

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAVID EARL BOOKMAN,
Petitioner.

No. 2 CA-CR 2013-0496-PR
Filed February 19, 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NOT FOR PUBLICATION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. CR2009005872001DT

The Honorable Barbara L. Spencer, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By E. Catherine Leisch, Deputy County Attorney, Phoenix
Counsel for Respondent

David Earl Bookman, Buckeye
In Propria Persona

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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 David Bookman petitions this court for review of the trial court’s order summarily dismissing 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). Bookman has not met his burden of demonstrating such abuse here.

¶2 Bookman was convicted after a jury trial of aggravated assault and sentenced to an 11.25-year prison term. We affirmed his conviction and his sentence as modified to reflect the correct amount of presentence incarceration credit. *State v. Bookman*, No. 1 CA-CR 10-0283 (memorandum decision filed May 17, 2011).

¶3 Bookman sought post-conviction relief, arguing that his trial counsel had been ineffective for failing to present “certain favorable evidence and/or witnesses” or evidence in “support [of the defense’s] inconsistent exculpatory theories.” Specifically, he claimed, counsel failed to present evidence to illustrate what he believed was implausible testimony by the victim, to find and interview witnesses, and to obtain and present medical evidence concerning the victim. Bookman attached no affidavits or other exhibits to his petition. The trial court summarily denied relief, noting the petition “does not provide any facts or evidence supported by affidavits, records, or other evidence” in support of Bookman’s claims.

¶4 On review, Bookman first asserts that, upon finding his petition “incomplete” due to the absence of supporting documents,

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the trial court was required by Rule 32.5 to return the petition to him to “remedy any deficiency.” Rule 32.5¹ governs the contents of a petition for post-conviction relief and states:

The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, and certify that he or she has done so. Facts within the defendant’s personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required. In Rule 32 of-right and non-capital cases, the petition shall not exceed 25 pages. . . . A petition which fails to comply with this rule shall be returned by the court to the defendant for revision with an order specifying how the petition fails to comply with the rule. A petition that has been revised to comply with the rule shall be returned by the defendant for refile within 30 days after defendant’s receipt of the non-complying petition. If the petition is not so returned, the court shall dismiss the proceedings with prejudice.

¹Rule 32.5 was revised effective January 1, 2014. We cite the version of the rule in effect at the time Bookman filed his petition for post-conviction relief. *See* Arizona Supreme Court Order No. R-13-0009 (filed Nov. 14, 2013).

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¶5 We apply the plain language of a rule unless the language is ambiguous. *State v. Martin*, 225 Ariz. 162, ¶ 11, 225 P.3d 1045, 1048 (App. 2010). Based on the rule’s plain language, we cannot agree with Bookman’s position. The rule describes several unconditional requirements a petition for post-conviction relief must meet. For example, it requires a declaration by the defendant to be included and sets page limits. Affidavits and other supporting materials, however, need only be included if they are “currently available to the defendant.” Ariz. R. Crim. P. 32.5. Upon receiving a petition, the trial court has no way of knowing whether such materials are available and the petitioner neglected to include them or whether the petitioner simply cannot muster such evidence in support of his or her claim. Accordingly, a petition lacking such supporting documentation does not necessarily “fail[] to comply with this rule” and the court need not return the petition to the petitioner. Ariz. R. Crim. P. 32.5. In any event, any error plainly was harmless because Bookman has not suggested there is any evidence or affidavit he could have provided that would entitle him to relief on his claims. *Cf. State v. Pena*, 209 Ariz. 503, ¶ 15, 104 P.3d 873, 877 (App. 2005) (“Error is harmless only if . . . , absent the error, the [trial] court would have reached the same result.”).

¶6 Bookman next asserts that his claims of ineffective assistance of counsel nonetheless warrant relief because counsel “never presented any defense against the charges, but instead, chose to leave the victim’s claims virtually uncontested.” Thus, he argues, we must presume prejudice because counsel did not “subject the state’s case to meaningful adversarial testing.” “[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *United States v. Cronin*, 466 U.S. 648, 659 (1984). But an “attorney’s failure must be *complete*” before prejudice will be presumed. *State v. Glassel*, 211 Ariz. 33, ¶ 63, 116 P.3d 1193, 1211 (2005), *quoting Bell v. Cone*, 535 U.S. 685, 697 (2002) (emphasis in *Glassel*).

¶7 The record does not support Bookman’s claim that his trial counsel presented no defense. Counsel raised objections, cross-examined the state’s witnesses, and presented a lengthy closing

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argument detailing weaknesses in the state's case. And, although Bookman claims his counsel should have sought out witnesses, he does nothing more than speculate that doing so would have produced evidence helpful to his case. Thus, his claims of ineffective assistance of counsel fail. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (to state colorable claim of ineffective assistance, defendant must show counsel's performance fell below reasonable standards, resulting in prejudice to defendant); *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (trial court properly dismissed claim of ineffective assistance based on counsel's failure to call witnesses when petitioner failed to identify witnesses or provide affidavits containing "testimony they would have offered").

¶8 Finally, to the extent Bookman claims his post-conviction counsel was ineffective, that claim is not cognizable under Rule 32 for a non-pleading defendant like Bookman, *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013), even if he were permitted to raise it for the first time on review, *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). *See also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court and which the defendant wishes to present" for review).

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