

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

MIKE ALLEN SCHOMISCH,  
*Petitioner.*

No. 2 CA-CR 2014-0153-PR  
Filed October 24, 2014

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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NOT FOR PUBLICATION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.

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Petition for Review from the Superior Court in Pima County

No. CR20074570

The Honorable Deborah Bernini, Judge

**REVIEW GRANTED; RELIEF GRANTED**

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COUNSEL

Barbara LaWall, Pima County Attorney  
By Nicolette Kneup, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Law Offices of Jeffrey D. Bartolino, Tucson  
By Jeffrey D. Bartolino  
*Counsel for Petitioner*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

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ECKERSTROM, Chief Judge:

¶1 Mike Schomisch petitions this court for review of the trial court's order 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). We grant review and, because trial counsel performed deficiently by failing to make a reasoned decision to forgo investigating whether the brakes on Schomisch's vehicle had failed, and because that deficiency prejudiced Schomisch, we grant relief.

¶2 After a jury trial, Schomisch was convicted of manslaughter, two counts of aggravated assault with a deadly weapon or dangerous instrument, aggravated assault causing serious physical injury, criminal damage, and endangerment. Schomisch also was convicted of two counts of aggravated driving under the influence of an intoxicant (DUI), specifically: DUI with a suspended license and driving with a blood alcohol concentration (BAC) at or above .08 with a suspended license. The convictions stemmed from an incident in which Schomisch – with a BAC of .172 and driving at least fifteen miles per hour over the speed limit – struck a vehicle making a U-turn in front of him. The resulting collision killed Schomisch's passenger and flipped the vehicle he had struck into oncoming traffic, where it landed on a third vehicle. He was sentenced to concurrent and consecutive prison terms totaling nineteen years. We affirmed his convictions and sentences on appeal. *State v. Schomisch*, No. 2 CA-CR 2009-0096 (memorandum decision filed Feb. 11, 2011).

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¶3 Schomisch sought post-conviction relief, raising numerous claims of ineffective assistance of counsel, including that counsel had failed to: (1) investigate Schomisch's assertion that his brakes had failed; (2) investigate blood evidence obtained by the state; (3) move to suppress the blood evidence based on the state's failure to obtain a warrant; (4) obtain event data recorder (EDR) data from the vehicle Schomisch had hit; (5) raise various objections to jury instructions and statements made by the prosecutor; (6) adopt a reasonable overall trial strategy; and (7) offer mitigating evidence at sentencing. He also argued that, if the EDR data were found to be unavailable at the time of trial, then it constituted newly discovered evidence entitling him to relief. *See* Ariz. R. Crim. P. 32.1(e). After an evidentiary hearing, the trial court rejected Schomisch's claims, and this petition for review followed.

¶4 We first address Schomisch's argument that counsel was ineffective in failing to investigate whether the brakes had failed on his vehicle. "To prevail on this claim, [Schomisch] was required to demonstrate that counsel's conduct fell below prevailing professional norms and that he was prejudiced thereby." *State v. Denz*, 232 Ariz. 441, ¶ 6, 306 P.3d 98, 100-01 (App. 2013), *citing Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Whether counsel rendered ineffective assistance is a mixed question of fact and law." *Id.* Although we "defer to the trial court's factual findings," we "review de novo the ultimate legal conclusion." *Id.*, *quoting In re MH2010-002637*, 228 Ariz. 74, ¶ 13, 263 P.3d 82, 86 (App. 2011).

¶5 "[W]e must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *Id.* ¶ 7, *quoting Strickland*, 466 U.S. at 689. "To overcome this presumption, [Schomisch] was required to show counsel's decisions were not tactical in nature, but were instead the result of 'ineptitude, inexperience or lack of preparation.'" *Id.*, *quoting State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Therefore, "disagreements about trial strategy will not support an ineffective assistance claim if 'the challenged conduct has some reasoned basis,' even if the tactics counsel adopts

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are unsuccessful.” *Id.*, quoting *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985).

¶6 Despite counsel’s duty to adequately investigate possible defenses, “counsel may opt not to pursue a particular investigative path based on his or her reasoned conclusion that it would not yield useful information or is otherwise unnecessary in light of counsel’s chosen trial strategy.” *Id.* ¶ 11. “Strategic decisions are ‘conscious, reasonably informed decision[s] made by an attorney with an eye to benefitting his client.’” *Id.*, quoting *Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir. 2001) (alteration in *Denz*). “‘A purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.’” *Id.* ¶ 12, quoting *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005).

¶7 Schomisch testified at the evidentiary hearing that he had told his trial counsel several times that his brakes had failed as he tried to avoid the accident. His sister testified she had been present at a meeting where Schomisch told counsel about the brake failure. Trial counsel maintained at the evidentiary hearing that he had been unaware of the possibility of brake failure. He admitted, however, he would have investigated potential brake failure, even “if [he] were the most incompetent lawyer in the world,” had his client made him aware of it. Stanton Bloom, a defense attorney, testified at the evidentiary hearing that trial counsel had been ineffective for failing to investigate the possibility of brake failure.

¶8 The trial court found that Schomisch had informed counsel about his belief the brakes had failed. But it denied relief based on its finding that counsel’s “decision[] to pursue some claims and not pursue others, including any issue with the truck’s brakes, were strategic in nature and made by trial counsel after weighing the facts and available evidence prior to trial.”

¶9 In light of counsel’s explanation for why he did not investigate the possibility of brake failure (i.e., his client did not tell him the brakes failed), we cannot agree with the trial court’s conclusion that counsel made a reasoned or informed strategic

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decision to forego brake investigation.<sup>1</sup> Accepting, as we must, the court's finding that Schomisch told counsel about the brake problem, we conclude the failure to investigate that possibility plainly fell below prevailing professional norms. Accordingly, we must now address whether counsel's conduct prejudiced Schomisch. *Denz*, 232 Ariz. 441, ¶ 6, 306 P.3d at 100-01. To establish prejudice, Schomisch "was required to 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* ¶ 20, quoting *Strickland*, 466 U.S. at 694. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.*

¶10 At the Rule 32 evidentiary hearing, Schomisch presented evidence that leaking fluid and decomposing seals in the master cylinder, as well as the absence of fluid in the brake reservoirs, showed the brakes had suddenly failed and that the bent brake pedal established Schomisch had his foot on the brake pedal at the time of the accident. And an accident reconstruction expert testified Schomisch could have braked for at least two seconds—which would have lowered the speed of his vehicle by approximately thirty miles per hour had the brakes functioned properly. At the trial, in arguing Schomisch's conduct was reckless, the state had emphasized his failure to brake in its closing argument, claiming it was the result of his intoxication.

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<sup>1</sup>The state insists we can nonetheless uphold the trial court's determination that counsel's failure to investigate was a strategic choice. It claims that counsel could have made a reasoned decision to not investigate the brake failure because, "[t]o establish the defense, Schomisch would have had to testify" about the accident and about the condition of his truck. Even if we agreed with the state that the failure to investigate apparent brake failure in a motor vehicle accident could be a reasoned strategic decision, the strategic choice the state describes here is flatly contradicted by the record. Counsel denied knowing about the brake failure and acknowledged he would have investigated it had he been aware of it.

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¶11 Under the facts of this case, to convict Schomisch of manslaughter, aggravated assault, endangerment, and criminal damage, the state had to demonstrate his conduct was reckless. A.R.S. §§ 13-1103(A)(1), 13-1201(A), 13-1203(A)(1), 13-1204(A)(1), (2), 13-1602(A)(1), (2). A person is reckless if that “person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.” A.R.S. § 13-105(10)(c). Moreover, “[t]he risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” *Id.* There is no question that driving in excess of the speed limit while intoxicated would support a jury finding of recklessness. However, those facts do not require that conclusion. *Cf. State v. Bass*, 198 Ariz. 571, ¶ 42, 12 P.3d 796, 806 (2000) (noting that driving at excessive speeds might not “establish[] criminal recklessness to the satisfaction of the jury”); *Smith v. Chapman*, 115 Ariz. 211, 214, 564 P.2d 900, 903 (1977) (rejecting notion, in civil case, that “intoxication plus negligent driving equals reckless disregard for the safety and rights of others’ under all circumstances”).

¶12 Information that Schomisch’s brakes had failed would permit the jury to conclude that he timely attempted to brake to prevent the collision and, particularly in light of the state’s argument that his failure to brake was evidence of his recklessness, that Schomisch had not recklessly caused the accident. *Cf. State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983) (conduct of other driver relevant to whether defendant negligent). Indeed, the state acknowledged as much, noting in its response to his petition below that evidence of brake failure would be “clearly exculpatory.”<sup>2</sup>

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<sup>2</sup>Although evidence of brake failure is clearly relevant to whether Schomisch’s conduct caused the collision, we need not and do not decide whether Schomisch would be entitled to a jury instruction on superseding cause based on the possible failure of his vehicle’s brakes. *See generally State v. Bass*, 198 Ariz. 571, ¶¶ 11, 14, 12 P.3d 796, 800-01 (2000) (unforeseeable and abnormal or extraordinary superseding cause relieves defendant of liability).

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¶13 Because we grant relief on Schomisch’s claim that counsel was ineffective for failing to investigate the possibility of brake failure, we need not address the bulk of his remaining arguments. However, he asserts several claims related to the admission of blood alcohol evidence which, if meritorious, might require a new trial on his DUI convictions.

¶14 Schomisch first claims that trial counsel was ineffective for failing to request the gas chromatogram from the testing of his blood samples. He argues that, had counsel done so, he would have discovered the “test blank” used for those tests was contaminated, rendering the test results unreliable. But trial counsel had obtained an independent test of the blood sample, the results of which were consistent with the results of the state’s tests. Thus, there was no reason for counsel to believe the test results were flawed due to contamination, and no reason to obtain the gas chromatogram. “[C]ounsel may opt not to pursue a particular investigative path based on his or her reasoned conclusion that it would not yield useful information . . . .” *Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d at 102. The trial court did not err in rejecting this claim.

¶15 Schomisch also asserts his trial counsel was ineffective in failing to move to suppress the blood test results on the basis that the blood draws were illegally performed without a warrant. Schomisch acknowledges there were two additional blood draws, and does not assert those draws were constitutionally deficient. He asserts, however, that the latter blood draws “were outside the two-hour limit contained in the D.U.I. statute” and, relying on the testimony of a criminalist who testified at the evidentiary hearing, claims “that it would be impossible to retrograde the [test] results . . . to the time of the incident.”

¶16 Even assuming some constitutional fault in the first blood draw, Schomisch cannot show prejudice. The criminalist testified retrograde extrapolation would “most likely [be] an overestimate” “if there is information that would suggest that there was alcohol consumed shortly before the time of the accident” because there still could be alcohol in the subject’s stomach at the

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time of the blood draw. But he acknowledged that Schomisch's blood alcohol concentration must have been at least .140, well above the legal limit, irrespective of retrograde error.

¶17 For the reasons stated, we grant relief and remand the case to the trial court for a new trial on the charges of manslaughter, aggravated assault, criminal damage, and endangerment.