

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JONATHAN DAVID SWIHART,
Petitioner.

No. 2 CA-CR 2014-0171-PR
Filed September 11, 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NOT FOR PUBLICATION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. CR20083756

The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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

Jill E. Thorpe, Tucson
Counsel for Petitioner

STATE v. SWIHART
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Petitioner Jonathan Swihart 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). Swihart has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Swihart was convicted of manslaughter and sentenced to a presumptive 10.5-year prison term. Swihart thereafter initiated a proceeding for post-conviction relief. He argued in his petition that he had received ineffective assistance of counsel based on counsel's failure to challenge on various grounds the admission of a text message sent to the victim shortly before she was shot saying, "Ur dead." And he maintained he was "denied appellate review of his sentence on grounds it was excessive when the trial court failed to state the grounds for imposing the presumptive sentence."

¶3 The same trial judge conducted the pretrial hearings, presided over the jury trial, imposed sentence, and ruled on the petition for post-conviction relief. In a five-page, detailed minute entry, the court summarily denied relief. It concluded Swihart had not established that counsel's performance was not part of trial strategy or deficient; further, it determined Swihart had not shown he was prejudiced by the admission of the text message in light of the other evidence against him. It also rejected Swihart's sentencing claim, noting the court was not required to set forth the reasons for a presumptive sentence.

STATE v. SWIHART
Decision of the Court

¶4 On review, Swihart maintains the trial court abused its discretion in denying his petition without a hearing. He maintains, *inter alia*, that because the state failed to present an affidavit from trial counsel stating that his decisions relating to the text message were strategic, the court could not conclude his acts “were, in fact, ones of strategy or tactics.” However, 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). The trial court’s ruling on Swihart’s ineffective assistance of counsel claim correctly identified and resolved the issue raised and we adopt its ruling on this point.¹ *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court’s correct ruling in a written decision”).

¶5 Swihart next claims his appellate counsel was ineffective for failing to appeal the imposition of a presumptive sentence.² Specifically, that the trial court should have stated its reasons for doing so. He has failed, however, to cite authority in support of that claim or meaningfully argue the point, either below or on review. And, in any event, we agree with the trial court that

¹Swihart correctly notes that the trial court characterized the “Ur dead” text message as being sent “shortly” before the victim was fatally shot; indeed in its order, the court stated it was “only minutes.” The parties, however, agreed there was a ninety minute interval. The appearance and timing of text messages formed the basis of a motion to preclude and trial continuance, cross-examination, and claims of error on appeal. Significantly, Swihart merely speculates the “jury verdict might have been different” had trial counsel done something different regarding questioning about the text messages.

²To the extent Swihart alleges sentencing error as an independent claim, it was precluded because it could have been asserted on appeal. *See Ariz. R. Crim. P. 32.2(a)(3)*.

STATE v. SWIHART
Decision of the Court

A.R.S. § 13-702(C) only requires a trial court to set forth its findings as to aggravating and mitigating circumstances when an aggravated or mitigated term is imposed. Because Swihart received a presumptive sentence, he has not shown that appellate counsel's performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶6 For these reasons, although we grant the petition for review, we deny relief.