

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

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

FORREST EARL HOUSEWORTH,  
*Petitioner.*

No. 2 CA-CR 2016-0262-PR  
Filed December 21, 2016

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NOT FOR PUBLICATION  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

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Petition for Review from the Superior Court in Cochise County  
No. CR201200252  
The Honorable Karl D. Elledge, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Brian M. McIntyre, Cochise County Attorney  
By Roger H. Contreras, Deputy County Attorney, Bisbee  
*Counsel for Respondent*

Forrest Houseworth, Eloy  
*In Propria Persona*

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**MEMORANDUM DECISION**

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

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E C K E R S T R O M, Chief Judge:

¶1 Forrest Houseworth seeks review of the trial court’s order dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Houseworth has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Houseworth was convicted of transporting a dangerous drug for sale, possessing a dangerous drug for sale,<sup>1</sup> four counts of weapons misconduct, two counts of possession of marijuana weighing less than two pounds, nine counts of possession of drug paraphernalia, and resisting arrest. The trial court sentenced him to consecutive and concurrent prison terms totaling 22.5 years. We affirmed Houseworth’s convictions and sentences on appeal. *State v. Houseworth*, No. 2 CA-CR 2014-0081 (Ariz. App. Apr. 8, 2015) (mem. decision).

¶3 Houseworth sought post-conviction relief and appointed counsel filed a notice of completion stating he was unable to find a colorable claim to raise in a Rule 32 petition. In April 2016, Houseworth filed a pro se petition. In its ruling dismissing that petition, the trial court found only one of Houseworth’s ineffective assistance claims “require[d] closer examination,” to wit, “that his [second] trial counsel advised [him] not to accept a favorable plea

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<sup>1</sup>The trial court later vacated this count after it concluded it was a lesser-included offense of transporting a dangerous drug for sale.

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agreement.” Relying on the ruling from a hearing held pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), during which Houseworth had declined the state’s plea offer, the court concluded the record did not support his claim.

¶4 On review, Houseworth argues the trial court erred by summarily dismissing his claim that his second trial attorney had erroneously advised him to reject the state’s second plea offer. Following a *Donald* hearing conducted at an early resolution conference, a different division of the trial court concluded Houseworth “was informed of the possible consequences if the plea offer was accepted and was also informed of the possible consequences if found guilty on the charges now pending in Justice Court,” and “was given the opportunity to address any questions regarding both the plea offer and the anticipated charges. After being fully advised, [Houseworth] declined the plea offer.”

¶5 As the trial court correctly concluded, Houseworth did not present any evidence to meaningfully challenge the ruling that a proper *Donald* hearing had been held. Moreover, it does not appear that the transcript of that hearing was designated as part of the record before us. “It is within the defendant’s control as to what the record on appeal will contain, and it is the defendant’s duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to be raised in the appeal.” *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990). “Where matters are not included in the record on appeal, the missing portion of the record will be presumed to support the decision of the trial court.” *Id.* Accordingly, in the absence of any evidence to the contrary, we conclude the court’s reliance upon the ruling from the *Donald* hearing was not unreasonable. We similarly find unpersuasive Houseworth’s unsupported assertion that his first trial attorney incorrectly advised him to reject the state’s first plea offer of five years, for which he maintains no *Donald* hearing was conducted.

¶6 To the extent Houseworth claims he received ineffective assistance of counsel because counsel erroneously advised him as to his chances of success at trial, a claim of ineffective assistance of counsel requires a showing that counsel’s performance was deficient

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under prevailing professional norms and that the deficient performance prejudiced him. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Houseworth has not made a showing that his attorney's conduct fell below professional norms, and we therefore need not consider whether he was prejudiced. *See State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635 (App. 2005).

¶7 Houseworth further argues the trial court erred in summarily dismissing his other claims that: 1) trial counsel advised him to fabricate a third-party liability theory, which ultimately caused the court to impose a longer sentence; and 2) at sentencing, counsel failed to present "substantial medical evidence" that Houseworth suffered from mental and cognitive defects and post-traumatic stress disorder. Houseworth essentially reasserts the claims he raised below, maintaining the brevity of the court's ruling suggests it did not consider these arguments; he characterizes the court's conduct as "blind subterfuge" and "judicial avoidance." He cites Rule 32.6 in support of his belief that the court was required "to make a full factual determination before" denying his claims. However, that rule requires a court to summarily dismiss claims when a defendant has not "present[ed] a material issue of fact or law which would entitle the defendant to relief." Ariz. R. Crim. P. 32.6(c). Here, the court concluded Houseworth "ha[d] not presented a material issue of fact or law that would entitle him to relief under Rule 32.1, Ariz. R. Crim. P., and no purpose would be served by any further proceedings," as it was entitled to do.

¶8 Underlying Houseworth's argument that the trial court's ruling lacked sufficient detail is his contention that his claims were colorable and that he is entitled to an evidentiary hearing. A claim is colorable, thereby entitling the defendant to an evidentiary hearing, only if the "allegations, if true, would have changed the verdict." *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995). To present a colorable claim of ineffective assistance of counsel, Houseworth was required to show both that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced him. *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68; *see also Strickland*, 466 U.S. at 687-88.

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¶9 Houseworth maintains trial counsel “convinced [him] to lie” and to misrepresent a theory of third-party liability to the trial court and to the individual who prepared the presentence report. However, other than his own assertion that this is true, the record does not support his claim. Although the court expressed displeasure with the fact that Houseworth had not accepted responsibility for his actions and noted that the “opportunity” to do so “was missed in this case,” the court’s comments do not establish that counsel was responsible for Houseworth’s conduct, as he now suggests.

¶10 In fact, at the hearing on Houseworth’s motion for change of representation, trial counsel testified that Houseworth would not follow his advice and had asked counsel to present an “unethical” defense. Nor does the record support Houseworth’s assertion his sentence was increased as a result of his failure to take responsibility. Finally, Houseworth offers no evidence to support his claim that there was “substantial medical evidence” of his mental defects and that counsel was deficient for failing to present such evidence in mitigation at sentencing. We thus conclude the trial court did not abuse its discretion by summarily dismissing these claims.

¶11 For all of these reasons, we grant review but deny relief.