

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RAYMOND GABRIEL CABRERA,
Petitioner.

No. 2 CA-CR 2013-0358-PR
Filed November 15, 2013

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24

Petition for Review from the Superior Court in Maricopa County
No. CR20081645044001SE
The Honorable Emmet Ronan, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin, Deputy Attorney, Phoenix

Counsel for Respondent

Raymond G. Cabrera, San Luis

In Propria Persona

STATE v. CABRERA
Decision of the Court

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Raymond Cabrera petitions this court for 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 that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Cabrera has not met his burden of establishing such abuse here.

¶2 Cabrera was convicted after a jury trial of robbery and sentenced to a six-year prison term. We affirmed his conviction and sentence on appeal. *State v. Cabrera*, No. 1 CA-CR 09-0617 (memorandum decision filed May 18, 2010). Cabrera then sought post-conviction relief, asserting his trial counsel had been ineffective in failing to interview and call at trial two witnesses—M.M., who was charged with committing the same robbery and had entered a guilty plea, and G.J., who had been present during the robbery—who allegedly would have testified Cabrera had not been present and another person had participated in the robbery.

¶3 After an evidentiary hearing, the trial court denied relief. It determined Cabrera's counsel's performance did not fall below prevailing professional norms. The court found M.M. had been unavailable as a witness because, although he had entered his plea before Cabrera's trial, "his case was still pending" because his time for filing a petition for post-conviction relief had not expired and it was unlikely the court would have continued the trial based on the possibility M.M. would testify. The court also noted that an investigator had failed to locate G.J. before trial and that she had not responded to a subpoena to testify at the evidentiary hearing and

STATE v. CABRERA
Decision of the Court

thus it was “questionable whether she would have responded to a trial subpoena even if the investigator had been able to locate her.” Finally, the court determined Cabrera had not shown prejudice in light of “credibility issues” with M.M. and G.J., the fact the victim had identified Cabrera in a pretrial lineup, and the presence of Cabrera’s fingerprint on the outside of the vehicle used during the robbery.

¶4 To prevail on a claim of ineffective assistance of counsel, Cabrera was required to show that counsel’s performance both fell below prevailing professional norms and prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). To demonstrate prejudice, Cabrera must show there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984), *quoting Strickland*, 466 U.S. at 694.

¶5 In his pro se petition for review, Cabrera generally reurges his claim and argues the trial court erred in concluding M.M. would have been unavailable to testify because M.M. did not seek post-conviction relief and thus could have been available at the time of Cabrera’s trial. Even were that the case, however, Cabrera has identified no evidence in the record suggesting M.M. would have been willing to testify at trial, nor has he addressed the trial court’s determination that M.M.’s testimony would not have changed the verdict. Notably, Cabrera did not provide this court with a transcript of the evidentiary hearing, and we therefore must presume the contents of that missing transcript support the court’s ruling. *See State v. Wilson*, 179 Ariz. 17, n.1, 875 P.2d 1322, 1324 n.1 (App. 1993); *see also* Ariz. R. Crim. P. 32.8(e) (“The court may, and shall upon request of a party within the time for filing a petition for review, order that a certified transcript of the evidentiary hearing be prepared.”).

¶6 Cabrera does not otherwise attempt to identify any error in the trial court’s ruling and instead raises several claims not raised below, including that the state failed to disclose exculpatory evidence showing that samples taken from the vehicle interior did

STATE v. CABRERA
Decision of the Court

not match Cabrera's DNA¹ profile and that the state failed to adequately investigate an alternate suspect in the case. We do not address claims not raised in the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶7 For the reasons stated, although review is granted, relief is denied.

¹Deoxyribonucleic acid.