DIVISION ONE
FILED: 09/30/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0613 PRPC
	)	
Respondent,	)	DEPARTMENT C
	)	
v.	)	Mohave County
	)	Superior Court
MARIO GONZALEZ,	)	No. CR2006-0070
	)	
Petitioner.	)	
	)	**DECISION ORDER**
	)	

Presiding Judge Maurice Portley and Judges Downie and Orozco have considered this petition for review. For the reasons stated, we grant review and grant relief on the claim of ineffective assistance of counsel for trial counsel's unexplained failure at Gonzalez's retrial to present testimony from the only defense witness at Gonzalez's first trial.

FACTS AND PROCEDURAL HISTORY

We discuss only the facts necessary to our disposition of this matter. A police officer observed Gonzalez driving. Because he knew Gonzalez's license was suspended, Gonzalez was

subsequently arrested. After a search incident to arrest, police found a small amount of marijuana in his pants pocket.

Gonzalez was charged and tried for possession of drug paraphernalia (the pants) and possession of marijuana. His defense was that the pants belonged to his nephew, Juan Carlos Vasquez. After consulting with counsel, Vasquez testified that the pants and marijuana belonged to him. As a result, Gonzalez was acquitted of possessing drug paraphernalia, but the jury could not reach a verdict on the other charge. The trial court declared a mistrial as to the possession of marijuana charge and set a trial date for the retrial.

At the retrial, Gonzalez again argued that the pants did not belong to him. Vasquez did not, however, testify. After the State rested, counsel advised the court:

> THE COURT: And, Ms. Sears, do you have your Defense witness here ready to go?
>
> MS. SEARS: No, I do not, your Honor.
>
> THE COURT: And - -
>
> MS. SEARS: It came to my attention that while I was gone last week our investigator was unable to get him served so I will not be putting on a Defense case.

After being instructed, the jury found him guilty of marijuana possession. The jury then found that Gonzalez had committed the offense while on felony release. The State proved Gonzalez had three prior historical felonies, and Gonzalez was

sentenced as a repetitive offender to a mitigated term of three years' imprisonment, and two years were added because the felony was committed while he was on felony release, for a total of five years. We affirmed the conviction and sentence on direct appeal. *State v. Gonzalez*, 1 CA-CR 06-0600 (Ariz. App. Jul. 17, 2008) (mem. decision).

Gonzalez then filed a petition for post-conviction relief alleging ineffective assistance of counsel ("IAC"). He argued that Vasquez was a key defense witness who should have been called to testify at his second trial. Alternatively, he argued that if Vasquez was unavailable, counsel should have requested a continuance and had a transcript of Vasquez's testimony at the first trial prepared for use in the second trial. The court found the claim colorable and set an evidentiary hearing.

At the hearing, Gonzalez's trial counsel testified that she had told Vasquez that he would have to come back for the second trial. She testified that she also subpoenaed him and had an investigator attempt to serve him. When asked at what point she first became aware Vasquez was not going to appear, she replied, "[t]he date that he didn't show up." When asked what she did, she stated, "I honestly don't remember exactly what I did. I mean, I had to go forward with the trial." Although Vasquez was the "key" witness, she admitted

that she did not seek a continuance and did not make an attempt to get or use the transcript of his earlier testimony pursuant to Arizona Rule of Evidence 804. She did not have a strategic or tactical reason for failing to secure the transcript of Vasquez's earlier testimony.

After considering the record and testimony, the trial court denied relief. The court found Gonzalez failed to establish prejudice because even Vasquez's testimony had been read to the jury, the outcome of the trial would not have been any different. The court then speculated as to why counsel might have decided not to procure the prior testimony and found no deficient performance. Vasquez petitioned this court for review, and for the reasons set forth below, we grant relief.[1]

DISCUSSION

The Sixth Amendment guarantee of the right to counsel entitles a defendant to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). An ineffective assistance of counsel claim has two components: "First, the defendant must show that counsel's performance was

[1] The State did not file a response. Although this could be considered a confession of error, *State ex rel. McDougall v. Superior Court*, 174 Ariz. 450, 452, 850 P.2d 688, 690 (App. 1993), we choose to reach the merits of Gonzalez's claim. Because of our resolution on the issue of the ineffective assistance of counsel claim, we do not address the other issues raised in Gonzalez's petition for review.

deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687.

In this case, the trial court found that counsel's attempts to secure Vasquez's presence at trial did not constitute deficient performance. She personally told Vasquez he had to return for retrial, had subpoenaed him, and had an investigator attempt to serve him on multiple occasions. When Vasquez failed to appear, and she simply announced "I will not be putting on a defense case," her performance was deficient.

At the evidentiary hearing, it was established that Vasquez was unavailable pursuant to Arizona Rule of Evidence 804(a)(5). We conclude that counsel's failure to even attempt to obtain a transcript of Vasquez's testimony from the first trial and introduce it at the second trial was unreasonable.[2] Although the trial court speculated about possible reasons counsel could have for not obtaining the transcript, we, as directed by our supreme court, "[w]ill not impute this reasoning to counsel without some clear indication that such reasoning did affect his decision. It is neither our job, nor our desire, to find justifications to shield counsel from claims of ineffective assistance when the record provides no sound basis to do so."

[2] The transcript of Vasquez's testimony, introduced at the evidentiary hearing, is only twenty pages in length. The State's suggestion at the evidentiary hearing that it would have taken sixty days to obtain this transcript is not supported by the record.

State v. Lee, 142 Ariz. 210, 219 n.4, 689 P.2d 153, 162 n.4 (1984).

Instead, counsel did not offer any strategic or tactical reason for her failure to obtain the transcript, and the trial court found "the court has the impression from the testimony that [counsel] simply did not think of the option of proceeding under Rule 804." We agree with that finding, and it supports the first prong of the analysis.

The second prong is prejudice. Prejudice requires only a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lee*, 142 Ariz. at 214, 689 P.2d at 157 (quoting *Strickland*, 466 U.S. at 694). "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. A "reasonable probability" has been defined as "less than 'more likely than not' but more than a mere possibility." *Lee,* 142 Ariz. at 214, 689 P.2d at 157. According to *Strickland,* "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696. If the burden has been met, "the court should be concerned with whether . . . the result of the particular proceeding is

unreliable because of a breakdown in the adversarial process." *Id.*

In this case, a jury hearing Vasquez admit to possessing marijuana under oath would "reasonably likely" have raised "a reasonable doubt respecting [Gonzalez's] guilt." Gonzalez, therefore, has established prejudice.

The trial court's contrary finding is unsupported by the record. Vasquez's testimony was specific; he identified the only pants introduced into evidence and testified that the marijuana in the pants pocket belonged to him. Gonzalez does not have the burden to establish the truth of the testimony. His only burden is to establish that had counsel presented the testimony to the jury, "the [jury's] decision . . . would reasonably likely have been different." *Id.*

CONCLUSION

Counsel's unexplained failure to present Vasquez's testimony at retrial constitutes deficient performance. Gonzalez's only defense was that the pants he wore, and the marijuana in the pocket, were not his. Vasquez, represented by counsel and admonished by the court, exposed himself to felony prosecution and testified the pants and marijuana belonged to him. It is reasonably likely that presentation of this testimony would have created a reasonable doubt about Gonzalez's guilt, as it did in the first trial.

Consequently, we vacate the order of July 29, 2009, and remand this matter to the trial court for proceedings consistent with this decision.

/s/

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MAURICE PORTLEY, Presiding Judge