IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RUBEN RENE ROJAS,
Petitioner.

No. 2 CA-CR 2022-0054-PR
Filed October 14, 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NOT FOR PUBLICATION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 Graham County
No. CR201700375
The Honorable Michael D. Peterson, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Christian C. Ackerley, Phoenix
Counsel for Petitioner

MEMORANDUM DECISION

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

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

¶1 Petitioner Ruben Rojas seeks review of the trial court's order dismissing in part his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Rojas has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Rojas was convicted of driving with a blood-alcohol concentration (BAC) of .20 or more (extreme DUI), *see* A.R.S. § 28-1382(A)(2), and two counts of aggravated driving while his driver license was suspended or revoked, one based on his BAC of .08 or more and one based on his driving while under the influence of intoxicating liquor, *see* A.R.S. §§ 28-1381(A), 28-1383(A)—one misdemeanor count and two felony counts, respectively. The trial court sentenced Rojas to concurrent sentences, the longest two of which are fifteen years. This court affirmed his convictions and sentences on appeal. *State v. Rojas*, No. 2 CA-CR 2018-0308 (Ariz. App. Jan. 31, 2020) (mem. decision).

¶3 Rojas thereafter sought post-conviction relief, arguing in his petition that his sentence was illegal under *Apprendi v. New Jersey*,[1] that the "[l]oss" of a "longer" video recording of his traffic stop from the arresting officer's body camera had violated his due process rights, and that he had received ineffective assistance of appellate counsel because counsel failed to raise the improper sentencing issue on appeal. In an amendment to the petition, he also asserted he had received ineffective assistance of trial counsel based on counsel's failure to adequately prepare for a hearing on Rojas's motion to suppress or to hire an expert to enhance the video. Rojas filed a motion requesting appointment of an expert witness "to correct and enhance" the video. The trial court denied the request for an expert at a subsequent status conference, "noting the ease of manipulation." Rojas filed a renewed motion, which the court also denied. After an evidentiary

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[1]*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

hearing, the court granted Rojas relief in part, ordering resentencing on his sentencing claim, but otherwise denying relief. At resentencing, the court imposed concurrent sentences totaling 11.5 years' imprisonment.

¶4 On review, Rojas argues that his due process rights were violated by the denial of his request for an expert witness and that the trial court abused its discretion in rejecting his claim of ineffective assistance of trial counsel related to the video recordings. After an evidentiary hearing in a Rule 32 proceeding, our review of the court's factual findings "is limited to a determination of whether those findings are clearly erroneous"; we "view the facts in the light most favorable to sustaining the lower court's ruling, and we must resolve all reasonable inferences against the defendant." *State v. Sasak*, 178 Ariz. 182, 186 (App. 1993). When the "court's ruling is based on substantial evidence, this court will affirm." *Id.* And, "[e]vidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.*; *see also State v. Fritz*, 157 Ariz. 139, 141 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding). Rojas had the burden of proving his factual allegations by a preponderance of the evidence. *See* Ariz. R. Crim. P. 32.13(c).

¶5 Both of Rojas's arguments on review rely on the premise that a version of the arresting officer's body camera video existed and "contained more information than the version played" at a pretrial suppression hearing and at trial. At the suppression hearing, the prosecutor played the state's copy of the video, and on cross-examination, defense counsel asked to see a part of the video showing Rojas's car before it had turned onto the street where the arrest was made. Because the prosecutor asserted that he had shown the "start of the video," defense counsel played his copy of the video, and questioning continued. At trial, the video shown at the hearing initially could not be found, but eventually was, and during the trial, both counsel went to the Safford Police Department and obtained a new copy. The arresting officer again gave foundation testimony, outside the presence of the jury, and both copies were admitted into evidence, but the second copy did not go to the jury.

¶6 In his petition for post-conviction relief, Rojas based his claims for relief on the various copies of the video introduced during the proceedings and his declaration that he had seen a longer version of the video that showed his vehicle, with an operational plate light, travelling "50-75 feet" on another road before he turned. After Rojas filed a request for production of a "full, unedited version of the body cam video," the prosecutor and defense counsel apparently again went together to the Safford Police Department and obtained "a new original copy of the body

camera video." At the evidentiary hearing on his Rule 32 proceeding, Rojas conceded that this video "wasn't any longer" than the previously introduced copy, but he argued "the clarity of the image" was much better and it showed the plate light had been working. In its ruling, the trial court noted that it had "studied the . . . video carefully" and found that the new version "certainly gives the impression that his license plate light was not working at the time of the stop." It attached screenshots from the video to its ruling, which it found "show[ed] that the light was not functioning."

¶7 On review, Rojas abandons his argument about the quality of the new video and returns to his contention that the version originally provided to defense counsel "contained more information" and "began at an earlier point in time" than that "played for the Jury." As the trial court pointed out in its ruling, however, at the evidentiary hearing, both counsel "agreed that no 'longer' version of the video existed."

¶8 Rojas also contends "the video is clear" and "[a] working licen[s]e plate light is visible." This argument, however, amounts solely to a request for this court to reweigh the evidence presented to the trial court, which we will not do. *See Sasak*, 178 Ariz. at 186. Because substantial evidence supports the court's finding that the light was not working, we cannot say it abused its discretion. *See id.* Thus, the court properly denied relief as to Rojas's claim of ineffective assistance of counsel. *See State v. Salazar*, 146 Ariz. 540, 541 (1985) (to establish ineffective assistance defendant must show deficient performance and prejudice; court need not address both requirements if one not met).

¶9 Rojas also contends that "he would have been able to prove the . . . vide[o] did show his [license] plate lamp was working" if the trial court had granted his motion for appointment of an expert witness. Rojas cites various cases supporting the proposition that a defendant is entitled to due process, including rulings in which due process violations were found on the basis of the destruction of evidence and the presentation of false evidence. *See, e.g.*, *Oshrin v. Coulter*, 142 Ariz. 109, 111 (1984); *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005). He has not, however, meaningfully explained how the court violated his due process rights or abused its discretion by denying his request for an expert, a situation distinguishable from those in which there has been wrongful action by the state. *See* Ariz. R. Crim. P. 32.16(c)(2)(D); *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (defendant waived claim when he did not "develop the argument in any meaningful way" on review).

¶10 Furthermore, we will not disturb a trial court's refusal to appoint investigators and experts absent substantial prejudice. *State v.*

Apelt, 176 Ariz. 369, 375 (1993). In its ruling on Rojas's petition for post-conviction relief, the court pointed out that even assuming arguendo the plate light had been functional, it would have concluded the arresting officer had been justified in making the traffic stop on the basis of a good faith mistake, citing *State v. Moreno*, 236 Ariz. 347 (App. 2014). Indeed, when facts, "as believed by" the investigating officer "g[i]ve rise to reasonable suspicion" of a traffic violation, "the traffic stop may be upheld on that basis alone." *Id.* ¶ 11. Rojas has not addressed, much less established, prejudice on review, and we therefore have no basis to disturb the court's ruling on the motion for appointment of an expert. *See Apelt*, 176 Ariz. at 375; *see also* Ariz. R. Crim. P. 32.16(c)(2)(D).

¶11 We grant the petition for review, but deny relief.