

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRANK KARL HERTEL,
Petitioner.

No. 2 CA-CR 2014-0315-PR
Filed December 19, 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NOT FOR PUBLICATION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. CR20002435

The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Frank Karl Hertel, Florence
In Propria Persona

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Frank Hertel seeks review of the trial court’s summary denial of his petition for post-conviction relief, filed pursuant to Rule 32.3, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

¶2 After a jury trial held in his absence in the summer of 2001, Hertel was convicted of sexual conduct with a minor under the age of fifteen. In October 2012, after his extradition from Germany, he was sentenced to a twenty-year prison term. We affirmed his conviction and sentence on appeal. *State v. Hertel*, No. 2 CA-CR 2012-0451 (memorandum decision filed Oct. 23, 2013).

¶3 In a petition for post-conviction relief filed by appointed counsel, Hertel argued his trial and appellate counsel had been ineffective in failing to argue—or to argue adequately—that trying him *in absentia* violated his constitutional right to be present at trial. Hertel maintained the trial court had erred in concluding his absence was voluntary pursuant to Rule 9.1, Ariz. R. Crim. P., because he did not “sign any paperwork at his arraignment acknowledging” his understanding that he had the right to be present at trial and that a trial would proceed in his absence if he failed to appear, and also because no trial date had been set before he absconded.¹ Relying on *Crosby v. United States*, 506 U.S. 255

¹Rule 9.1 provides that “a defendant may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it.” In addition, a “court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the

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(1993), he also asserted that “Arizona rules and case law are not in accord with Supreme Court case law that binds lower courts.”

¶4 The trial court denied relief in a detailed ruling that clearly identified, addressed, and correctly resolved Hertel’s ineffective assistance claims. Essentially, the court concluded Hertel had not stated a colorable claim because it had not erred in ordering him tried *in absentia*. See *State v. Bennett*, 213 Ariz. 562, ¶¶ 21, 25, 146 P.3d 63, 68-69 (2006) (colorable claim of ineffective assistance requires showing of deficient performance and “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”), quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *State v. Ring*, 131 Ariz. 374, 377, 641 P.2d 862, 865 (1982) (“Failure to argue frivolous or groundless matters does not make counsel ineffective.”).

¶5 In his petition for review, Hertel relies on many of the same arguments he made below. Because the trial court addressed those arguments correctly and at length in its ruling, we need not repeat that analysis here; instead, we adopt it. See *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We address Hertel’s arguments only to the extent that he disputes that analysis.

¶6 In challenging the trial court’s determination that he had “voluntarily absent[ed] himself” from pre-trial and trial proceedings, Ariz. R. Crim. P. 9.1, Hertel contends that “[w]ithout [his] signature on the [Conditions of Release] form[,] it cannot be ascertained that [he] had personal knowledge of the right to be present at trial.” And, despite the form’s indication that a copy was to be provided to him, he asserts, as he did below, that he never received it. Hertel also argues the trial court erroneously relied on cases such as *State v. Bishop* for the proposition that “[a]n out-of-custody defendant has the responsibility to remain in contact with his attorney and the court,” 139 Ariz. 567, 571, 679 P.2d 1054, 1058

proceeding would go forward in his or her absence should he or she fail to appear.” Ariz. R. Crim. P. 9.1.

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(1984), alleging he had never been expressly informed of his responsibility to do so.

¶7 In its ruling, the trial court noted multiple occasions on which Hertel had been advised of his duty to appear and warned that a trial would proceed in his absence.² And, as we have explained, “The pivotal question is whether the defendant waived his right to be present by his voluntary absence and Rule 9.1 merely suggests one combination of factors which may support an inference of voluntariness.” *State ex rel. Romley v. Superior Court (Ochoa)*, 183 Ariz. 139, 144, 901 P.2d 1169, 1174 (App. 1995), quoting *State v. Cook*, 115 Ariz. 146, 149, 564 P.2d 97, 100 (App. 1977), supplemented, 118 Ariz. 154, 575 P.2d 353 (App. 1978), overruled in part on other grounds, *State v. Fettis*, 136 Ariz. 58, 59, 664 P.2d 208, 209 (1983).

¶8 In *Ochoa*, we concluded trial *in absentia* was warranted when a defendant had escaped from custody, even though he had no notice of his trial date and had never been informed of an obligation to maintain contact with his attorney or the court. *Id.* at 143, 145. We observed, “[T]he fact of his escape itself provided evidence of his intent not to appear at trial no matter when it was held,” supporting the trial court’s ruling that he could be tried *in absentia*. *Id.* at 145.

¶9 Similarly, here, Hertel apparently did not contact his attorney or the court during the nine months between his last court appearance in October 2000 and his trial in July 2001, and Hertel’s wife had told his attorney that he had “left a note,” was “gone,” and “wasn’t coming back.” Moreover, Hertel has not suggested, in his petition below or on review, that his leaving and remaining outside

²For example, at a case management conference on September 5, 2000, six weeks before his last pre-trial court appearance, the trial court informed Hertel: “[Y]ou need to be back here on October 3rd. If you fail to appear, a warrant would issue for your arrest, and any trial would go forward in your absence. You understand?” Hertel replied, “Yes.”

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the United States for more than a decade had been anything but voluntary. *Cf. State v. Sainz*, 186 Ariz. 470, 473, 924 P.2d 474, 477 (App. 1996) (upon defendant's return to court after trial *in absentia* "trial court must, *if asked*, determine whether the defendant's absence was, in fact, voluntary" based on facts unknown to court prior to trial) (emphasis added).

¶10 Hertel has provided no basis to conclude the trial court abused its discretion in summarily denying post-conviction relief. *See Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d at 67. Accordingly, although we grant review, relief is denied.