

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JAMES LEE PRICE JR.,
Petitioner.

No. 2 CA-CR 2014-0122-PR
Filed June 26, 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NOT FOR PUBLICATION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 Yavapai County

No. P1300CR20090730

The Honorable Tina R. Ainley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Sheila Polk, Yavapai County Attorney
By Steven J. Sisneros, Deputy County Attorney, Prescott
Counsel for Respondent

C. Kenneth Ray II, P.C., Prescott
By C. Kenneth Ray II
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 James Price seeks review of the trial court’s orders summarily denying, in part, his petition for post-conviction relief and denying his motion for rehearing. 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). For the reasons that follow, we grant review but deny relief.

¶2 Price was convicted after a jury trial of possession of methamphetamine for sale and possession of drug paraphernalia and sentenced to concurrent prison terms, the longest of which was eleven years. Price appealed his conviction for methamphetamine possession, which we affirmed. *State v. Price*, No. 1 CA-CR 10-0810, ¶¶ 1, 17 (memorandum decision filed Dec. 15, 2011).

¶3 Price then sought post-conviction relief, arguing in his petition that the state had failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), specifically “impeachment information” related to an investigating detective’s “discipline for misconduct,” and that trial counsel was ineffective for failing to obtain the information via a public records request. He attached to his petition documents showing that the detective had been disciplined for “the commencement of a sexual act with a . . . prostitute” while undercover during a prostitution investigation. The incident occurred nearly six months after Price’s arrest but before trial. Price further argued he was entitled to additional presentence incarceration credit.

¶4 The trial court denied relief on Price’s claim of ineffective assistance of counsel, concluding that the evidence’s

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usefulness for impeachment was “tenuous” and would not have changed the outcome of the trial.¹ It granted relief on Price’s claim concerning presentence incarceration credit. This petition for review followed the court’s denial of Price’s motion for rehearing.

¶5 On review, Price repeats his claim based on *Brady* and his related claim of ineffective assistance of counsel. We agree with the trial court that Price is not entitled to relief.² *Brady* requires the state to disclose any evidence favorable to the defense and material to the issue of guilt. 373 U.S. at 86-87. See also Ariz. R. Crim. P. 15.1(b)(8). Such evidence includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

¶6 “‘The test for a *Brady* violation is whether the undisclosed material would have created a reasonable doubt had it been presented to the jury.’” *State v. Montañó*, 204 Ariz. 413, ¶ 52, 65 P.3d 61, 72 (2003), quoting *State v. Dumaine*, 162 Ariz. 392, 405, 783 P.2d 1184, 1197 (1989). “[E]vidence is ‘material’ within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). “A reasonable probability does not mean that the defendant ‘would more likely than not have received a different verdict with the evidence,’ only that the likelihood of a different result is great enough to ‘undermine[] confidence in the outcome of the trial.’” *Smith v. Cain*, ___ U.S. ___, ___, 132 S. Ct. 627, 630 (2012), quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (alterations in *Smith*).

¹As Price correctly notes, the trial court did not expressly address his claim based on *Brady*. But, as we explain, both claims fail based on the court’s correct conclusion that the evidence could not have changed the outcome at trial.

²Because Price’s claims do not warrant relief on the merits, we need not determine whether a *Brady* claim properly can be raised for the first time in a Rule 32 proceeding independent of a claim of newly discovered evidence or ineffective assistance of counsel. See Ariz. R. Crim. P. 32.1; 32.2(a).

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¶7 “To state a colorable claim of ineffective assistance of counsel,” Price 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, Price must show a reasonable probability that the outcome would have been different absent counsel’s ineffectiveness. See *State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). A claim for relief is colorable, and a defendant is therefore entitled to an evidentiary hearing, when the “allegations, if true, would have changed the verdict.” *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995).

¶8 Price has not demonstrated the evidence of the detective’s later misconduct could have altered the verdict. Although Price insists the detective’s credibility was “central” to the issues decided at trial, he has not identified any testimony by the detective that was critical to his conviction. Price admitted his guilt during a recorded interview with police that was played for the jury. Although Price claimed at trial that he had lied during the interview about selling drugs, he does not explain how the detective’s testimony is material to the jury’s evaluation of his credibility on that issue. Moreover, the evidence is of marginal impeachment value because it does not impugn the detective’s character for truthfulness—he immediately self-reported the incident and there is no suggestion in the record that he omitted any facts or otherwise concealed the truth of his conduct. See Ariz. R. Evid. 608(b).

¶9 Price’s reliance on *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013), is misplaced. The facts of *Milke* do not meaningfully compare to the facts before us. The police officer in that case had engaged in extensive misconduct, including “taking ‘liberties’ with a female motorist and then lying about it to his supervisors; four court cases where judges tossed out confessions or indictments because [the officer] lied under oath; and four cases where judges suppressed confessions or vacated convictions because [the officer] had violated the Fifth Amendment or the Fourth Amendment in the course of interrogations.” *Id.* at 1003. And the court in *Milke* noted that “[t]he trial was, essentially, a swearing contest between” the defendant and

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police officer. *Id.* at 1000. In contrast, the evidence in question here relates to an isolated incident that included no dishonesty, and the detective's testimony was of secondary importance, at most, in determining Price's guilt.

¶10 Thus, Price has not demonstrated that the state was required to disclose the information pursuant to *Brady* nor that any prejudice resulted from his counsel's failure to procure it independently. Moreover, he has identified no authority suggesting that counsel fell below prevailing professional norms. He claimed in his petition below that counsel could have made a public records request, but has not explained how counsel should have known when to make the request, nor does he suggest that competent counsel make such requests about investigating officers as a matter of course.

¶11 For the reasons stated, although we grant review, we deny relief.