

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANDREA JOSEPHINE SIMON,
Petitioner.

No. 2 CA-CR 2013-0354-PR
Filed January 14, 2014

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NOT FOR PUBLICATION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. CR20112868001

The Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Henry Jacobs PLLC, Tucson
By Henry Jacobs
Counsel for Petitioner

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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 Andrea Simon petitions this court for review of the trial court's order summarily denying her 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). Simon has not met her burden of demonstrating such abuse here.

¶2 Simon was convicted after a jury trial of four counts of sale and/or transfer of a narcotic drug (cocaine) and sentenced to minimum, concurrent, four-year prison terms for each offense. Her convictions were based on four separate transactions in which she sold cocaine or cocaine base to the same undercover police officer. On appeal, we affirmed Simon's convictions and sentences except for the criminal restitution order entered at her sentencing, which we vacated. *State v. Simon*, No. 2 CA-CR 2012-0188 (memorandum decision filed May 22, 2013).

¶3 Simon then sought post-conviction relief, arguing that her trial and appellate counsel had been ineffective in failing to raise a claim of "sentencing manipulation" by the state—essentially, that the state had unfairly increased her sentence and eliminated her eligibility for probation by arranging a series of drug transactions instead of arresting her after the first transaction. She claimed the state's conduct violated her due process rights and, had counsel raised the issue at trial or on appeal, the convictions resulting from any "superfluous investigation" were subject to dismissal.

¶4 The trial court summarily denied relief. It determined there was no due process violation because nothing in the records

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showed that the multiple transactions were conducted “for any reason other than to do a thorough investigation.” It noted that the undercover officer, on at least one occasion, was not sure whether Simon or another individual would conduct the transaction and that “[a]ll but one of the purchases were made under scenarios where other people were present and apparently knowledgeable about what was transpiring.” Thus, the court concluded, trial counsel was not ineffective by choosing “not to raise [the] issue at trial.” The court did not expressly address her claim of ineffective assistance of appellate counsel.

¶5 On review, Simon reurges her claims of ineffective assistance of trial and appellate counsel and asserts she was entitled to an evidentiary hearing. She is entitled to an evidentiary hearing only if she has presented a colorable claim. *See State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995). Thus, Simon was required to “show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced [her].” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). She claims that trial counsel should have argued “sentence manipulation as a due process violation for the purpose of dismissing the superfluous counts and that appellate counsel failed to present the issue on appeal as fundamental error.”

¶6 Some federal courts have adopted the doctrine of sentence manipulation, which permits courts to depart from the federal sentencing guidelines when law enforcement officers have manipulated those guidelines by “engag[ing] in improper conduct that has the effect of increasing a defendant’s sentence.” *State v. Monaco*, 207 Ariz. 75, ¶¶ 4-7, 83 P.3d 553, 555-56 (App. 2004). In *Monaco*, we rejected the application of this doctrine in Arizona because, absent a violation of the prohibition against cruel and unusual punishment,¹ Arizona courts are “required to sentence a

¹ In rejecting application of the sentencing manipulation doctrine in *Monaco*, we stated that “Arizona courts, including the supreme court, have uniformly held that, absent a constitutional violation, a trial court is required to sentence a defendant within the

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defendant within the statutory range.” *Id.* ¶ 11. We further noted that several federal circuits and state courts have rejected the doctrine as well. *Id.* ¶ 13.

¶7 The defendant in *Monaco* additionally argued, however, that a trial court could “depart from the mandatory sentence” based on a purported violation of his due process rights caused by law enforcement’s investigation.² *Id.* ¶ 14. We concluded the investigative conduct did not violate due process because it did not “rise to the level of ‘coercion, violence, or brutality to the person,’” nor was it otherwise “‘outrageous.’” *Id.* ¶ 15. Moreover, we noted the defendant had not cited “any . . . case in which a court construed similar investigative conduct as a violation of a defendant’s due process right.” *Id.* Because we determined there had been no due process violation, we did not determine whether a violation could have justified a sentence below the statutory minimum.

¶8 We need not decide, however, whether the state’s investigative conduct in this case could constitute a due process violation. Simon’s claim is that her trial and appellate counsel were ineffective for failing to raise an argument based on purported sentence manipulation by the undercover officer. But we rejected application of the sentence manipulation doctrine to Arizona’s sentencing scheme in *Monaco*. *Id.* ¶ 11. And, as noted above, we did not conclude that a due process violation could entitle a defendant to sentencing relief, much less, as Simon suggests, that it could entitle a defendant to the dismissal of charges. Indeed, Simon cites no authority holding that dismissal would be an appropriate

statutory range.” 207 Ariz. 75, ¶ 11, 83 P.3d at 557. Simon suggests that any “constitutional violation,” including a due process violation, would thus permit an Arizona court to apply this doctrine. A careful reading of *Monaco* reveals that we were referring specifically to violations of the Eighth Amendment. *See id.* ¶¶ 9, 11.

²Similarly to Simon, the defendant in *Monaco* had sold cocaine to an undercover officer five times before the officer obtained a search warrant and arrested him. *Id.* ¶ 2.

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remedy for sentencing manipulation.³ See *United States v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995) (“No court has held . . . that sentencing manipulation can serve as a complete bar to prosecution.”).

¶9 We cannot reasonably conclude that counsel fell below prevailing professional norms for failing to raise a legal argument that apparently has never been adopted by any court, much less an Arizona court. See *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. Thus, the trial court did not err in summarily rejecting Simon’s claims of ineffective assistance of trial and appellate counsel.

¶10 Although review is granted, relief is denied.

³Simon cites *United States v. Ross*, 372 F.3d 1097 (9th Cir. 2004), for the proposition that “a successful outrageous conduct defense results in dismissal of the indictment.” That case does not discuss sentence manipulation—the outrageous conduct at issue there was an agent’s illegal conduct in obtaining permanent resident status for an informant. *Id.* at 1102. And the court in *Ross* denied relief, concluding the defendant had not been prejudiced. *Id.* at 1110.