

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GUILLERMO E. COONEY,
Petitioner.

No. 2 CA-CR 2015-0364-PR
Filed April 6, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20103945001

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

Steven R. Sonenberg, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Petitioner

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Petitioner Guillermo Cooney seeks review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Cooney has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Cooney was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI). The trial court imposed enhanced, concurrent, presumptive prison terms of ten years. This court affirmed the convictions and sentences on appeal. *State v. Cooney*, 233 Ariz. 335, ¶ 19, 312 P.3d 134, 140 (App. 2013).

¶3 Cooney initiated a proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel. Specifically he argued counsel was ineffective in failing to challenge his indictment on the two charges pursuant to A.R.S. § 28-1383(A)(2), or to seek to preclude evidence of his incarceration during the years preceding the current DUI convictions. The trial court summarily dismissed the petition, and denied Cooney's subsequent motion for reconsideration.

¶4 On review, Cooney repeats his claim that trial counsel was ineffective in failing to move to dismiss the two counts of the

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indictment before trial.¹ He argues the trial court “erred in failing to find that [these counts] were insufficient as a matter of law.” We conclude, however, that even were counsel’s performance in this regard deficient, Cooney has not established he was prejudiced.

¶5 “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.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶6 In this case, we agree with the trial court that had counsel moved for remand to the grand jury, “the state could have easily presented evidence of excluded time, as it did during trial.” Section 28-1383(B) provides that “the time that a person is incarcerated in any state, federal, county or city jail or correctional facility is excluded when determining the eighty-four month period provided in subsection A, paragraph 2 ... of this section.” Thus, even were we to accept that counsel’s failure to seek remand was deficient and that such a motion would have been successful, we cannot say Cooney has established that the result of the proceeding here would have been different. *See Strickland*, 466 U.S. at 694.

¶7 Therefore, although we grant the petition for review, we deny relief.

¹Cooney abandons his claim that counsel was ineffective in failing to seek to exclude the evidence of his incarceration, and we therefore do not address it.