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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ABRAAN RENE ORTIZ, Petitioner.	2 CA-CR 2010-0246-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064581

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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B R A M M E R, Presiding Judge.

¶1 Following a jury trial, petitioner Abraan Ortiz was convicted of possession of a narcotic drug for sale, a class two felony, and possession of drug paraphernalia, a class six felony. The trial court sentenced him to concurrent, enhanced, presumptive

prison terms, the longer of which was 15.75 years. On appeal, we affirmed his convictions and sentences. *State v. Ortiz*, No. 2 CA-CR 2007-0375 (memorandum decision filed Dec. 10, 2008).

¶2 Legal defender Stephan McCaffery then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Ortiz filed a motion to dismiss McCaffery as counsel and to appoint new counsel, claiming McCaffery had refused to raise a claim of ineffective assistance of trial counsel based on counsel's alleged drug use at trial. The trial court denied Ortiz's motion but granted him leave to file a supplemental, pro se Rule 32 petition "for the sole purpose of raising issues against trial counsel." McCaffery subsequently filed a notice on behalf of Ortiz stating Ortiz no longer intended to file a supplemental petition. Nonetheless, one month later Ortiz filed a pro se petition for post-conviction relief. The state responded separately to McCaffery's and Ortiz's petitions, and McCaffery and Ortiz individually replied to the state's responses. The court dismissed[1] both petitions in a single ruling without conducting an evidentiary hearing. Ortiz then filed a pro se petition for review of the court's dismissal of his petition for post-conviction relief, after which McCaffery filed a separate petition for review.[2] "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear

[1]However, the court did grant counsel's request to vacate a previously ordered criminal restitution order.

[2]Although we consider counsel's petition for review as a supplement to Ortiz's pro se petition for review, we do so only because the trial court permitted Ortiz and counsel to proceed with separate petitions. However, we caution counsel that a defendant does not have the right to hybrid representation, s*ee Montgomery v. Sheldon*, 181 Ariz. 256, 260-61, 889 P.2d 614, 618-19 (1995), *overruled in part on other grounds by State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996), nor do we condone it.

abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶3 The following facts, established at the suppression hearing and adopted by this court on appeal, are relevant to the arguments on review. One evening in November 2006, two police officers were patrolling an area "known for its high narcotics activity and stolen vehicles," when they saw Ortiz's vehicle parked in front of a home. The vehicle bore temporary license plates, which are often used to disguise stolen vehicles. The car's lights initially were on and Ortiz and another individual were visible inside; upon passing the vehicle a second time, the officers noticed that, although the car's lights had been turned off, the two individuals remained inside the vehicle. One of the officers approached the car and knocked on the window. When Ortiz rolled it down, the officer immediately recognized "a strong odor of [fresh] marijuana" in the car; a second officer believed the smell indicated there was a "significant amount" of marijuana in the car. The officers then searched the car, including a lunch box on the back seat, which contained cocaine and drug paraphernalia. They later found a small quantity of marijuana in the passenger's sock.

¶4 Trial counsel filed a motion to dismiss/motion to suppress the evidence in the lunchbox "for lack of reasonable suspicion; invalid search." He maintained Ortiz had been "illegally detained in violation of" his constitutional rights, arguing the officers did not have reasonable suspicion that would justify the stop of the vehicle, their approach to the car to question him, and the continued detention beyond a traffic stop; consequently, the search of the vehicle was unlawful. At the hearing on that motion, one

of the officers testified that, because he had "reasonable belief . . . that there was unburned marijuana within the vehicle" based on the smell emanating from the car, the officers had searched the car, including the lunch box in the backseat of the vehicle. The trial court denied the motion and Ortiz's motion for reconsideration. On appeal, Ortiz challenged the legality of the officers' approaching the car, an argument we found to be without merit.

¶5 We first consider Ortiz's pro se petition for review, which essentially consists of one sentence: "[t]he issues before the court are those detailed in the Petition for Post-Conviction Relief and the Reply to the State's Response." Ortiz has not acknowledged the trial court's ruling or established how the court erred. Rather, he directs us to reread his petition below. The purpose of a petition for review is to provide this court the opportunity to "review . . . the actions of the trial court," *see* Rule 32.9(c), not for us to consider anew the issues presented to that court. Accordingly, because Ortiz has failed to comply with Rule 32.9, we deny his pro se petition for review.

¶6 We next consider the issues presented in the supplemental petition for review counsel filed. That petition asserts the trial court erred in denying relief summarily on Ortiz's claim that trial counsel had been ineffective for failing to challenge the search of the lunch box in light of the fact that the police had "eliminated" it as a source of the marijuana before the search, arguing counsel should have questioned whether the police had probable cause to search the lunch box "apart from challenging the search of the car." In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively

reasonable professional standard and that the deficient performance was prejudicial 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).

¶7 In denying post-conviction relief on this claim, the court made the following findings:

> In this case counsel for [Ortiz] made the precise arguments that [Ortiz] argues that he was ineffective for not making. At the hearing on [Ortiz's] motion to suppress . . . counsel for [Ortiz] asked the officer on cross[-]examination if the odor of marijuana he smelled was emanating from the lunch box. The Officer responded that the odor was not coming from the lunch box. After having illicited [sic] that testimony, counsel for [Ortiz] then made the following argument at the conclusion of the motion to suppress:
>
> "And further, Judge, Officer Currier looks in a lunch box, which is another container. He didn't have permission to search in the car and certainly didn't have permission to search in the lunch box, which is another container, and he specified that the odor wasn't emanating from the container.
>
> Now, I would argue that the State would argue . . . the marijuana was in a container. But if he is saying that the odor did not emanate from there, it just emanated from the car, they don't have any right to be in that car searching it."
>
> Counsel for [Ortiz] goes on to comment that "I think this is a bad search, as bad as it comes, Judge." Clearly the Court understood this argument as a basis for suppression because following counsel's argument the Court inquired of the State about it. The Court asked counsel for the state "But what about this? . . . [E]ven though they are searching the vehicle . . . do they not need to get a search warrant just to search the lunch container[?] I mean, that is . . . not going anywhere." The Court also asked the State "but do you believe that the lunch box is part of the vehicle search?" The Court finds that [Ortiz's] argument that counsel was ineffective for not asking the court to suppress the items in the lunch box is not well

> taken. In fact, counsel for [Ortiz] advanced the very arguments this petition suggests that he should. [Ortiz] has failed to prove either prong of the *Strickland* test. (Citations omitted.)

¶8 Although the Rule 32 judge may have mistakenly believed trial counsel raised the "precise arguments" Ortiz argues counsel should have raised, specifically, whether the police had probable cause to search the lunch box, the fact remains that the judge had noted correctly that, in denying the motion to suppress/dismiss, the trial court had "understood" the essence of this argument.[3] Notably, counsel acknowledges on review that the court, in fact, did consider at the suppression hearing the very question he claims trial counsel should have presented, even though the argument might not have been articulated in precisely the same way, that is, whether "the lunch box search lacked probable cause." In addition, although counsel argues the judge in the Rule 32 proceeding presented a "strained and inaccurate interpretation of the record" from the suppression hearing, the record speaks for itself and simply does not support counsel's argument that there is a meaningful difference between what was argued at the hearing and what counsel asserts should have been argued. Ultimately, as the Rule 32 judge found, and as counsel concedes, the trial court did consider the propriety of the search of the lunch box. Accordingly, even assuming, without deciding, trial counsel's performance was deficient, because the court considered the very argument Ortiz asserts trial counsel should have raised at the suppression hearing, he was not prejudiced. Thus, the Rule 32 judge did not abuse her discretion in denying relief on this claim. Moreover,

[3]Different judges presided over the Rule 32 and suppression proceedings.

to the extent counsel is challenging the court's ruling at the suppression hearing, he is precluded from raising that claim now. *See* Ariz. R. Crim P. 32.2(a)(1), (3).

¶9 Counsel also argues the trial court erred by failing to address his claim of ineffective assistance of appellate counsel. In the petition for post-conviction relief, Ortiz first asserted appellate counsel could not challenge the search of the lunch box because trial counsel had failed to raise that issue below, and that appellate counsel had "litigated the only suppression issues she could" on appeal. He then asserted, "to the extent appellate counsel could have, but did not, litigate the issue of whether the lunch box search fell outside the scope of the search justified by the odor of unburnt marijuana, she was ineffective . . . ." Although the judge in the Rule 32 proceeding did not expressly address Ortiz's claim of ineffective assistance of appellate counsel, we can infer from the fact that she denied relief that she had considered all claims before her. Moreover, in light of the less-than-clear argument regarding appellate counsel's performance, and in light of the court's determination that Ortiz had not established a colorable claim of ineffective assistance of trial counsel in any event, we can infer she would have rejected a claim of ineffective assistance of appellate counsel for failing to challenge the constitutionality of the search of the lunch box.

¶10 Counsel next asserts the trial court "erroneously" believed Ortiz had admitted he was on probation when he committed the instant offenses, and thus believed a mitigated sentence was not available pursuant to A.R.S. § 13-708(C) (if defendant commits felony offense while on probation for conviction of another felony offense, trial

court must impose not less than presumptive sentence).[4] Counsel asserts the Rule 32 judge erred by "implicitly" denying his claims of ineffective assistance of trial and appellate counsel related to sentencing.[5] At the prior convictions hearing, defense counsel informed the court he had reviewed with Ortiz "what the State is alleging," had informed Ortiz the state has "everything needed to prove this," and that Ortiz "realizes that those allegations [the prior convictions and probation status] . . . increase his exposure to prison." The prosecutor then clarified that the purpose of the hearing was to prove two prior felony convictions and the allegation that Ortiz had been on probation when he committed the instant offenses, stating that she wanted "to make sure that [Ortiz] knows that those are the things that he would be dealing with if he made an admission." Defense counsel also explained to the court that Ortiz had been on probation in the same two matters that comprised the prior convictions when he committed the instant offenses. Notably, Ortiz acknowledged he understood when the court reviewed the sentencing range and explained to him that his admission to the prior convictions and his probation status "would be increasing [his] sentence quite a bit," to a range of 15.75 and 35 years.

[4]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of Ortiz's offenses.

[5]It is unclear what counsel means by the court's having "implicitly" denied his ineffective assistance claims on this issue. The court expressly addressed and denied these claims in its ruling.

¶11 After the trial court provided the plea-type colloquy Rule 17.6, Ariz. R. Crim. P. requires when a defendant admits a prior conviction, Ortiz admitted the two prior felony convictions; however, the court did not specifically ask him whether he was on probation at the time of the offense. The Rule 32 judge noted the following in her ruling below:

> The fact of the matter is, that all present overlooked the fact that [Ortiz] never actually uttered the words that he was on probation at the time these offense[s] were committed. Counsel for [Ortiz] missed it, the State missed it, and the Court missed it. Nonetheless, everybody in that courtroom knew, including [Ortiz], that it was the intent of the parties that at the conclusion of the hearing on prior convictions, the sentencing range available to the court would be 15.75 years to 35 years.

¶12 At the prosecutor's suggestion, the trial court admitted in evidence the two exhibits that certified the prior convictions and also showed that Ortiz was on probation at the time he committed the current offenses. This was not lost on the judge in the Rule 32 proceeding, who noted in her ruling that the two exhibits reflected Ortiz "was indeed on probation at the time these offenses were committed." The judge further found "[b]ased upon the dialogue and admissions that occurred at the hearing concerning [Ortiz's] prior convictions and the information contained in State's exhibits two and three, the [sentencing] Court properly found and reasonable evidence supported the fact that the instant offenses were committed while [Ortiz] was on probation." *See State v. Sowards*, 147 Ariz. 156, 159, 709 P.2d 513, 516 (1985) (allegation defendant committed offense while on release must be supported by reasonable evidence). Moreover, at sentencing, the court stated more than once, without objection, that Ortiz had admitted

being on probation when he committed the instant offenses. In fact, defense counsel agreed with the state and the court that the sentence imposed depended, in part, on the fact Ortiz was on probation when he committed the instant offenses, and stated "Ortiz presents himself in having two prior felony convictions and being on probation."

¶13 We find no abuse of discretion in the trial court's dismissal of Ortiz's ineffective assistance of counsel claim. Notably, Ortiz does not argue he was not on probation when he committed the underlying offenses, or that the record does not support that he was on probation at that time. In fact, although not dispositive, Ortiz told police at the time of his arrest that he was on probation. Nor has Ortiz suggested he would not have admitted he was on probation had the court asked him. *Cf. State v. Morales*, 215 Ariz. 59 ¶ 11, 157 P.3d 479, 482 (2007) (prejudice established for lack of plea colloquy by showing defendant would not have admitted fact of prior conviction). In addition, the exhibits admitted at the prior convictions hearing and the presentence report, which the court presumably considered at sentencing, and the contents of which Ortiz has not challenged, also confirmed Ortiz's probation status. Accordingly, even if trial and appellate counsel had erred by failing to object on this ground below, because the record establishes unequivocally Ortiz was on probation, he was not prejudiced, as the court in the Rule 32 proceeding correctly noted.

¶14 Counsel also argues Ortiz was entitled to an evidentiary hearing on all of his claims. A defendant is entitled to a hearing only if he raises a colorable claim for relief which is one that, if taken as true, likely would have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). Based on the trial

court's correct determination that Ortiz presented no colorable claims for relief, the court correctly dismissed his petition without conducting an evidentiary hearing.

¶15 Therefore, we grant the petition for review but deny relief.

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

CONCURRING:

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

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