IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TIMOTHY MICHAEL AGUIRRE,
Petitioner.

No. 2 CA-CR 2022-0032-PR
Filed April 25, 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NOT FOR PUBLICATION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 Pima County
No. CR20183927001
The Honorable Kathleen Quigley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Joel Feinman, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Timothy Aguirre seeks review of the trial court's order 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). Aguirre has not shown such abuse here.

¶2 After a jury trial, Aguirre was convicted of aggravated driving with an illegal drug or its metabolite in his system (DUI) while his license was suspended and revoked. The trial court sentenced him to an eight-year prison term. We affirmed his convictions and sentences on appeal. *State v. Aguirre*, No. 2 CA-CR 2019-0157 (Ariz. App. May 28, 2020) (mem. decision).

¶3 Aguirre sought post-conviction relief, arguing his appellate counsel had been ineffective by failing to challenge the trial court's denial of his motion to suppress. Specifically, he contends that a law enforcement officer misstated the facts supporting a warrant application seeking a blood draw. He also claimed that trial counsel had been ineffective in failing to object to evidence and jury instructions regarding his refusal to submit to a warrantless blood draw and that appellate counsel was ineffective for failing to later raise that issue. The court summarily dismissed the proceeding, and this petition for review followed.

¶4 Aguirre repeats his arguments on review. "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.* To establish prejudice, a defendant must show "a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶ 25 (quoting *Strickland*, 466 U.S. at 694). We review de novo

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

¶5 Aguirre first asserts that trial and appellate counsel were ineffective in failing to object to evidence he had refused testing and the related jury instruction allowing the jury to consider that evidence. Arizona's implied consent law provides that drivers "consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for [DUI]." A.R.S. § 28-1321(A). Evidence that a DUI defendant has refused such testing is made admissible by A.R.S. § 28-1388(D): "If a person under arrest refuses to submit to a test or tests under § 28-1321, whether or not a sample was collected pursuant to subsection E of this section or a search warrant, evidence of refusal is admissible in any civil or criminal action or other proceeding." Our supreme court has held the provision constitutional because the fact of refusal is not testimonial evidence. *State v. Superior Court*, 155 Ariz. 408, 411 (1987). A police officer testified Aguirre refused to consent to a blood draw and the jury was instructed that it could "consider . . . evidence [of his refusal] together with all of the other evidence."

¶6 Aguirre asserts that admission of evidence of his refusal and the related jury instruction violate his Fourth Amendment rights because those rights are implicated by Arizona's implied consent law, citing *State v. Valenzuela*, 239 Ariz. 299, ¶¶ 10, 28 (2016) ("[O]fficers must inform arrestees in a way that does not coerce consent by stating or implying that officers have lawful authority, without a warrant, to compel samples of blood, breath, or other bodily substances."). He rests his argument primarily on *State v. Stevens*, 228 Ariz. 411 (App. 2012), and *State v. Palenkas*, 188 Ariz. 201 (App. 1996). In *Stevens*, when a defendant refused a warrantless search of her home, we determined it was error to permit "the State to introduce as direct evidence of guilt that [the defendant] invoked her Fourth Amendment rights and then argue she did so because she knew police would find illegal drugs and drug paraphernalia inside her house." 228 Ariz. 411, ¶¶ 4, 16. Similarly, in *Palenkas*, we determined it was improper for the prosecutor to elicit testimony about the defendant's invocation of his Fourth Amendment rights to "induce the jury to infer guilt" by arguing the defendant contacted an attorney because "he was involved in" the victim's death. 188 Ariz. at 212 (quoting *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978)).

¶7 The argument Aguirre proposes would require us to alter Arizona law. *Stevens* and *Palenkas* are distinguishable. The prosecutor in this case did not suggest to the jury it could infer Aguirre's guilt from his refusal to test. *See Stevens*, 228 Ariz. 411, ¶ 4; *Palenkas*, 188 Ariz. at 212. Division One applied those cases to A.R.S. § 28-1388(D) in an unpublished memorandum decision where (unlike here) the prosecutor told the jury it could infer from the defendant's refusal that he had driven while impaired; the appellate panel ultimately found, however, that any error "did not deprive [the defendant] of a fair trial or due process" in light of the "overwhelming evidence" supporting the convictions. *State v. Lewis*, No. 1 CA-CR 20-0010, ¶¶ 17-25 (Ariz. App. Dec. 15, 2020) (mem. decision). An argument more like the one Aguirre now proposes—that the admission of evidence under § 28-1388(D) violates the Fourth Amendment—was raised and rejected in a 2014 unpublished memorandum decision. *State v. Clark*, No. 2 CA-CR 2014-0041, ¶¶ 10-14 (Ariz. App. Dec. 30, 2014) (mem. decision).

¶8 But we need not decide whether Aguirre's argument might have prevailed in the trial court or on appeal. Instead, the question before us is whether competent counsel necessarily would have raised the argument in this case. Aguirre included with his petition an affidavit by a defense attorney, David Euchner, in which Euchner avowed competent counsel would have raised this issue. In evaluating whether a defendant's claim is colorable, we generally are required to take factual assertions made in affidavits as true. *See State v. Jackson*, 209 Ariz. 13, ¶ 6 (App. 2004). But the question whether counsel fell below prevailing professional standards is a mixed question of fact and law subject to our de novo review. *Smith*, 244 Ariz. 482, ¶ 9. We reject as a matter of law Euchner's assertion that counsel falls below prevailing professional standards by failing to argue for an extension of Arizona law. *See Anderson v. United States*, 393 F.3d 749, 754 (8th Cir. 2005) ("Counsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective."); *Trueblood v. State*, 715 N.E.2d 1242, 1258 (Ind. 1999) ("[C]ounsel cannot be held ineffective for failing to anticipate or effectuate a change in the existing law.").

¶9 Aguirre also argues that he raised a colorable claim that appellate counsel should have challenged the denial of his motion to suppress. In that motion, Aguirre primarily argued that body-worn camera footage demonstrated a police officer had made false statements in a blooddraw warrant application—specifically, that Aguirre had been swaying and had bloodshot eyes at the time of the traffic stop. After an evidentiary hearing, the trial court denied the motion. It agreed with Aguirre that the video did not show he was swaying but accepted the

officer's explanation that the video might not show everything the officer could see—including whether Aguirre's eyes were bloodshot or whether he was swaying. Finding the officer's observations credible, the court concluded the officer seeking the warrant "acted in good faith" and had not "knowingly, recklessly, or otherwise misled" the issuing magistrate.

¶10 We agree with the trial court that Aguirre's claim is not colorable. Even had counsel raised this claim on appeal, it would not have prevailed. Aguirre argues the trial court erred in concluding the attesting officer did not mislead the magistrate because the facts asserted in support of the warrant were belied by the "physical evidence," that is, the camera footage. And, he contends, we would be entitled on appeal to "conduct independent review of the video" because "the trial court [was] in no better position" than this court to evaluate it. Even if we adopted that approach,[1] however, it would not have changed the outcome on appeal.

¶11 The trial court recognized the inconsistencies between the video and the officer's testimony and nonetheless found the officer credible. We are required to defer to that determination, which in turn supports the court's determination that the officer did not mislead the issuing magistrate. *See State v. Teagle*, 217 Ariz. 17, ¶ 19 (App. 2007); *see also State v. Buccini*, 167 Ariz. 550, 554 (1991) (defendant may challenge warrant affidavit on basis of knowing, intentional, or reckless misstatements in warrant affidavit). Aguirre has identified no legal error in the trial court's ruling. We therefore cannot agree with Aguirre's argument that appellate counsel fell below prevailing professional standards or that he was prejudiced by appellate counsel's decision to forego raising a non-meritorious argument on appeal. The trial court did not err in summarily rejecting Aguirre's petition for post-conviction relief.

¶12 We grant review but deny relief.

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[1]In support of this contention, Aguirre cites *State v. Sweeney*, 224 Ariz. 107, ¶ 12 (App. 2010). There, Division One of this court "conducted an independent review" of video evidence. *Id.* But the court did not rely on that review to disturb the trial court's credibility determination, *see id.* ¶ 24, and *Sweeney* cited no authority suggesting that it would be appropriate to do so.