

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

STEVEN JAMES KING,
Petitioner.

No. 2 CA-CR 2013-0184-PR
Filed November 7, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20051648

The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
by Jacob R. Lines, Deputy County Attorney, Tucson

Counsel for Respondent

Steven James King, Kingman

In Propria Persona

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Steven King petitions this court for review of the trial court's order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). King has not met his burden of demonstrating such abuse here.

¶2 King was convicted after a jury trial of four counts of aggravated driving under the influence of an intoxicant and sentenced to concurrent, 6.5-year prison terms. We affirmed his convictions and sentences on appeal. *State v. King*, No. 2 CA-CR 2010-0105, ¶ 21 (memorandum decision filed Jan. 24, 2012).

¶3 King sought post-conviction relief, asserting his trial counsel had been ineffective in failing to: 1) seek a settlement conference or a "global plea offer" from the state pertaining to this case and another pending case, 2) give him "the necessary advice to make an inf[o]rmed decision" whether to accept a plea offer from the state, 3) investigate discrepancies between the color of the vehicle reported by a 9-1-1 caller and "the color of the vehicle that officers contacted," 4) seek suppression of evidence based on the officers' purported lack of reasonable suspicion, and 5) request a particular jury instruction for actual physical control and object to the instruction given. Finding King had not presented colorable claims of ineffective assistance of counsel, the trial court summarily dismissed his petition for post-conviction relief.

¶4 On review, King argues the trial court erred in rejecting his claims of ineffective assistance of counsel regarding the state's plea offer and counsel's failure to file a motion to suppress. He

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contends his counsel failed to give him sufficient information about the strengths and weaknesses of his case to make an informed decision whether to accept the state's plea offer and that counsel did not give him sufficient time to make a decision. He additionally argues counsel failed to inform him that, if he did not accept the plea offer from the state, his sentence if convicted would be enhanced because he had been on release at the time he committed the offenses.

¶5 “To state a colorable claim of ineffective assistance of counsel,” King was required to “show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced [him].” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶6 “[A] defendant may state a claim for post-conviction relief on the basis that counsel’s ineffective assistance led the defendant to make an uninformed decision to reject a plea bargain and proceed to trial.” *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000). “To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea.” *Id.* ¶ 16. And, to establish prejudice, “a defendant must show ‘a reasonable probability that, absent his attorney’s deficient advice, he would have accepted the plea offer’ and declined to go forward to trial.” *Id.* ¶ 20, quoting *People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997), abrogated on other grounds by *People v. Hale*, No. 113140, ¶ 20, 2013 WL 5488909 (Ill. 2013).

¶7 King claimed in his affidavit below that he had not received a *Donald* hearing in regards to the state’s offer to plead guilty to “a Class 4 felony with an open range and no allegation of a prior conviction.” He additionally maintained that he was not informed of “the risk of going to trial with a prior” or that he would face an enhanced sentence based on the state’s allegation that he had been on release in his previous case at the time he committed the offenses here.

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¶8 The trial court determined, however, that this claim was not colorable because King had been given a *Donald* hearing and been advised of the consequences of rejecting the state's plea offer. Despite his earlier avowal to the contrary, King does not dispute on review the court's finding that he was provided a *Donald* hearing and correctly apprised of the sentence he could face upon conviction if he rejected the plea. Thus, although he continues to maintain that his counsel did not inform him his sentence would be enhanced, he cannot demonstrate resulting prejudice.

¶9 Moreover, King cannot show prejudice because he did not avow that he would have accepted the state's plea had he known the full sentencing range he could face upon conviction after a jury trial. *Donald*, 198 Ariz. 406, ¶¶ 20-22, 10 P.3d at 1201; *see also State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007) (reviewing court will affirm trial court's ruling for any reason supported by record). Also absent from his affidavit are any statements supporting his assertions on review that counsel failed to advise him adequately about the strengths and weaknesses of his case or that he had insufficient time to consider the plea offer. *Cf. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d at 1201 (to warrant evidentiary hearing, defendant must provide more than "conclusory assertions"). Thus, the trial court did not err in summarily denying King's claim that counsel rendered ineffective assistance regarding the state's plea offer.

¶10 King additionally claims the trial court erred in rejecting his claim that trial counsel should have filed a motion to suppress evidence based on the lack of reasonable suspicion. The court rejected his argument below that law enforcement officers lacked reasonable suspicion to detain him because of inconsistencies in the 9-1-1 caller's description of King's vehicle and the caller having temporarily lost sight of King. The court determined that, despite these facts, the 9-1-1 caller nonetheless provided King's license plate number and "[t]hat fact alone gave police reasonable suspicion to stop [King]." *See generally State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008) (officer may conduct investigatory stop "if the totality of the circumstances 'raise[s] a justifiable suspicion that the particular individual to be detained is involved in criminal

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activity’”) (emphasis omitted), *quoting State v. Graciano*, 134 Ariz. 35, 37, 653 P.2d 683, 685 (1982). Thus, the court concluded, it was reasonable for trial counsel not to have filed a motion to suppress.

¶11 King argues, however, that because the 9-1-1 caller’s identity was unknown at the time law enforcement officers detained him, the information provided by the caller was “totally unreliable” and could not support a finding of reasonable suspicion. But King did not raise this possible ground for a motion to suppress below, and we therefore will not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”).

¶12 For the reasons stated, although review is granted, relief is denied.