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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OF ARIZONA, Respondent, v. JAMES STUART REICHERT, Petitioner.	2 CA-CR 2011-0190-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092446001

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF GRANTED IN PART; REMANDED

The Law Offices of Stephanie K. Bond, P.C.
By Stephanie K. Bond
Tucson
Attorney for Petitioner

K E L L Y, Judge.

¶1 Petitioner James Reichert 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. After a jury trial, Reichert was convicted of two counts each of aggravated driving under the influence of an intoxicant (DUI) and driving with an alcohol concentration (AC) of .08 or greater, while his license was suspended, canceled, revoked, refused or

restricted. The court sentenced him to enhanced, presumptive, ten-year terms of imprisonment, to be served concurrently. We affirmed his convictions and sentences on appeal. *State v. Reichert*, No. 2 CA-CR 2010-0037 (memorandum decision filed Aug. 31, 2010).

¶2 In Reichert's petition for post-conviction relief, he alleged his trial counsel had been ineffective in failing to file a pretrial motion to dismiss or motion to suppress the results of the blood test administered by police officers and in failing to present expert testimony. In an affidavit filed with his petition, he averred he had asked for an attorney four separate times. He stated his first request was made immediately after he was stopped by a police officer, the second when the officer attempted to ask him questions and administer field sobriety tests, the third after he was placed under arrest and transported to a holding cell. And the last request occurred "some time" later, before his blood was drawn pursuant to a warrant. After the blood draw, he was told he had the right to an independent blood test, and he asked that it be performed, but he averred that, once he was transported for the test, "the doctor talked him out of it by saying how expensive it was [and] that a vi[al] would be available for an independent test." He also stated he had "told [his trial attorney] that he was not allowed to contact an attorney when he asked for one."

¶3 In addition, Reichert averred that he had asked his trial counsel to investigate whether difficulties he had experienced while donating plasma the morning of his arrest could have affected the results of the blood test and alcohol concentration analysis. He also submitted the affidavit of Charles Laroue, who stated he had

"previously been deemed an expert in Pima County Superior Court regarding DUI investigation, blood and breath testing, and phlebotomy procedures"; he had reviewed "[Reichert]'s affidavit, the blood draw reports and gas chromatographs related to this case"; and, in his opinion, "the defense should have retained an expert to present the argument that the analysis may not represent the true blood alcohol content" because it failed to consider "any differences in blood balance" caused by Reichert's aborted plasma donation that morning, as well as to challenge the reliability of the alcohol content analysis on other grounds.

¶4 The trial court denied relief without conducting an evidentiary hearing, finding Reichert's claims not colorable. *See* Ariz. R. Crim. P. 32.6. With respect to trial counsel's failure to file a motion to dismiss or motion to suppress evidence on the ground police officers had interfered with Reichert's right to counsel, the court concluded "even had trial counsel filed a motion to suppress the blood, whether the Court would have granted such motion under the circumstances is highly speculative." The court further noted, "[T]here was ample evidence to find [Reichert] guilty and no evidence that officers violated [his] right to counsel for which a dismissal would be warranted. The result would have been no different. Counsel was not ineffective, nor was [Reichert] prejudiced."

¶5 The trial court also found Reichert had failed to state a colorable claim that counsel had been ineffective in failing to present expert testimony that the result of his blood test had been affected by his plasma donation earlier that day. The court wrote,

> The Court is at a loss as to how a theory of dehydration from plasma donation could bring the true concentration of alcohol from .185 to below .08. Further, the fact that [Reichert]'s blood may have been more concentrated, does not mean he was *less* intoxicated—only that he may have been able to be less intoxicated if he had more plasma—which, accepting [his] argument, he did not. One cannot negate the crime of DUI by positing that the [alcohol concentration] would be lower if one had more plasma. Such a result would be absurd. Whether Petitioner was more affected by the alcohol he consumed because he had donated plasma that day is of no moment. Poor planning or bad luck, he had a BAC of .185 and he was clearly impaired. An expert would not have changed this. Trial counsel was not ineffective for refusing to call a witness to advance this theory, nor was [Reichert] prejudiced.

On review, Reichert maintains both his claims are colorable and the trial court "erred" when it summarily dismissed his petition without an evidentiary hearing.

Discussion

¶6 We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). A Rule 32 petitioner "is entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *see also* Ariz. R. Crim. P. 32.6(c) (court shall dismiss petition upon determination that "no [non-precluded] claim presents a material issue of fact or law which would entitle the defendant to relief . . . and that no purpose would be served by any further proceedings"). "To state 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." *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶7 Although a determination that a petitioner has failed to state a colorable claim "is, to some extent, a discretionary decision for the trial court," that court "must be mindful . . . that when doubt exists, 'a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.'" *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988), *quoting State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). As our supreme court has observed, "[O]ne purpose of Rule 32 is to 'furnish an evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established of record.'" *Bennett*, 213 Ariz. 562, ¶ 30, 146 P.3d at 69-70, *quoting State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

Counsel's Failure to Retain Expert

¶8 Reichert maintains trial counsel was deficient in failing either to retain a defense expert or to interview the state's expert with respect to whether his plasma donation had affected the results of his blood test. But his challenge to the trial court's finding that he failed to establish prejudice is merely conclusory. He asserts, "The jury would have been free to disregard the alcohol content based on the expert's testimony and the jury would be free to disregard the presumption that [Reichert] was impaired." We find no abuse of discretion in the court's determination that Reichert failed to state a colorable claim that the result of his trial would have been different had he presented

expert testimony that his alcohol concentration would not have been as high had he not been dehydrated at the time, whatever the cause of his dehydration might have been.

Counsel's Failure to File Pretrial Motions

¶9 We reach a different result with respect to Reichert's claim that counsel was ineffective in failing to file pretrial motions. Reichert argues counsel "[fell] below the minimum standards of professional competence required of defense counsel" when she failed to allege pretrial claims that the state had unreasonably restricted his right to counsel. *See State v. Watson*, 134 Ariz. 1, 4-5, 653 P.2d 351, 354-55 (1982) (defense attorney's failure to file pretrial motions on issues raised by facts may constitute deficient representation), *overruled on other grounds by State v. Lee*, 142 Ariz. 210, 689 P.2d 153 (1984). He notes the trial court's comment that "when Petitioner did, indeed, request an attorney (before the warrant was served), the Officers drew his blood but did not question him," and suggests "[t]he [c]ourt's ruling implies that this is a Fifth Amendment issue regarding a person's right to have an attorney present during questioning, rather than a Sixth Amendment issue regarding the right to have an attorney to consult with."

¶10 Reichert relies on a line of authority holding that, in a criminal DUI case, the accused has the right to consult with an attorney before submitting to an alcohol concentration test if such consultation "does not disrupt the investigation." *State v. Juarez*, 161 Ariz. 76, 80, 775 P.2d 1140, 1144 (1989); *see also State v. Vannoy*, 177 Ariz. 206, 209, 866 P.2d 874, 877 (App. 1993) ("If defendant asked to speak with an attorney, he had a right to do so before taking the test."). Pursuant to these authorities, he maintains that, had trial counsel filed an appropriate motion, the state would have been

required to establish that his consultation with counsel would have disrupted its investigation, *see Juarez*, 161 Ariz. at 81, 775 P.2d at 1145, and, if the state had been unable to meet this burden, the appropriate remedy would have been suppression of the blood evidence or dismissal of the charges, *see Kunzler v. Pima Cnty. Superior Court*, 154 Ariz. 568, 570, 744 P.2d 669, 671 (1987) (finding proper remedy was suppression of evidence); *State v. Holland*, 147 Ariz. 453, 456, 711 P.2d 592, 595 (1985) (holding dismissal was required).

¶11 Reichert avers he had requested counsel several times before his blood was drawn pursuant to a warrant. Although the trial court found Reichert's assertion that he had requested counsel when he was first stopped by the police officer "contradictory to the police report and the supporting testimony," at trial, the court interrupted Reichert's attorney when she began questioning a police officer about an earlier request for counsel "[b]ecause no pre-trial motions were filed on this issue." At a bench conference, the court dissuaded counsel from developing evidence of any such requests, and the record contains no testimony about Reichert's request for an attorney.[1] Moreover, although a police report indicates that Reichert requested an attorney after police had obtained a warrant for a blood draw, it does not specify that this was his first request for counsel.

[1]The arresting officer testified that she placed Reichert under arrest and asked if he would submit voluntarily to blood or breath testing pursuant to Arizona's implied consent law, A.R.S. § 28-1321. She reported that Reichert's only response was, "La, la, la, I can't understand what you're saying." At the bench conference, Reichert's counsel told the court Reichert had responded in this fashion because he had requested counsel and wanted to convey that "he wasn't going to say anything."

¶12 Reichert argues that, because no motion had been filed, the state was never required to establish that affording Reichert an opportunity to consult with counsel, either before or after the blood draw, would have interfered with its investigation and that, therefore, "the Judge never got the opportunity to decide the issue."[2] Similarly, because no motion was filed, no evidentiary hearing has been held, and the issue was not developed at trial, the court lacked an evidentiary basis to find, summarily, that Reichert's allegations lack credibility. Finally, Reichert argues an evidentiary hearing is required because he is "unable to hypothesize any sound trial strategy" for trial counsel's failure to raise the issue of wrongful interference with his right to counsel, "especially considering the potential remedy" for such a violation is dismissal of the charges or suppression of evidence that was critical to the state's case.[3]

¶13 To establish prejudice for a claim of ineffective assistance of counsel based on the failure to file a motion to suppress, a defendant must show a reasonable probability that the motion would have been successful as well as a reasonable probability that suppression of the evidence would have changed the result at trial. *Cf. State v. Berryman*, 178 Ariz. 617, 622 & n.3, 875 P.2d 850, 855 & n.3 (App. 1994) (finding, after evidentiary hearing, counsel not ineffective for failing to file motion to suppress for

[2]Reichert argues that, even if the trial court were to find, after an evidentiary hearing, that his request to consult with counsel before the initial blood draw would have interfered with the investigation, he was arguably prejudiced by his inability to consult with counsel before deciding whether to request an independent test and, had such a consultation been provided, he might not have been dissuaded from making that request.

[3]Reichert maintains that because he "did not perform field sobriety tests or make any admissions regarding drinking, the alcohol content [determined by the state's blood draw] was a vital piece of evidence for the State in obtaining its conviction."

alleged fourth amendment violation), *citing Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Although the trial court concluded it was "highly speculative" that the judge who presided over the trial would have granted a motion to suppress had one been filed, it did so without benefit of an evidentiary hearing, implicitly resolving factual disputes against Reichert when it found there was "no evidence that officers violated [Reichert's] right to counsel for which a dismissal would be warranted." But where, as here, the record is devoid of evidence because the "issue was never presented to the trial court, and no hearing has ever been held to determine the full facts," Rule 32 provides the means to develop the record required for a determination of a defendant's claims and sufficient for our review of the court's ruling. *State v. Cabrera*, 114 Ariz. 233, 236, 560 P.2d 417, 420 (1977).

¶14 Taken as true, Reichert's allegation that he asked to consult with counsel before the police obtained a warrant creates a reasonable probability that a motion to dismiss or suppress critical evidence would have been granted. *See State v. Rosengren*, 199 Ariz. 112, ¶¶ 4-5, 29-30, 14 P.3d 303, 306, 312-13 (App. 2000) (court properly suppressed blood evidence obtained by warrant after police violated defendant's right to counsel; suppression compelled by "interference with [defendant]'s due process right to gather contemporary, independent exculpatory evidence of sobriety"); *but see State v. Rumsey*, 225 Ariz. 374, ¶ 16, 238 P.3d 642, 647-48 (App. 2010) (not every violation of right to counsel in DUI case "automatically necessitates suppression of the test results; . . . suppression is not required unless a nexus exists between the violation and the evidence obtained"). He is therefore entitled to an evidentiary hearing on his claim that

trial counsel was ineffective in failing to file such motions. *See Bennett*, 213 Ariz. 562, ¶¶ 21, 30, 146 P.3d at 68, 69 (evidentiary hearing required when defendant states colorable claim).

¶15 Accordingly, we conclude the trial court erred in summarily denying Reichert's claim that counsel was ineffective in failing to file a motion to dismiss or motion to suppress evidence on the ground that the state had wrongly interfered with his right to counsel, and we remand the case for an evidentiary hearing on this issue. We express no opinion on the validity of Reichert's claim.

Conclusion

¶16 We grant review, grant relief in part, and remand this case to the trial court for further proceedings consistent with this decision.

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

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

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