

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 26 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0138-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
THOMAS EUGENE WAITE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20044897

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Thomas Waite

Tucson
In Propria Persona

ESPINOSA, Judge.

¶1 In 2006, a jury found petitioner Thomas Eugene Waite guilty of three counts of aggravated driving under the influence of alcohol. The trial court sentenced

him to concurrent prison terms, the longest of which are nine-year terms. On appeal, we affirmed Waite's convictions, but modified his sentences to grant him additional presentence incarceration credit. *State v. Waite*, No. 2 CA-CR 2006-0300 (memorandum decision filed April 9, 2008).

¶2 Counsel filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging trial counsel had rendered ineffective assistance by failing to call a critical witness, Billy Joe Smith, to testify at trial. Following an evidentiary hearing, the trial court denied relief, and this petition for review, filed in propria persona, followed. "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, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶3 To state a colorable claim of ineffective assistance of counsel, a defendant must establish both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Waite argues that his trial attorneys did not read and investigate Smith's affidavit before trial, and consequently failed to call him as a witness. According to Waite, Smith's affidavit contained potentially exculpatory evidence, and he was prejudiced by counsels' omissions. In his petition below, Waite asked the trial court to order a new trial; we infer he is asking this court to provide the same relief.

¶4 The trial court conducted an extensive evidentiary hearing at which Waite, Smith, Waite's investigator, and both of Waite's trial attorneys testified. The court then denied post-conviction relief in a minute entry order that clearly identified Waite's

argument and correctly ruled on it in a manner that will allow this court and any future court to understand its resolution. We therefore adopt the trial court’s ruling and see no need to revisit it. *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶5 We further note that Waite has inserted in his petition for review a new complaint about counsels’ performance. Specifically, Waite alleges that, as a result of inadequate investigation, counsel failed to advise him to testify at trial. We do not address this claim, as this court will not consider on review any issue not first presented to the trial court. *See* Ariz. R. Crim. P. 32.9(c) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶6 Because we conclude the trial court did not abuse its discretion by dismissing Waite’s petition for post-conviction relief, we grant the petition for review but deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge