

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 -9 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0049-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
JOSE JUAN OCHOA,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR20080357

Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

Matthew J. Smith, Mohave County Attorney  
By Gregory A. McPhillips

Kingman  
Attorneys for Respondent

Clifford Levenson

Phoenix  
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Jose Ochoa seeks review of the trial court's denial of his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, deny relief.

¶2 After entering a plea agreement, Ochoa was convicted of conspiracy to sell dangerous drugs, second-degree money laundering, and two counts of attempted transportation of dangerous drugs for sale. The trial court sentenced him to aggravated terms of imprisonment, three consecutive and the other concurrent, totaling fifteen years. Ochoa then filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and, in his petition below, claimed his plea of guilty had been induced by ineffective assistance of trial counsel. Specifically, Ochoa argued his attorneys' performance was ineffective because they had made "erroneous representations to him regarding" plea negotiations, had "fail[ed] to adequately prepare for trial," and had induced him to plead guilty by telling him, less than a month before his trial date, that he should accept the state's plea offer because "they did not have enough time to adequately prepare for trial." The court denied relief after an evidentiary hearing, and this petition for review followed.

¶3 On review, Ochoa argues the trial court abused its discretion in finding his testimony was not credible and therefore finding "as a matter of fact that [Ochoa's] trial counsel did not advise him that he would not be ready to go to trial and that that was therefore not the reason for [Ochoa] pleading guilty pursuant to the plea agreement." According to Ochoa, his testimony that counsel had told him they could not be prepared for trial in a month's time "was not contradicted by any evidence presented at the hearing," and the court's finding thus was "not supported by evidence." He argues the finding was instead the result of the "court's preoccupation with" record evidence of counsels' efforts on Ochoa's behalf, which the court found "included filing a motion to

suppress the evidence obtained as a result of [a] wiretap, interviewing at least several dozen witnesses[,] and trying to negotiate a favorable plea agreement.”

¶4 In addressing this point in its order, the court stated the “attorney actually handling this case” when Ochoa pleaded guilty testified

that he does not recall telling [Ochoa] that he could not be ready to try the case in a month. He did testify that [his] firm would in fact be ready to try this case as scheduled. The reference to “the firm” may have suggested that there was more than one attorney [who] would be mobilized to prepare this case for trial. The Court understood [counsel’s] testimony to be that he does not remember making the statement attributed to him by [Ochoa] but that he would have had no reason to make the statement because his firm would in fact be ready for trial. [Ochoa] testified unequivocally that he was told that his attorney would not be ready for trial, forcing him to accept a plea agreement instead of going to trial.

The trial court further found Ochoa had failed to establish his claim that counsel also had been “ineffective for failing to interview certain witnesses,” noting,

[O]ther than suggesting that [these witnesses] could discredit [a state’s witness,] there is no indication as to what their testimony actually would have been. Those persons presumably could have been subpoenaed for the evidentiary hearing to show what testimony they would or could have presented that would have been favorable to [Ochoa’s] defense. There were not even any affidavits from such persons. [Ochoa] has failed to meet his burden of showing how he was prejudiced even if his trial attorney did fail to interview potential witnesses as requested.

“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). Ochoa has not sustained his burden of establishing an abuse of discretion here.

¶5 It is a petitioner’s burden to prove by a preponderance of the evidence all factual allegations raised in his petition for post-conviction relief. Ariz. R. Crim. P. 32.8(c). And, when the court has held an evidentiary hearing, we defer to its factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). Thus, we “view the facts in the light most favorable to sustaining the lower court’s ruling, and we must resolve all reasonable inferences against the defendant.” *Id.* Moreover, “the trial court is the sole arbitrator of the credibility of witnesses” in post-conviction proceedings. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). It is for that court, not this one, to resolve any factual disputes underlying an ineffective assistance of counsel claim. *See State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995).

¶6 Notwithstanding Ochoa’s argument, a trial court “is not compelled to believe the uncontradicted evidence of an interested party.” *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, ¶ 12, 9 P.3d 314, 318 (2000); *see also State v. Pieck*, 111 Ariz. 318, 320, 529 P.2d 217, 219 (1974) (same); *Kocher v. Dep’t of Revenue*, 206 Ariz. 480, ¶ 10, 80 P.3d 287, 289 (App. 2003) (same). The court did not abuse its discretion in finding Ochoa’s testimony was not credible. *See Limsico v. U.S. Immigration & Naturalization Serv.*, 951 F.2d 210, 215 (9th Cir. 1991) (“Disbelief of a defendant’s testimony by the fact finder, along with other evidence, may provide the basis for a conclusion that the opposite of the testimony is true.”).

¶7 Ochoa also argues the trial court failed to address his contention, not raised until the evidentiary hearing, that counsel had been ineffective in failing to interview

another witness, D.M. Sr. And he maintains the court failed to “consider the failure to interview these witnesses as evidence of lack of preparedness for trial.” But “where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence,” prejudice will depend on “the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea,” which, “in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). As the court observed, Ochoa offered nothing more than his own conclusory assertions to establish the potential witnesses identified in his petition would have offered helpful testimony at trial, and that observation would apply equally to Ochoa’s assertions about D.M. Sr. The court did not abuse its discretion in concluding Ochoa failed to meet his burden of showing any prejudice resulting from counsel’s failure to interview witnesses.

¶8 In sum, Ochoa has failed to establish any abuse of discretion in the trial court’s denial of post-conviction relief. Accordingly, review is granted, but relief is denied.

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

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

/s/ Michael Miller  
MICHAEL MILLER, Judge