

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAMON PAUL MACK,
Petitioner.

No. 2 CA-CR 2014-0281-PR
Filed September 22, 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NOT FOR PUBLICATION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 Mohave County

No. CR2011681

The Honorable Derek C. Carlisle, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Kevin J. Oursland, Tucson
By Kevin J. Oursland
Counsel for Petitioner

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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 Damon Mack seeks review of the trial court’s order summarily denying 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. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Pursuant to a plea agreement, Mack was convicted of two counts of aggravated assault arising from an altercation at a bar during which he hit each of two victims in the head with a pool stick. The trial court sentenced him to consecutive, aggravated prison sentences totaling eleven years.¹

¶3 On review,² Mack argues trial counsel was ineffective in failing to challenge the assertions made by one of the victims, B.B., regarding the extent of his injuries, which the trial court relied

¹The plea agreement provided Mack was probation eligible, but could receive a sentence of up to fifteen years in prison.

²Mack’s petition for review not only lacks citations to the record, but it provides no standard of review or citation to authority relevant to the trial court’s determination or our review. *See* Ariz. R. Crim. P. 32.9(c)(1) (“petition for review shall contain specific references to the record” and must contain “reasons why the petition should be granted”). Although in some circumstances the failure to cite relevant authority would justify our summary denial of a petition for review, in our discretion, we consider Mack’s petition.

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on as an aggravating factor at sentencing. Claiming there was evidence available to counsel at the time of sentencing showing that B.B.'s injuries were not as extensive as those described in a letter B.B. had submitted to the court, Mack argues he was entitled to an evidentiary hearing.

¶4 In a June 2012 letter that the trial court considered at sentencing, B.B. stated that after Mack had "struck [him] in the back of the head with the weighted end of a pool stick," he was transported to a medical center in Lake Havasu, "where [he] was bleeding to death by lacerations and five facial and skull fractures," and was then transported by "Life Flight" to a hospital in Las Vegas. B.B. explained, "It has been a long and painful recovery I am permanently scarred for life, have off and on severe headaches, [and] memory loss." He also stated, "I am still out of work since the accident My quality of life might never be able to be what it . . . was due to my depression, insomnia, and mental mindset as a direct result of the events that occurred that day."

¶5 Referring to the medical report from the Las Vegas hospital, Mack contends B.B. "suffered only one 'small fracture lateral orbital rim at the level of the zygomatic arch'" rather than the multiple fractures referred to in his letter. He also relies on the note that the presence of sutures "may account for the preliminary report from the outside facility [in Lake Havasu] describing possible fractures." Mack further contends B.B. failed to document his claim that he was "permanently scarred for life" or that his headaches and memory loss were caused by the incident at the bar. In addition, because a report from the Havasu medical facility dated shortly after the incident at the bar documents B.B.'s "history of anxiety [preceding the incident with Mack]," Mack maintains counsel should have challenged B.B.'s allegations that the assault caused B.B.'s ongoing depression issues.

¶6 At sentencing, the trial court referred to a surveillance video of the incident, and noted "it is very striking . . . the differences between [Mack] as described in the letters that are attached in his support and [Mack] as described in the video and in the [presentence report] describing the offense." The court noted

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that although the individuals who wrote letters on Mack's behalf described him as being a "nonviolent person, a person who is a positive role model and a positive influence in his community," the presentence report described the underlying incident as "a brutal attack, where [Mack] hits the victims with a pool stick for no apparent reason." The court went on to state, "apparently as depicted on the video, [Mack] hits the victims as they're standing there, not looking at him, he hits both of them hard enough with a single blow to knock them both down," and then "continues to beat on them with a pool stick until it breaks and then with his fists until somebody intervenes."

¶7 Noting Mack's history of alcohol abuse³ and relying on B.B.'s letter, the trial court then imposed aggravated sentences based on the following factors: Mack's prior convictions, and the infliction of serious physical injury⁴ and emotional harm to B.B. The court found that "nobody has objected to show that these are serious physical injuries, life-threatening injuries and perhaps permanent injuries." It also stated it was "most" concerned with the fact that Mack had "brutally attacked the two victims, hit them apparently in the back of the head when they weren't looking with a pool stick and caused fairly significant injuries in doing that, and continued to strike them when they were down."

³The court referred to the unchallenged presentence report, which provided that Mack "usually drinks about 20 to 40 beers a week, his highest usage is 80 beers in a week, then he describes himself as moderately addicted—it seems like if you're drinking 80 beers in a week, that's perhaps beyond moderately addicted." In his sentencing memorandum Mack acknowledged he "was under the influence of alcohol at the time of the incident."

⁴Section 13-105(39), A.R.S., defines a "[s]erious physical injury" as one "that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."

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¶8 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and also that the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Reviewing courts indulge "a strong presumption" that counsel provided effective assistance. *Strickland*, 466 U.S. at 689; see also *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994). "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996). A colorable claim is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶9 In its ruling dismissing this claim below, the trial court correctly noted that, "[a]lthough the records may have caused defense counsel to question the number of fractures, nothing in the records provided to the Court demonstrated that the victim's injuries did not create a reasonable risk of death," and "[n]othing indicated that the victim did not suffer a protracted impairment of the function of any bodily organ."

¶10 In addition to B.B.'s letter, which Mack challenges, the trial court considered the presentence report, the content of which Mack expressly acknowledged was accurate. The author of the report summarized relevant portions of the police report as follows: the victims were "lying down next to the pool table bleeding profusely"; B.B. was "lying on the floor in a pool of blood" and was "incoherent and unable to make any rational statements"; and B.B. was taken for medical treatment "due to head trauma" and "multiple skull and facial fractures." The report also described the surveillance video, which the court referred to at sentencing, as previously noted.

¶11 As the trial court correctly noted, counsel could have "question[ed] the number of fractures" B.B. suffered. Assuming

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counsel was deficient in failing to more fully explore B.B.'s injuries, the record nonetheless establishes the outcome of the case would not have been different even if he had done so. The record contains ample evidence to support the court's finding that, having attacked B.B. with a pool stick from behind exposed him to "a reasonable risk of death" – B.B. suffered head trauma rendering him "incoherent," at least one facial fracture, and profuse bleeding, in addition to the fact that his injuries were sufficiently serious to require transporting him by air to another medical facility. *See, e.g., State v. George*, 206 Ariz. 436, ¶¶ 7-9, 79 P.3d 1050, 1054-55 (App. 2003) (serious physical injury encompasses significant rather than minor injuries). Moreover, the same judge presided over the change-of-plea hearing and at sentencing, and had the opportunity to reconsider the propriety of the sentence in light of counsel's deficient conduct with the benefit of the materials included with the Rule 32 petition. Having done so, he apparently found no prejudice and therefore, no error. Accordingly, we are not persuaded the trial court abused its discretion in summarily denying relief.

¶12 Therefore, we grant review but deny relief.