NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
APR -8 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2009-0377-PR
Respondent,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
JAMES MATTHEWSON,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701012

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Karp & Weiss, P.C.
By Stephen M. Weiss — Tucson
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 After a jury trial, petitioner James Matthewson was convicted of driving under the influence of alcohol (DUI), driving with an alcohol concentration (AC) of .08 or more, and negligent homicide. This court affirmed his convictions and sentences on appeal. *State v. Matthewson*, No. 2 CA-CR 2008-0176 (memorandum decision filed

April 30, 2009). In his petition for review, Matthewson challenges the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged numerous instances of ineffective assistance of counsel. Matthewson contends that at the very least he was entitled to an evidentiary hearing. Absent a clear abuse of discretion, we will not disturb the court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient—based on prevailing professional norms—and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Like the ultimate decision whether to grant or deny post-conviction relief, whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶3 In his petition for post-conviction relief, Matthewson pointed to a number of instances in which trial counsel's performance had been deficient and requested a new trial. Expanding on the following claims in his memorandum, he contended, inter alia, that counsel: failed to "subject the State's case to meaningful adversarial testing," by conducting deficient pretrial interviews; failed to challenge properly the AC test results;

did not present an expert or other witness to establish a reasonable doubt as to whether Matthewson had been intoxicated; failed to cross-examine adequately the state's witnesses, who testified about Matthewson's level of impairment; and did not submit a "theory of defense instruction concerning supervening and/or intervening cause[,] which [Matthewson claimed] was clearly justified by the evidence." Denying the petition, the trial court stated: "[T]he record of the entire trial clearly indicates that, while the Defendant did not receive a 'perfect' trial, he did receive a fair trial." The court further found, "no single issue raised by Defendant's counsel, nor all the issues in conjunction, would lead this Court to find that Defendant's trial counsel was so ineffective as to mandate setting aside the Jury's verdict, the convictions and ordering a new trial."

¶4 In his petition for review, Matthewson essentially reiterates his claims. He contends counsel was ineffective because he inadequately cross-examined the state's criminalist and failed to retain an expert to challenge the .08 AC test result, which he insists provided the only evidence of impairment because of the statutory presumption that he was intoxicated. He argues that he raised a colorable claim for relief on this claim and that the trial court abused its discretion by denying relief without an evidentiary hearing. Matthewson also argues the court erred by dismissing the claim based in part on its finding that attorneys may employ different trial tactics; he contends the affidavit of criminal defense lawyer Michael Bloom established Matthewson's trial counsel had performed inconsistently with prevailing professional norms.

¶5 Additionally, Matthewson again asserts trial counsel had been ineffective because he failed to request a jury instruction on the defense of intervening/superseding

cause and did not conduct adequate pretrial interviews. He contends, as he did below, that counsel did not question properly either the state's criminalist or an off-duty police officer who had witnessed the accident. He insists counsel's failures during discovery affected his cross-examination of the witnesses at trial.

¶6 Matthewson has not persuaded us the trial court abused its discretion by summarily dismissing the petition for post-conviction relief. "[D]isagreements as to trial strategy or errors in trial tactics will not support an effectiveness claim so long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). A reviewing court should give great deference to tactical decisions made by counsel and should refrain from evaluating counsel's performance in the harsh light of hindsight. *See State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). And here, it appears trial counsel chose to challenge the state's evidence by, inter alia, establishing during his cross-examination of the state's expert that the officer's detection of only two out of six cues of intoxication under the horizontal gaze nystagmus test did not correlate with Matthewson's AC of .088. That counsel did not present the testimony of his own expert appears to have been neither deficient nor prejudicial.

¶7 Moreover, as the trial court correctly noted in its order, the constitution only "'entitles a criminal defendant to a fair trial, not a perfect one.'" *State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231, 239 (2003), *quoting Rose v. Clark*, 478 U.S. 570, 579 (1986). Similarly, "[d]efendants are not guaranteed perfect counsel, only competent counsel." *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989); *see also State v. Jenkins*, 148 Ariz. 463, 467, 715 P.2d 716, 720 (1986). Even assuming, without

deciding, that certain of counsel's decisions amounted to deficient performance, Matthewson has not established the trial court abused its discretion by finding that his trial nevertheless had been fair and that there was insufficient reason "to mandate setting aside the Jury's verdict." Implicit in the court's ruling is the additional finding that Matthewson had not shown a reasonable probability existed that the outcome would have been different.[1] *See Strickland*, 466 U.S. at 687, 694. On the record before us, we cannot say Matthewson sustained his burden of establishing the trial court abused its discretion.

¶8 For the reasons stated, we grant Matthewson's petition for review but deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

[1]We infer this finding based on the trial court's order taken as a whole. Moreover, unless it is apparent the court misapplied the law, "[w]e presume that a court is aware of the relevant law and applies it correctly in arriving at its ruling." *State v. Moody*, 208 Ariz. 424, ¶ 49, 94 P.3d 1119, 1138 (2004).