

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

JUL 15 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0200-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVIS MICHAEL ROMERO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007006033001DT

Honorable Andrew G. Klein, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Diane Meloche

Phoenix
Attorneys for Respondent

Davis Michael Romero

Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Davis Romero seeks review of the trial court’s order denying 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). Romero has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Romero was convicted of five counts of sexual conduct with a minor, thirteen counts of tampering with a witness, and two counts of influencing a witness. The trial court imposed consecutive terms of life imprisonment without the possibility of release for thirty-five years for each of the five counts of sexual conduct, concurrent, presumptive terms of 1.5 years’ imprisonment on each count of influencing a witness, and one-year terms of imprisonment for each count of tampering with a witness, to be served consecutive to the sentences for sexual conduct. Before filing a notice of appeal, Romero filed a notice of post-conviction relief but moved to withdraw it “without prejudice to allow for refiling at a later date.” The trial court granted the motion. Romero’s convictions and sentences were affirmed on appeal. *State v. Romero*, No. 1 CA-CR 08-0580 (memorandum decision filed Apr. 29, 2010).

¶3 Romero filed another notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and had been “unable to find a tenable issue to submit . . . pursuant to” Rule 32. In a pro se supplemental petition Romero argued (1) he had been improperly sentenced, (2) his double-jeopardy rights had been violated, (3) evidence that Romero and the victim had engaged in sexual acts in another state had been improperly admitted under Rule 404(c), Ariz. R. Evid., (4)

evidence relating to charges that had been dismissed by the court had been admitted at trial, (5) the “Maricopa County Superior Court is without subject matter jurisdiction” to try or convict him due to a lack of an “enacting clause” for the Arizona Revised Statutes, (6) his right to confront witnesses against him had been violated, (7) the prosecutor presented perjured testimony and the state obtained evidence “through an illegal search and seizure,” and (8) he had received ineffective assistance of trial and appellate counsel. The trial court concluded all of Romero’s claims except those relating to ineffective assistance of counsel were precluded and he had failed to state a colorable claim of ineffective assistance.

¶4 On review, Romero largely repeats his arguments made below, claims the trial court abused its discretion in denying his petition, and asserts the court “act[ed] with bias and prejudice toward” him. We agree with the trial court that most of Romero’s claims are precluded. Pursuant to Rule 32.2(a)(2) and (3), all claims that were “[f]inally adjudicated on the merits on appeal” or “[t]hat has been waived at trial [or] on appeal” are precluded from relief. All of Romero’s claims except his claims of ineffective assistance of counsel could have been raised on appeal and are therefore precluded. And Romero has not established that any of the exceptions to preclusion apply. *See* Ariz. R. Crim. P. 32.2(b). Although he argues that a claim of lack of subject matter jurisdiction may be raised at any time and is therefore not subject to preclusion, such a claim as a ground for relief under Rule 32 falls under either Rule 32.1(a) or (c), and claims brought under those subsections are not exempted from preclusion by Rule 32.2(b).

¶5 Furthermore, we agree with the trial court’s conclusion that Romero failed to state a colorable claim of ineffective assistance of counsel. As the court pointed out, to establish such a claim, Romero was required to show that counsel’s performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). Trial counsel is presumed to have acted properly unless a petitioner can show that counsel’s decisions were not tactical, “but, rather, revealed ineptitude, inexperience or lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). “Matters of trial strategy and tactics are committed to defense counsel’s judgment” and generally cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988).

¶6 As the trial court correctly concluded, Romero’s claims largely address matters of trial strategy and he has failed to overcome the ““strong presumption”” that counsel’s performance was effective. *State v. Walton*, 159 Ariz. 571, 592, 769 P.2d 1017, 1038 (1989), *quoting Strickland*, 466 U.S. at 689. “Disagreements as to trial strategy or errors in trial [tactics] will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis.” *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984). And “[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation,” *Meeker*, 143 Ariz. at 264, 693 P.2d at 919, but Romero has provided nothing more than speculation in support of his claims of ineffective assistance. He provided no affidavits or other evidence to

show that trial or appellate counsel’s performance fell below professional norms and his bald assertions of error are insufficient to sustain his burden of demonstrating the first requirement of the *Strickland* test. See *State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim “must consist of more than conclusory assertions”).

¶7 Finally, Romero alleges the trial court “acted with bias and prejudice” in denying his petition for post-conviction relief. But, “[a] trial judge is presumed to be free of bias and prejudice,” and a defendant must show by a preponderance of the evidence that the . . . judge was, in fact, biased.” *State v. Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d 756, 768 (App. 2005), quoting *State v. Hurley*, 197 Ariz. 400, ¶ 24, 4 P.3d 455, 459 (App. 2000).

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Id., quoting *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997). We cannot say the court here displayed such antagonism. The comments about Romero in the court’s ruling were limited to his conduct during trial and, contrary to Romero’s assertions that they related to all of his claims, the comments were focused on how Romero’s behavior would have impacted counsel’s performance in relation to Romero’s claims of ineffective assistance.

¶8 For all these reasons, although we grant the petition for review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge