

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

THE STATE OF ARIZONA,  
*Respondent,*

*v.*

HOWARD NED MCMONIGAL III,  
*Petitioner.*

No. 2 CA-CR 2013-0476-PR  
Filed April 4, 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NOT FOR PUBLICATION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 Pima County

No. CR20073959

The Honorable Jane L. Eikleberry, Judge

**REVIEW GRANTED; RELIEF DENIED**

---

COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Barton & Storts, P.C., Tucson  
By Brick P. Storts, III  
*Counsel for Petitioner*

STATE v. McMONIGAL  
Decision of the Court

---

**MEMORANDUM DECISION**

Chief Judge Howard authored the decision of the Court, in which Judge Miller and Judge Brammer<sup>1</sup> concurred.

---

H O W A R D, Chief Judge:

¶1 Petitioner Ned McMonigal III seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., after an evidentiary hearing upon remand from this court. "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). McMonigal has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, McMonigal was convicted of one count of illegally conducting an enterprise, three counts of theft, one count of possessing a motor vehicle with an altered identification number, five counts of kidnapping, three counts of sexual assault, one count of aggravated assault, and one count of possession of methamphetamine. He was sentenced to a combination of concurrent and consecutive prison terms totaling 128.75 years. We affirmed the convictions and sentences on appeal. *State v. McMonigal*, No. 2 CA-CR 2009-0099, ¶ 33 (memorandum decision filed Apr. 22, 2010).

¶3 McMonigal then sought post-conviction relief, raising various claims challenging the indictment against him, asserting trial error, and maintaining he had received ineffective assistance of trial counsel. The trial court summarily denied relief, and McMonigal sought review in this court. We granted review and

---

<sup>1</sup>The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

STATE v. McMONIGAL  
Decision of the Court

relief in part. *State v. McMonigal*, No. 2 CA-CR 2012-0217-PR, ¶¶ 8, 14 (memorandum decision filed Oct. 2, 2012). We concluded the court had improperly determined McMonigal's claim of ineffective assistance relating to counsel's failure to call a particular witness was precluded and not colorable. *Id.* ¶ 8. We remanded the matter for an evidentiary hearing on that claim. *Id.* ¶¶ 8, 14.

¶4 The trial court thereafter set an evidentiary hearing and appointed counsel to represent McMonigal. Following the hearing, the court granted McMonigal's motion to file a supplemental memorandum on the ineffective-assistance claim. After considering the evidence presented and the supplemental memoranda filed by McMonigal and the state, the court denied relief. It concluded counsel had made a tactical decision not to call the witness and her performance therefore was not deficient, and that, in any event, McMonigal had failed to establish prejudice based on counsel's failure to call the witness.

¶5 On review, McMonigal maintains the trial court's "ruling is simply not borne out by the testimony at the hearing and/or the transcribed record" and contends it therefore abused its discretion in rejecting his claim. Our review of the court's factual findings "is limited to a determination of whether those findings are clearly erroneous," and 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." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.*

¶6 As outlined in our previous decision, McMonigal's claim of ineffective assistance focused on the prospective testimony of Ashley Delima, who had signed an affidavit avowing that she knew several of McMonigal's victims and that they had lied in various aspects of their testimony. Trial counsel originally had prepared, although apparently improperly, a writ to have Delima transported as a witness for trial. Counsel volunteered to resubmit a corrected writ the following day, but did not do so.

STATE v. McMONIGAL  
Decision of the Court

¶7 At the evidentiary hearing, Delima testified in a manner generally consistent with her affidavit. McMonigal's trial counsel also testified, explaining that after her investigator had interviewed Delima, she had considered calling Delima as a witness. But she said that during a later interview, at which counsel was present, Delima was uncooperative, used "foul" language, and there was "a dramatic difference in the way she answered [the prosecutor's] questions and the way she answered" defense counsel's questions. Counsel testified that, after that interview, and after a conflicting witness testified in a compelling manner, she "beg[a]n to doubt" whether she should call Delima as a witness. Counsel went on to explain that she believed Delima would have come to court dressed in prison garb and was "just going to blow up in th[e] courtroom" upon cross-examination. She explained that after she had the initial problem with the writ required to transport Delima to court, she "really sat back and thought about" whether to call Delima as a witness, and had decided doing so would be "harmful to [the] case."

¶8 McMonigal had the burden of proving his factual allegations by a preponderance of the evidence. *See* Ariz. R. Crim. P. 32.8(c). And, the trial court was "the sole arbit[er] of the credibility of witnesses" at the evidentiary hearing. *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988); *see also Sasak*, 178 Ariz. at 186, 871 P.2d at 733 ("It is the duty of the trial court to resolve any conflicts in the evidence."). Evidence at the hearing supported the court's determination that counsel's decision was a reasoned, tactical one, and therefore could not support a claim of ineffective assistance of counsel. McMonigal's argument on review merely amounts to a request for us to reweigh the evidence, which we will not do.

¶9 Therefore, although we grant the petition for review, we deny relief.