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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. NATHANIEL KEON CURTIS, Petitioner.	2 CA-CR 2011-0248-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20064588

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

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

Nathaniel K. Curtis
Buckeye
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Nathaniel Curtis seeks review of the trial court's order denying his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., after an evidentiary hearing. Absent a clear abuse by the trial court of its discretion to decide

whether post-conviction relief is warranted, we will not disturb its ruling. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 After a jury trial, Curtis was convicted of sale of a narcotic drug (cocaine base) with two historical prior felony convictions and sentenced to a 15.75-year prison term. Appointed counsel filed a brief on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he had found no arguable issue to raise but suggesting perhaps the trial court had erred when it admitted into evidence "an audio recording Tucson police officer Christopher Widmer testified he had made while he was arranging for and purchasing cocaine base from Curtis . . . ." *State v. Curtis*, No. 2 CA-CR 2007-0408, ¶¶ 2-3 (memorandum decision filed Oct. 30, 2008). Counsel also suggested the court had erred in "permitting an out-of-state alibi witness to identify Curtis telephonically by way of an in-court photograph transmitted by cellular telephone." *Id.* Curtis then filed a pro se supplemental brief in which he restated counsel's suggested claims and challenged the admission of his driver license, which was found in the house where Widmer bought the cocaine base. *Id.* ¶ 3.

¶3 Affirming the conviction and sentence, we rejected the suggested arguments. We first noted that because Curtis had not objected to the admission of a redacted version of the audio recording, we could only review that claim for error that was both fundamental and prejudicial. *Id.* ¶ 5. We concluded that if the court had erred at all, the error was not prejudicial, given Widmer's identification of Curtis at trial as the person from whom he had purchased the drugs. *Id.* We also rejected Curtis's argument about the telephonic testimony of his alibi witness. *Id.* ¶ 6. The witness identified Curtis

from a telephonically-transmitted photograph of Curtis. *Id.* We concluded Curtis had not been prejudiced by the telephonic testimony, an alternative to live testimony that Curtis himself suggested "as an alternative to requesting a mistrial and continuance in order to subpoena the witness." *Id.* We rejected, too, counsel's suggestion that the court had erred by not sua sponte declaring a mistrial when it became clear the witness would not be appearing and testifying at trial. *Id.* n.1. Finally, we found wholly lacking in merit Curtis's contention in his pro se brief that the driver license should not have been admitted because it was circumstantial evidence, pointing out that evidence is not inadmissible simply because it is circumstantial. *Id.* ¶ 7.

¶4 In September 2008, Curtis commenced this post-conviction proceeding. In March 2010, appointed counsel filed a notice in lieu of a petition, avowing that after reviewing the record, he did not believe "a good faith Rule 32 claim exists." Counsel explained he and Curtis had "a difference of opinion as to whether trial counsel, Chris Kimminau, was ineffective in his representation in the underlying matter." Rule 32 counsel characterized Kimminau's decisions as strategic and tactical, adding "Mr. Kimminau chose not to call certain witnesses primarily because he felt their testimony, or testimony which would have been revealed on cross-examination, would have done more harm than good for the case." The trial court gave Curtis additional time to file a pro se supplemental petition, which he subsequently filed, raising claims of ineffective assistance of counsel and newly discovered evidence. The court denied relief after an evidentiary hearing.

¶5 In reviewing the trial court's ruling we are mindful of certain principles. First, a defendant is not entitled to relief based on a claim of ineffective assistance of counsel unless he can show "both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). A defendant is not entitled to relief based on a claim of newly discovered evidence unless he can present material evidence that existed at the time of trial, that could not have been discovered with the exercise of due diligence, and that is likely to change the outcome of the case. *State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989); *see* Ariz. R. Crim. P. 32.1(e).

¶6 When a court conducts an evidentiary hearing on a defendant's claims, the defendant has the "burden of proving the allegations of fact by a preponderance of the evidence." Ariz. R. Crim. P. 32.8(c). We defer to the trial court with respect to any factual findings unless those findings are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). In other words, we will not disturb any factual findings unless they are clearly erroneous. *State v. Cuffle*, 171 Ariz. 49, 51, 828 P.2d 773, 775 (1992). And, we view the evidence in the record in the light most favorable to sustaining the court's ruling. *See State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992). It is for the trial court, not this court, to resolve any conflicts in the evidence. *See id*. at 596-97, 832 P.2d at 613-14.

¶7 On review, Curtis primarily reasserts the arguments he made below, which are each, in some measure, fact-dependent claims that must be resolved by the trial court. That court is best situated to assess counsel's performance or the effect any new evidence would have had on the outcome of the trial. To the extent Curtis is asking us to reweigh evidence in the record, this we will not do. *Cf. State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (noting court does not reweigh evidence on appeal); *Sasak*, 178 Ariz. at 186, 871 P.2d at 733 (reviewing findings after post-conviction evidentiary hearing for clear error; findings upheld if supported by substantial evidence).

¶8 The trial court denied Curtis's request for post-conviction relief in March 2011 in a thorough, well-reasoned, six-page minute entry. The court found trial counsel had not been ineffective in deciding not to call a certain alibi witness or in presenting defenses, but made reasoned tactical decisions. The court also rejected Curtis's claim that trial counsel had been ineffective in failing to request a continuance so that he could secure the in-court testimony of the alibi witness who testified telephonically. The court acknowledged our rejection of the related issue on appeal and again found counsel's performance was neither deficient nor prejudicial. Similarly, the court rejected Curtis's claim that trial counsel had been ineffective in failing to object to the introduction of the recordings of his conversations with Officer Widmer, this court having concluded on appeal the admission of the recording was not prejudicial. Finally, the court concluded Curtis had failed to establish a claim of newly discovered evidence entitling him to relief because information about two potential defense witnesses had existed before trial and

was cumulative. *See Bilke*, 162 Ariz. at 52-53, 781 P.2d at 29-30; Ariz. R. Crim. P. 32.1(e).

¶9 The trial court clearly identified and thoroughly evaluated Curtis's claims, citing the relevant authority. It ruled correctly and in a manner sufficient to permit this or any other reviewing court to understand the nature of the claims raised and the basis for the court's denial of relief on those grounds. Because the court has resolved the claims correctly, consequently "[n]o useful purpose would be served by . . . rehashing the trial court's correct ruling in a written decision." *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly identified and ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution"). Rather, we adopt the court's ruling. *See id.*

¶10 The petition for review is granted and relief is denied.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Presiding Judge