IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DANIEL LOUIS MASON,
Petitioner.

No. 2 CA-CR 2023-0176-PR
Filed October 17, 2023

Petition for Review from the Superior Court in Maricopa County
No. CR2018116401001DT
The Honorable Laura J. Giaquinto, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Rachel H. Mitchell, Maricopa County Attorney
By Douglas Gerlach, Deputy County Attorney, Phoenix
Counsel for Respondent

MayesTelles PLLC, Phoenix
By Donielle I. Wright
Counsel for Petitioner

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Brearcliffe and Judge Kelly concurred.

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

¶1 Daniel Mason 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 ruling unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Mason has not met his burden of establishing such abuse here.

¶2 After a jury trial, Mason was convicted of misdemeanor resisting arrest and two counts of aggravated driving under the influence (DUI). The offenses occurred in April 2018, and Mason's driver license was suspended at the time. The trial court sentenced him to time served for resisting arrest and concurrent, ten-year prison terms for the counts of aggravated DUI. We affirmed his convictions and sentences on appeal. *State v. Mason*, No. 1 CA-CR 20-0464 (Ariz. App. Dec. 30, 2021) (mem. decision).

¶3 Mason sought post-conviction relief, arguing his trial and sentencing counsel had been ineffective and raising a claim of newly discovered evidence. He asserted trial counsel should have obtained and presented as evidence the transcript of a license suspension hearing showing that Mason had been informed his license suspension would be "voided." He also asserted counsel should have called his mother and his former spouse as witnesses to testify at trial that the postal service in their neighborhood was unreliable. Mason further contended trial counsel had been ineffective by failing to timely file a motion for new trial and accused counsel of "unprofessional conduct during the [t]rial." And Mason claimed his sentencing counsel had been ineffective in failing to present evidence of his sobriety. Last, Mason asserted there were newly discovered material facts relevant to his case, specifically evidence of an internal audit by the Arizona Department of Transportation (ADOT) showing that some drivers "may not have been sent corrective action notices" from August 1, 2020 to March 24, 2021.

¶4 The trial court summarily dismissed the proceeding. It concluded that Mason had not shown a reasonable probability that but for counsel's "substandard representation as alleged," the outcome of his trial would have been different. The court further concluded the newly discovered material facts "did not exist at the time of [Mason]'s trial" and thus could not support a claim for post-conviction relief. This petition for review followed.

¶5 On review, Mason first reasserts his claims of ineffective assistance of counsel and argues he is entitled to an evidentiary hearing. A defendant is entitled to an evidentiary hearing if the defendant presents a colorable claim for relief. *State v. Gutierrez*, 229 Ariz. 573, ¶ 25 (2012); *see also* Ariz. R. Crim. P. 32.13(a). To establish "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.* "[W]e must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7 (App. 2013) (quoting *Strickland*, 466 U.S. at 689). Thus, disagreements about trial strategy cannot support a claim of ineffective assistance if counsel's choices were reasonable. *Id.* And, although we must treat Mason's factual assertions as true, *see State v. Watton*, 164 Ariz. 323, 328 (1990), he cannot meet his burden by "mere speculation," *State v. Rosario*, 195 Ariz. 264, ¶ 23 (App. 1999). Mason is entitled to an evidentiary hearing only if he has alleged facts that, if true, "would probably have changed" the verdicts. *State v. Amaral*, 239 Ariz. 217, ¶ 11 (2016) (emphasis omitted).

¶6 Mason argued at trial that he lacked notice his license had been suspended and thus was not guilty of aggravated DUI. On review, Mason begins with his claim that counsel should have obtained and presented a transcript of a suspension hearing at which Mason was told his license would not be suspended. In November 2017, an administrative law judge (ALJ) held a hearing regarding a suspension of Mason's license. The ALJ told Mason it would "void [a] suspension" that had been entered prematurely but warned Mason "to keep your eyes open" for notification of the suspension to begin in February because "another suspension may occur when the conviction is finalized." After the hearing, the ALJ issued an order affirming a suspension of Mason's license to begin on February 21, 2018. That decision was mailed to Mason on November 13, 2017. We agree

with the trial court that the outcome of this case was unlikely to change even had counsel obtained the transcript and presented it to the jury. The hearing transcript weakens Mason's claim that he was unaware of his license suspension because the ALJ told him at the close of the hearing to expect a suspension to begin in February.

¶7 Mason also repeats his argument that counsel should have called his former spouse and his mother to testify that mail service in their neighborhood was unreliable. We again agree with the trial court that this testimony was not likely to have altered the jury's verdicts. Although both witnesses offered in their affidavits some specific allegations of mail delivery problems, they did not explain when those delivery problems occurred, and the included supporting documents are unhelpful to Mason's case. For example, Mason's mother claimed she "recently" received "approximately 10 suspension letters and corrective action notices." Mason included those notices with his petition, but all have dates occurring well after his arrest and trial. Mason's mother also asserted in her affidavit that she "often receive[s] notices from the post office stating that they are looking for a package they misplaced." But the two such notices included with Mason's petition are from 2020—years after the time of Mason's suspension.

¶8 Mason argues that counsel was ineffective for failing to timely seek a new trial.[1] But Mason cannot show prejudice. The arguments he asserts were never presented to the trial court—that the prosecutor committed misconduct and that a flight instruction was erroneous—were raised and rejected on appeal.

¶9 Mason's final claim of ineffective assistance concerns his sentencing. He asserts counsel was ineffective in failing to "present evidence that Mr. Mason had been sober for two years prior to his sentencing hearing." But Mason told the trial court about his sobriety. And, although it may have been better practice for counsel to have supported this important sentencing factor with documentary evidence, Mason has failed to direct us to anything in the record suggesting it would have given that fact more weight if counsel had included documentary evidence. The court's rejection of this claim suggests otherwise.

[1] Mason sought a new trial, but the trial court dismissed it as untimely—a decision we affirmed on appeal.

¶10 Insofar as Mason claims he is entitled to relief due to the "cumulative effect" of counsel's ineffective assistance, he does not explain how the prejudice calculation changes if we consider counsel's conduct as a whole. Thus, he has waived this argument, and we do not address it further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim). For the same reason, we do not address his passing and unsupported claim that counsel "failed to subject the State's case to any meaningful adversarial testing."

¶11 Mason also reasserts his claim pursuant to Rule 32.1(e) that there are newly discovered material facts relevant to his case. Mason included with his petition below a news article and letter discussing an internal audit showing ADOT had failed to send numerous suspension notices between August 2020 and March 2021. To state a colorable claim under Rule 32.1(e), Mason must identify relevant evidence that existed at the time of trial but could not be discovered until after trial and provide sufficient facts for the trial court to conclude he was diligent in discovering that evidence. *Amaral*, 239 Ariz. 217, ¶ 9. He must also establish the evidence would likely have changed the verdict if known at the time of trial. *Id.*

¶12 Mason, apparently recognizing that neither the article, letter, nor the underlying audit existed at the time of his trial, argues the audit is instead evidence of "an underlying disorganization that existed at the time of Mr. Mason's offense and at the time his license was suspended." Even if we accept this argument, we cannot agree that evidence showing ADOT failed to consistently send notices during a window in late 2020 and early 2021 is likely to convince a jury that ADOT failed to send Mason a notice in 2018.

¶13 We grant review but deny relief.