

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MONTY L. HELMS,
Petitioner.

No. 2 CA-CR 2013-0414-PR
Filed April 11, 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NOT FOR PUBLICATION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 Pinal County

No. S1100CR200900409

The Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Rosemary Gordon Pánuco, Deputy County Attorney, Florence
Counsel for Respondent

Monty L. Helms, Florence
In Propria Persona

STATE v. HELMS
Decision of the Court

MEMORANDUM DECISION

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

VÁSQUEZ, Presiding Judge:

¶1 Petitioner Monty Helms seeks review of the trial court's summary denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, deny relief.

¶2 After a jury trial, Helms was convicted of possession of a dangerous drug for sale, possession of drug paraphernalia, and weapons misconduct. The trial court sentenced him to a combination of consecutive and concurrent, presumptive prison terms totaling 12.5 years. We affirmed his convictions and sentences on appeal, and summarized the facts relevant to his claim of insufficient evidence as follows:

Apache Junction Police officers searched Helms's residence pursuant to a warrant. In Helms's bedroom, officers found \$1,210 in cash strewn on the floor, a glass pipe next to a desk, and an electronic scale on the floor under the desk. Another electronic scale was found on the bed. Inside a portable safe in the bedroom, they found two firearms, an eyeglass case containing three syringes and a plastic bag of methamphetamine, small plastic bags that commonly are used for packaging small quantities of drugs, another plastic bag containing methamphetamine, a small scale, a manila envelope containing the titles to a motorcycle and a truck both in

STATE v. HELMS
Decision of the Court

Helms's name, and a note to "Monte" signed with a heart. An officer testified the safe "had to be pried open" because the officers "didn't have the combination." Helms told the officers he did not own the safe.

Helms's former neighbor, R. L., testified that another man living at Helms's residence had offered R. L. the use of the safe to store guns and had opened it with a combination and a key. At that time the safe had been stored in R. L.'s backyard in a shed, but had been moved into Helms's residence shortly before the search. Although officers found ammunition in the guns, the neighbor did not believe the guns had been loaded when he put them in the safe.

State v. Helms, No. 2 CA-CR 2010-0301, ¶¶ 1, 8-9 (memorandum decision filed July 29, 2011). We noted circumstantial evidence that Helms had access to and possessed items found in the safe and explained that another person's "access to the safe does not negate Helms's ability to exercise dominion and control over it" because "[p]ossession need not be exclusive but 'may be sole or joint.'" *Id.* ¶ 11, quoting *State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (1976).

¶3 Helms filed a timely notice of post-conviction relief, and his attorney filed a petition alleging trial counsel had been ineffective in filing an "inadequate" motion to suppress evidence. Specifically, Helms alleged that, although it "appear[ed] from [counsel's] motion" that he intended to challenge the validity of a search warrant based on the "staleness of the information in the [probable cause] affidavit," the case authority counsel cited was limited to application of A.R.S. § 13-3918, which requires execution of a search warrant within five days of its issuance. According to Helms, "[t]he affidavit in this case was stale, and had counsel

STATE v. HELMS
Decision of the Court

actually provided caselaw and argued the motion, all the evidence obtained would have been [suppressed].” Helms also argued trial counsel had been ineffective in failing to call two witnesses— Helms’s girlfriend and her sister— who would have testified at trial that the safe had belonged to someone named S.H. He supported this second claim with transcripts of interviews with the two women, conducted by an investigator employed by Rule 32 counsel.

¶4 The trial court summarily denied relief. With respect to Helms’s claim related to trial counsel’s motion to suppress, the court stated, “Petitioner claims that his counsel did not argue the staleness of the information contained in the affidavit. This is incorrect. While counsel did use the five day rule for serving a warrant as an example of staleness, he did argue the age of the information contained in the affidavit” rendered it invalid. The court found the motion “sufficed to bring the issues before the court.”

¶5 The trial court also denied Helms’s claim that counsel had been ineffective in failing to call two witnesses who would have testified that the safe found in Helms’s bedroom did not belong to him. Citing this court’s memorandum decision, the court concluded the claim “fails in the face of the findings of the Court of Appeals” that trial evidence was sufficient to establish Helms’s possession.

¶6 In his pro se petition for review, Helms repeats the arguments he raised below. He maintains the trial court’s ruling is in conflict with *Kimmelman v. Morrison*, 477 U.S. 365, 385-86 (1986), in which the Supreme Court held counsel’s failure to timely file a motion to suppress, due to a “complete lack of pretrial preparation,” “fell below the level of reasonable professional assistance.” He also seems to argue the ruling violates his constitutional rights and “arbitrarily limits” his ability “to secure further testimony of favorable witnesses” at an evidentiary hearing.¹

¹Pursuant to Rule 32.5, Helms was required to attach to his petition “[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition.” Filing transcripts of unsworn interviews of the proposed witnesses, instead of their affidavits, is inconsistent with this requirement. See *State v.*

STATE v. HELMS
Decision of the Court

¶7 We review for an abuse of discretion a trial court's denial of post-conviction relief for failure to state a colorable claim. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). "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." *Id.* ¶ 21, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* To establish a colorable claim of prejudice, a defendant must "show a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶ 25, quoting *Strickland*, 466 U.S. at 694.

¶8 We agree with the trial court that, during argument on the motion to suppress, counsel adequately "br[ought] the issues before the court." Moreover, Helms has failed to show any reasonable probability that the trial court would have granted the motion had trial counsel cited different authority. In its response to Helms's petition for review, the state points out our supreme court's admonition that "[t]he question of staleness depends more on the nature of the activity than on the number of days that have elapsed since the factual information was gathered"; thus, "where the information evidences activity of a continuous nature the passage of time becomes less significant." *State v. Hale*, 131 Ariz. 444, 446, 641 P.2d 1288, 1290 (1982). The court appears to have been aware of counsel's argument, and likely would have rejected it, even had counsel cited more appropriate authority. Accordingly, even if counsel had performed deficiently, Helms has failed to state a

Carriger, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984) ("Petitioners must strictly comply with Rule 32 or be denied relief."). Helms is not entitled to an evidentiary hearing to explore their "further testimony."

STATE v. HELMS
Decision of the Court

colorable claim of any resulting prejudice, as required by *Strickland*.² See *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶9 Similarly, Helms failed to establish a colorable claim of counsel's deficiency or resulting prejudice based on the omission of testimony from Helms's girlfriend and her sister. The jury had already heard evidence that the safe did not belong to Helms, and, as the state suggests, the two sisters were subject to impeachment based on their close relationships with Helms, their admissions of drug use, and their seemingly implausible statements made to the police after Helms's arrest.³

¶10 Finally, in a reply to the state's response to his petition for review, Helms raises a number of additional claims. We do not address these claims because they were not properly presented to the trial court. See Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues "decided by the trial court[,] . . . which the defendant wishes to present to the appellate court for review"); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶11 For the foregoing reasons, we grant review, but we deny relief.

²The trial court is correct that a challenge to the ruling on the motion to suppress is precluded by waiver. See Ariz. R. Crim. P. 32.2(a)(3). But to the extent the court's ruling might suggest Helms's claim of ineffective assistance of counsel, as related to presentation of the motion to suppress, is also precluded, we disapprove such a determination.

³This absence of prejudice may explain the trial court's reference to our determination of the sufficiency of evidence on appeal. That determination alone, of course, does not foreclose a claim of ineffective assistance of counsel; different standards apply to consideration of these separate claims.