

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

APR 20 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0002-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FRED AARON ETHRIDGE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062979

Honorable Terry L. Chandler, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
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William E. Perry

Tucson
Attorney for Petitioner

ESPINOSA, Judge.

¶1 After a jury trial, petitioner Fred Ethridge was convicted of one count of possession of a dangerous drug, two counts of transfer of a dangerous drug, and one count of sale of a dangerous drug. On appeal this court reviewed the record for

fundamental error pursuant to *Anders v. California*, 386 U.S. 738 (1967), and found his double jeopardy rights had been violated with respect to two of the convictions, which we vacated. *State v. Ethridge*, No. 2 CA-CR 2010-0061 (memorandum decision filed Nov. 4, 2010). Ethridge then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., raising claims of newly discovered evidence and ineffective assistance of counsel. The trial court denied relief without an evidentiary hearing and this petition for review followed. Absent a clear abuse of discretion by the trial court, we will not disturb its ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In its well-reasoned, thorough minute entry, the trial court summarized Ethridge's claims and, specifying the applicable law, concluded the evidence was not newly discovered for purposes of Rule 32.1(e). The court found, inter alia, the proposed testimony of the undercover officer was not "clearly contradictory" to his trial testimony and it "[wa]s not likely, and certainly not probable" the evidence "would have impacted the jury's analysis significantly." The court rejected the related claim of ineffective assistance of trial counsel, finding that even if counsel could be faulted for not discovering the purported new evidence—the officer's statement—that performance was not prejudicial because, as the court had concluded in addressing the claim of newly discovered evidence under Rule 32.1(e), the evidence was not likely to have changed the outcome. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (to be entitled to relief based on claim of ineffective assistance of counsel, defendant must show counsel's performance was both deficient and prejudicial); *see also State v. Salazar*, 146 Ariz. 540,

541, 707 P.2d 944, 945 (1985) (failure to prove either part of *Strickland* test fatal to claim of ineffective assistance of counsel).

¶3 No purpose would be served by rehashing the trial court's correct ruling in its entirety here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Rather, because the ruling is correct and because Ethridge has not sustained his burden of establishing the court abused its discretion in denying the petition for post-conviction relief, we adopt that ruling.

¶4 The petition for review is, therefore, granted. But for the reasons stated, we deny relief.

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

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge