing his argument. He claims essentially that he merely requested a hearing and does not "argue the ultimate issue, that summary judgment for ineffective assistance should have been granted the other way." This criticism is ill-placed. Huntoon argues that although he may have "in[]artfully" presented his argument in his Rule 32 petition below, he nonetheless is entitled to an evidentiary hearing to determine whether there was an actual plea offer for ten years with the stipulation that it run concurrently with the sentence in the federal matter.

¶7 However, in his Rule 32 petition, Huntoon repeatedly asserted the state had, in fact, negotiated a plea offer to settle both the state and federal cases for ten years, an agreement he maintained already existed and which his trial counsel failed to share with him. According to *Donald*, to show deficient performance, the petitioner must prove that his lawyer "failed to give information necessary to allow the petitioner to make an informed decision whether to accept [a] plea." 198 Ariz. 406, ¶ 16. It follows that, under *Donald*, the failure to inform a client that a plea offer existed would constitute deficient performance. However, this court has declined to extend *Donald* to counsel's alleged "failure to investigate the speculative possibilities of a potential plea offer, the very existence of which is contested." *State v. Jackson*, 209 Ariz. 13, ¶ 11 (App. 2004).

¶8 Huntoon is correct that we are generally required to take a defendant's assertions as true when evaluating a post-conviction claim. *See id.* ¶ 6. But that principle is not without limits—a court is not required to accept a facially incredible affidavit, *see State v. Krum*, 183 Ariz. 288, 294 (1995), and Huntoon must do more than simply contradict the record, *see State v. Jenkins*, 193 Ariz. 115, ¶ 15 (App. 1998). 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.

¶9 Here, the trial court considered the evidence presented, and concluded Huntoon had "failed to demonstrate that there was an offer, other than the one made at the [August 2016] settlement conference," which

Huntoon previously had rejected. The court correctly noted that the emails that Huntoon attached to his Rule 32 petition "only reflect that plea negotiations were ongoing through April 26, 2017 . . . [and t]hose emails cannot be construed to convey an [additional] offer made by the State."[5] Although the subject emails suggest that ongoing plea negotiations had occurred, including discussions about the possibility of a "single[-]digit[]" plea offer, it is clear the prosecutor made "no promises" of such an outcome. Put simply, based on the record before us, the court did not abuse its discretion in concluding that Huntoon did not establish a colorable claim that an actual plea offer existed, a factual determination the court was entitled to make. *See Jackson*, 209 Ariz. 13, ¶ 11.

¶10 Huntoon also argues he was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to assert the state violated A.R.S. § 13-3920 when it purportedly shared the contents from the hard drive of Huntoon's laptop computer with federal authorities, evidence the state had obtained pursuant to a search warrant. *See* § 13-3920(A) (property seized on warrant shall be retained in custody of seizing officer or agency subject to order of court in which warrant issued or any other court in which property is sought to be used as evidence). Citing § 13-3925(A) and (D), Huntoon maintains the evidence would have been suppressed if his trial counsel had raised this argument in his motion to suppress below. In its ruling, the trial court concluded even if the state had, in fact, turned over the evidence to federal authorities, and even if that act violated § 13-3920, it is not clear the evidence should be excluded. Notably, when Huntoon raised the very same underlying argument in his supplemental brief on appeal, we determined it was not an arguable issue requiring further briefing. *Huntoon*, No. 2 CA-CR 2019-0030, ¶¶ 3-4. We thus conclude the court did not abuse its discretion by summarily dismissing a claim of ineffective assistance based on counsel's failure to present an argument this court previously determined did not present an arguable issue.

¶11 Huntoon next argues appellate counsel was ineffective for failing to challenge the trial court's denial of the motion to suppress the evidence obtained as a result of the seizure of the hard drive from his computer, asserting it was obtained based on a search warrant that contained false or inaccurate statements. Once again, when Huntoon raised

[5]Although the trial court referred specifically to only one of the three exhibits Huntoon attached to his Rule 32 petition, we infer it reviewed all of the exhibits, including his affidavit.

the very same underlying issue in his supplemental brief on appeal, we rejected it. *See id*. Accordingly, the trial court dismissed his claim, correctly concluding, "[a]ll the issues [Huntoon] suggests that appellate counsel should have raised were adjudicated on the merits on appeal in his supplemental brief." Huntoon has not suggested any meaningful basis to support his argument that the outcome would have been different if appellate counsel had raised the same issue he raised, without success, on appeal.[6] Therefore, we conclude the court did not abuse its discretion by summarily dismissing this claim.

¶12 Finally, Huntoon argues his convictions for counts two through ten are multiplicitious and violate the constitutional prohibition against double jeopardy because the subject images were found "at one location, on one date, on one hard []drive," asserting his offenses constitute a single violation under A.R.S. § 13-3553. The trial court summarily dismissed this claim, concluding that Huntoon "was convicted of possessing ten distinct and different images, each representing a single count." Relying on A.R.S. § 13-3551(12), the court noted that a "'[v]isual depiction' includes **each** (emphasis added) visual image . . . ."

¶13 Although Huntoon's claim, raised pursuant to Rule 32.1(a), is precluded because it could have been raised on appeal, *see* Rule 32.2(a)(3), the trial court nonetheless addressed it briefly on the merits, correctly dismissing it. The relevant statutes are meant to criminalize each separate image or depiction that satisfies the elements of the offense. *State v. Berger*, 212 Ariz. 473, ¶ 3 (2006) ("Under this statutory scheme, the possession of each image of child pornography is a separate offense."); *State v. McPherson*, 228 Ariz. 557, ¶¶ 6-7 (App. 2012) ("[T]he legislature intended the unit of prosecution to be each individual 'depiction.'"). Double jeopardy does not bar separate prosecutions and sentences for each image of sexual exploitation of a minor, even if the images are identical, *State v. Valdez*, 182 Ariz. 165, 170-71 (App. 1994), or discovered on a single DVD, *McPherson*, 228 Ariz. 557, ¶ 7. Put simply, multiple images containing child pornography constitute multiple crimes. Accordingly, the court did not abuse its discretion in dismissing Huntoon's claim that his separate convictions and sentences for each of the ten counts violated the prohibition against double jeopardy. *See Roseberry*, 237 Ariz. 507, ¶ 7 (reviewing court

[6]We similarly decline to address Huntoon's unsupported suggestion that appellate counsel somehow erred merely by filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967).

"will affirm a trial court's decision" on petition for post-conviction relief "if it is legally correct for any reason").

¶14 We grant review but deny relief.