

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SHELTON OGUYNN JR.,
Petitioner.

No. 2 CA-CR 2013-0460-PR
Filed January 14, 2014

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NOT FOR PUBLICATION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. CR2010144624003SE

The Honorable James T. Blomo, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Shelton Oguynn Jr., Douglas
In Propria Persona

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MEMORANDUM DECISION

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

H O W A R D, Chief Judge:

¶1 Petitioner Shelton Oguynn Jr. 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). Oguynn has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Oguynn was convicted of two counts of kidnapping. The trial court imposed a “slightly aggravated,” fourteen-year term of imprisonment on one count and suspended the imposition of sentence on the remaining count, placing Oguynn on a four-year term of probation to begin upon his discharge from prison.

¶3 Oguynn thereafter initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and was “unable to find any claims for relief to raise in post-conviction relief proceedings.” In a supplemental pro se petition, however, Oguynn claimed he had received ineffective assistance of counsel. He specifically claimed his attorney had been “in-cooperative, non-compliant, and un-helpful.” Oguynn also asserted that before signing his plea he had been “incarcerated in general population” and was “under stress of not knowing what I needed to be doing.” He requested “[a] mitigated hearing and chance to negotiate [a] new plea.” In his reply to the state’s response to his petition, Oguynn specified counsel was ineffective in failing to request a bond reduction hearing or to “cooperate with [Oguynn’s]

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parents” before his scheduled trial. The trial court summarily denied relief.

¶4 On review, Oguynn repeats his claims of ineffective assistance of counsel based on conflict between himself and counsel, counsel’s failure to seek a bond reduction hearing, and counsel’s having “declined to cooperate” with Oguynn’s request “to have his parents assist [in his defense] on his behalf.”

¶5 To present a colorable claim of ineffective assistance of counsel, a defendant must 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). “A colorable claim of post-conviction relief is ‘one that, if the allegations are true, might have changed the outcome.’” *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), quoting *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶6 Additionally, 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 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).

¶7 “Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation.” *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984). There is “[a] strong presumption” that counsel “provided effective assistance,” *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant must overcome by providing evidence that counsel’s conduct did not

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comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶8 In this case, Oguynn provided no affidavits or other evidence in the trial court suggesting counsel's failure to request a bond hearing or to "cooperate" with Oguynn's parents fell below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."). And, it was only in his reply that he cited any legal authority to support a claim that actions by counsel purportedly similar to those here have been found to constitute ineffectiveness. *Cf. State v. Lopez*, 223 Ariz. 238, ¶ 7, 221 P.3d 1052, 1054 (App. 2009) (trial court need not consider issues first raised in petitioner's reply). Oguynn does not present any such authority on review. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "[t]he reasons why the petition should be granted" and "specific references to the record"); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010). Even if not waived, however, his reliance on *Hall v. United States*, 371 F.3d 969 (7th Cir. 2004), and *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998) is misplaced.

¶9 In *Hall*, the court addressed the attorney's conflict of interest, not conflict between the attorney and the client. 371 F.3d at 973-76. Likewise, the *Moore* court addressed a conflict of interest. 159 F.3d at 1157-58. Although the *Moore* court also addressed conflict between Moore and his attorney, the conflict there was irreconcilable, and Moore presented "consistent, persistent representations to the court" of "strong evidence of an irreconcilable conflict." *Id.* at 1159. No such evidence was presented here.

¶10 In sum, Oguynn's bald assertions that counsel was ineffective 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"). We therefore cannot say the trial court abused its discretion in denying relief. Thus, although the petition for review is granted, relief is denied.