

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

SEP 11 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0254-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RUBEN ROMIE AGUILAR,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20090210

Honorable Michael R. Bluff, Judge

REVIEW GRANTED; RELIEF DENIED

Sheila Sullivan Polk, Yavapai County Attorney
By Stephen J. Sisneros

Prescott
Attorneys for Respondent

Craig Williams, Attorney at Law, P.L.L.C.
By Craig Williams

Prescott Valley
Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Ruben Aguilar was convicted after a jury trial of sexual assault, kidnapping, robbery, two counts of aggravated assault, identity theft and theft of a credit card. The trial court sentenced him to concurrent prison terms, the longest of which was

eighteen years. This court affirmed Aguilar's convictions and sentences on appeal. *State v. Aguilar*, No. 1 CA-CR 10-0643, ¶ 2 (memorandum decision filed Aug. 16, 2011). Aguilar sought relief pursuant to Rule 32, Ariz. R. Crim. P., claiming trial counsel had been ineffective. The trial court denied relief without an evidentiary hearing and this petition for review followed. We will not disturb the trial court's ruling unless it clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Aguilar has not sustained his burden of establishing such abuse here.

¶2 In his Rule 32 petition, Aguilar claimed trial counsel had been ineffective in failing to introduce at trial evidence about the pain Aguilar must have been experiencing in his right hand at the time of the assault because he had broken it a week earlier, and evidence regarding the nature and extent of his injuries and the resulting limited use of his hand. Aguilar asserted this evidence would have established he could not have punched the victim in the face, breaking her nose, thereby supporting his defense that he and the victim had engaged in consensual sex earlier in the day and that someone else must have assaulted her that night, hitting her in the face, kidnapping her, and then sexually assaulting her. Trial counsel stated in her affidavit, however, that she had tried to find the physician who had taken the x-rays of Aguilar's broken hand but could not locate him, although she did obtain the medical records. She also stated the physicians she had spoken to "were not in a position to offer an opinion regarding use of the hand."

¶3 The trial court concluded Aguilar had not presented a colorable claim of ineffective assistance of counsel. As the court correctly noted, counsel had presented some evidence about the broken hand at trial.¹ And, the court further observed, counsel

¹That evidence included the testimony of Aguilar's supervisor at work that Aguilar was on light duty because he had injured his hand. Additionally, the parties stipulated to

had made strategic decisions with Aguilar’s knowledge not to present certain evidence and was unable to present other evidence, including the testimony of the physician who had treated Aguilar after he had broken his hand. The court also found Aguilar had “not shown there is a reasonable probability that but for counsel’s trial strategic decision the result would have been different.”

¶4 On review, Aguilar contends the trial court abused its discretion by denying relief, insisting that at the very least he was entitled to an evidentiary hearing. A defendant is entitled to an evidentiary hearing only when he or she makes a colorable claim, “one that, if the allegations are true, might have changed the outcome.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 67 (2006), quoting *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). To obtain an evidentiary hearing, Aguilar was required to make a colorable claim “that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *Id.* ¶ 21; see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶5 Aguilar argues counsel “failed to locate and present vital exculpatory evidentiary testimony from the emergency room doctor at trial: compelling evidence that the Petitioner could not have committed any assault(s).” He maintains the doctor’s testimony about how painful the break was and “how disabling the broken hand would be,” was crucial to his defense. He insists the outcome of the trial “probably would have been different” had the evidence been introduced. Acknowledging trial counsel’s statement in her affidavit that she could not “locate the doctor who x-rayed Ruben’s

the admission of Aguilar’s medical records, which included the emergency room records from when Aguilar sought treatment after breaking his hand. And, Aguilar was permitted to show his hand to the jury and testified he had broken his hand and, as a consequence, he had trouble raking, laying grass, picking up heavy things, mowing a lawn, and using a shovel.

hand,” Aguilar insists counsel did not try hard enough to find the physician, pointing out that Rule 32 counsel found him with little difficulty. Aguilar argues trial counsel did not make a tactical decision not to call the physician as a witness; rather, she failed to do so because of deficient pre-trial preparation and investigation. Thus, Aguilar asserts, the trial court’s finding that counsel had been unable to present a physician to testify about the extent of the limitations on Aguilar’s use of his hand and the pain he must have been experiencing was incorrect.

¶6 First, “disagreements 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). Second, even assuming Aguilar is correct that trial counsel could have expended greater effort in trying to find the physician who had treated Aguilar and that her failure to present this evidence was not the result of a tactical decision, Aguilar is not entitled to relief. The record before us includes the victim’s testimony that she believed Aguilar was the person who had assaulted her as well as the evidence introduced about his hand—the medical records and Aguilar’s own testimony about the pain, the incorrect way the broken bones had healed, and the resulting limitations on his ability to use his right hand. Equally important, Aguilar does not present any evidence that the physician who x-rayed him would have supported his contention that he could not have sexually assaulted the victim in the manner described by her.

¶7 Based on that record, Aguilar has not established the trial court abused its discretion by concluding the additional evidence probably would not have changed the outcome of the trial. *See State v. Nash*, 143 Ariz. 393, 397-98, 694 P.2d 222, 227-28 (1985) (adopting *Strickland* test and stating prejudice element requires showing that but

for deficient performance outcome probably would have been different). We adopt the court’s ruling, *see State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993), and conclude it did not err in denying relief without an evidentiary hearing and finding Aguilar had failed to raise a colorable claim for relief. *See State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004) (colorable claim warranting evidentiary hearing is “one that, if the allegations are true, might have changed the outcome”), *quoting Runnigeagle*, 176 Ariz. at 63, 859 P.2d at 173; Ariz. R. Crim. P. 32.6(c) (permitting summary dismissal of petition when no “material issue of fact or law” exists); Ariz. R. Crim. P. 32.8(a) (purpose of evidentiary hearing to “determine issues of material fact”).

¶8 For the reasons stated, we grant the petition for review but 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