

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANGEL DAVID NUÑEZ,
Petitioner.

No. 2 CA-CR 2013-0306-PR
Filed December 2, 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NOT FOR PUBLICATION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. CR20104195001

The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Stephanie J. Meade, Tucson
By Stephanie J. Meade
Counsel for Petitioner

STATE v. NUÑEZ
Decision of the Court

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Angel Nuñez petitions this court for review of the trial court's order summarily dismissing 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). Nuñez has not met his burden of establishing such abuse here.

¶2 Nuñez was convicted after a jury trial of two counts of aggravated driving under the influence of an intoxicant (DUI) while his driver license was suspended or revoked. The trial court sentenced him to concurrent, eight-year prison terms for each count. We affirmed his convictions and sentences on appeal. *State v. Nuñez*, No. 2 CA-CR 2011-0250 (memorandum decision filed Mar. 22, 2012).

¶3 Nuñez then filed a notice of and petition for post-conviction relief. He noted that the trial court had instructed the jury, pursuant to A.R.S. § 28-1381(G), that it could presume he had been under the influence of intoxicating liquor if his alcohol concentration (AC) was .08 or greater within two hours of driving. He argued his trial counsel had been ineffective because he did not object to the court's omission of part of the standard instruction for § 28-1381(G), specifically that the presumption was rebuttable and that the jury was "free to accept or reject [it] after considering all the facts and circumstances of the case" and that the burden of proving his guilt beyond a reasonable doubt remained with the state. He also claimed that counsel should have objected when the court omitted the definition of "refusal" contained in the standard instruction for A.R.S. § 28-1388 that the jury could consider a defendant's refusal to submit to blood or breath testing. Finally, he

STATE v. NUÑEZ
Decision of the Court

asserted appellate counsel had been ineffective for failing to raise those claims on appeal.

¶4 The trial court summarily denied relief. It determined that, because it had instructed the jury that “it may be presumed” from Nuñez’s AC that he had been under the influence of alcohol, the presumption instruction was not “coercive or mandatory.” Thus, the court concluded, counsel’s decision to not object did not prejudice Nuñez. It further noted that the jury instructions, viewed as a whole, properly set forth the law, specifically that the state bore the burden of proving Nuñez’s guilt beyond a reasonable doubt and that the burden does not shift. And it rejected Nuñez’s remaining claim of ineffective assistance of trial counsel because the jury reasonably could have concluded Nuñez did refuse to undergo breath or blood testing and the definition of “refusal” is “within the common understanding of a juror.” Finally, for the same reasons, the court concluded Nuñez had not suffered any prejudice from counsel’s decision not to raise the issues on appeal.

¶5 “To state a colorable claim of ineffective assistance of counsel,” Nuñez 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). To demonstrate resulting prejudice, Nuñez must show a reasonable probability that the outcome would have been different absent counsel’s ineffectiveness. See *State v. Nash*, 143 Ariz. 392, 397-98, 694 P.2d 222, 227-28 (1985).

¶6 On review, Nuñez reurges his claims. Regarding his claim concerning the § 28-1381(G) instruction, even if Nuñez is correct that it was error for the trial court to fail to give the complete instruction and that counsel thus fell below prevailing professional norms by failing to object, Nuñez’s claim still fails.¹ He cannot

¹Even assuming the instruction given was legally sufficient, we cannot see any reason for a trial court to decline to give the entire instruction to ensure the jury is properly appraised of its authority to reject the presumption.

STATE v. NUÑEZ
Decision of the Court

demonstrate the result would have been different had the complete instruction been given because the evidence that Nuñez was impaired to the slightest degree was overwhelming. *See* A.R.S. § 28-1381(A)(1); *Nash*, 143 Ariz. at 398, 694 P.2d at 228.

¶7 Nuñez was stopped because he had been traveling at approximately seventy-five miles per hour on city streets. *See State ex rel. McDougall v. Albrecht*, 168 Ariz. 128, 132, 811 P.2d 791, 795 (App. 1991) (speeding evidence of impairment). And officers reported that he had slurred speech and watery, bloodshot eyes, “staggered out of the vehicle,” and smelled of alcohol – all indicators of impairment. *See id.* Moreover, Nuñez had urinated on himself. Although trial counsel posited explanations for some of these individual facts at trial, viewed as a whole, even absent the blood evidence, the facts lead inexorably to the conclusion that Nuñez was impaired.

¶8 Nuñez has also failed to demonstrate any prejudice resulting from counsel’s decision to not object to the omission of the instruction defining “refusal.” According to Nuñez, the standard instruction states that: “A refusal to submit to [a] chemical test . . . occurs when the conduct of the arrested motorist is such that a reasonable person in the officer’s position would be justified in believing that such motorist was capable of refusal and exhibited an unwillingness to submit to the test.” Based on that instruction, no reasonable juror could have concluded that Nuñez had not refused to undergo testing. The evidence shows that Nuñez was capable of coherent conversation with police and unambiguously refused to participate in testing. Nuñez has identified no evidence suggesting he could not or did not refuse. Thus, the omission of the definition portion of the instruction would not have changed the result at trial.

¶9 Although review is granted, relief is denied.