

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

SAMEH BASTA,
Petitioner.

No. 2 CA-CR 2014-0215-PR
Filed July 28, 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NOT FOR PUBLICATION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. CR2003020557001DT

The Honorable William L. Brotherton Jr., Judge

REVIEW GRANTED; RELIEF DENIED

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

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Sameh Basta, Buckeye
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brammer¹ concurred.

M I L L E R, Presiding Judge:

¶1 Petitioner Sameh Basta 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). Basta has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Basta was convicted of kidnapping and first-degree murder. The trial court imposed a five-year prison term on the kidnapping count and a concurrent life sentence on the murder count. His convictions and sentences were affirmed on appeal. *State v. Basta*, No 1. CA-CR 08-0083 (memorandum decision filed Nov. 12, 2010).

¶3 Basta initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and was “unable to find any colorable claims for relief to raise” in a Rule 32 proceeding. In a pro se supplemental petition, however, Basta raised a claim relating to his initial prosecutor’s purported belief that Basta “was telling the truth,” and claimed his

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

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plea had been involuntary, the state had “eliminate[d] most of the other races” from his jury, the prosecutor had made prejudicial statements about the case to the media, and he had received ineffective assistance of trial counsel in that counsel had failed to call a witness who lived near the crime scene and had failed to properly prepare an expert witness. The trial court summarily denied relief on the petition.

¶4 On review, Basta repeats his arguments made below and argues the trial court erred in denying his petition. The majority of Basta’s claims, however, are precluded either because they were addressed or not raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(2), (3). Basta’s claims of ineffective assistance, however, are not precluded as they could not have been raised on appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

¶5 To present a colorable claim of ineffective assistance of counsel, a defendant must show counsel’s performance was deficient under prevailing professional norms and the deficient performance prejudiced the defense. *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). “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).

¶6 Here Basta claims counsel was ineffective in failing to call a witness who lived near the house in which the crime took place, who Basta claims would “verify that [he] was never seen ‘alone’ at the murder scene.” But Basta has provided no affidavit from this proposed witness as to the content of his possible testimony. *See* Ariz. R. Crim. P. 32.5; *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing). Nor has Basta established that counsel’s failure to call the witness was anything other than a tactical decision. 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,

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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 Basta also asserts that counsel was ineffective because she did not ensure that an expert witness called to testify about coercion of Basta’s confession to the murder had been provided with and viewed the videotape recording of that confession. But, the record contradicts his assertion that the expert had not been provided the videotape. Basta asserts in his petition for review that the witness testified, “I wasn’t supplied the materials to do that.” But that statement was made in connection with questioning about police reports and whether the confession “fit” with the facts of the crime and did not relate to the videotape.

¶8 The expert’s testimony about the videotape, on the other hand, was equivocal at the suppression hearing. He testified that he did not recall if he had received or watched it because his records of this case had been “lost in . . . moving.” Later, however, when the question of the videotape was raised at trial, the expert clarified that he had in fact received the videotape from counsel and, at the time of the earlier hearing, had not remembered whether he had viewed it in the absence of his records. Because Basta’s claims do no more than contradict the record before us, which establishes counsel did provide the videotape to the expert, we cannot say the trial court abused its discretion in denying relief on this claim. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant’s claim he was unaware sentence “must be served without possibility of early release” not colorable when “directly contradicted by the record”); *see also State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984) (“Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation.”); *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”).

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