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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OF ARIZONA, Respondent, v. EDUARDO VASQUEZ CELAYA, Petitioner.	2 CA-CR 2011-0364-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20063527

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Higgins and Higgins, P.C.
By Harold Higgins
Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Eduardo Celaya 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). Celaya has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Celaya was convicted of two counts of first-degree murder and was sentenced to consecutive terms of life imprisonment with no possibility of release until he had served twenty-five years on each count. This court affirmed his convictions and sentences on appeal. *State v. Celaya,* No. 2 CA-CR 2007-0307 (memorandum decision filed July 1, 2009). Celaya petitioned for, and was denied, review in the supreme court.

¶3 While his appeal was pending, Celaya filed a notice of post-conviction relief, and the trial court appointed counsel, but stayed the proceeding pending the outcome of the appeal. In his petition for post-conviction relief, Celaya asserted there was "newly discovered evidence which exonerates him and clearly entitles him to a new trial" and claimed his trial counsel had been ineffective. The court summarily denied relief. On review, Celaya essentially repeats the arguments he made below and maintains the trial court should have granted him a hearing so it could "determine the credibility" of the witnesses on whose statements he relied in his petition.

¶4 In his first claim of newly discovered evidence, Celaya cites an affidavit from Fredeberto Gonzalez, in which Gonzalez avers that Manuel Blanco, the state's witness against Celaya at trial, admitted to him that he had committed the offenses of which Celaya was convicted and had caused "the blame [to] fall upon" Celaya. Celaya claims Gonzalez's statement constitutes newly discovered evidence entitling him to relief.

¶5 As the trial court noted, "Before a trial court may grant post-conviction relief based on the discovery of new evidence, the following requirements must be met:"

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52–53, 781 P.2d 28, 29–30 (1989); *see also* Ariz. R. Crim. P. 32.1(e) (newly discovered material facts exist if discovered after trial, defendant exercised due diligence, and facts "are not merely cumulative or used solely for impeachment").

¶6 Blanco's alleged statement to Gonzalez amounts to a recantation of his testimony at trial, wherein he testified Celaya had killed the two victims. As we noted above, in order to be "newly discovered," the evidence must have existed at the time of trial but have been discovered after trial. *Bilke*, 162 Ariz. at 52, 781 P.2d at 29. Testimony recanted after trial, however, does not squarely meet this definition—although the falsity of the witness's statement plainly "existed" at trial, the recantation of that testimony did not. Our supreme court nonetheless has recognized that recanted testimony may form the basis of a claim for post-conviction relief under Rule 32.1(e). *State v. Hickle*, 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982) ("[E]vidence indicating [a witness] lied at trial qualifies as 'newly discovered material facts' pursuant to Rule 32.1 . . . .").

¶7 But, such testimony is "inherently unreliable," *Hickle*, 133 Ariz. at 238, 650 P.2d at 1220, and courts therefore "have long been skeptical of recanted testimony

claims," *State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995). The trial court did not expressly rule upon the credibility of Gonzalez's statement, apparently because it concluded it would be inadmissible hearsay. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason). But it suggested the statement lacked credibility by noting Blanco's purported confession had been made during a fifteen-minute conversation with Gonzalez, whom he did not know, and "Blanco did not give any details of the murders." We likewise conclude Gonzalez's statements are insufficient to overcome the inherent unreliability of Blanco's recantation. *See id.*

¶8 Celaya raises various other claims of newly discovered evidence as well, including an interview with a relative about his relationship with Blanco, an affidavit from a Mexican police officer about an encounter he had with Blanco, and a National Academy of Science report related to ballistic evidence in the case. The trial court clearly identified these claims and correctly resolved them; we see no need to rehash that ruling here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has ruled correctly 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").

¶9 Celaya also alleges his trial counsel was ineffective in failing to investigate the case properly, specifically in relation to footprint evidence and the testimony his wife could have provided, and in relation to other witnesses who could have testified about what Celaya had done on the day the bodies of the victims were found. Celaya also

maintains counsel was ineffective because he failed to communicate adequately with him, failed to advise him properly about his right to testify, and failed to disclose to Celaya his own prior felony convictions and previous disbarment.

¶10 As the trial court correctly noted, to present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). "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). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶11 We first address Celaya's assertion that he was "summarily advised he could not testify at trial." He maintains that he "tried to discuss the possibility of his testimony with defense counsel," but "was summarily rebuffed . . . and told it was not necessary." In his affidavit, Celaya averred:

> I wanted to testify in this matter. My attorney refused to even discuss this matter with me, or the pros and cons of testifying. He told me it was not needed. [Counsel] never took the time to fully discuss with me the information I would present at trial if allowed to testify.

He further contends counsel should have moved to preclude evidence that Celaya previously had been convicted of solicitation to sell a narcotic drug because, had counsel done so, his "inclinations to insist on testifying would have been greater."

¶12 Accepting Celaya's assertions as true, *see State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990), they are insufficient to establish a colorable claim of ineffective assistance. Celaya did not aver that counsel failed to advise him that he had a right to testify or that he was unaware of that right, merely that counsel summarily determined he should not do so. And, although the decision whether or not to testify ultimately belongs to the defendant, "[c]ounsel is encouraged to provide guidance and to urge the client to follow professional advice." *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). Celaya has not presented any evidence that advising a client not to testify, even strongly, falls below objectively reasonable standards of performance, nor has he explained what his testimony would have been or how it might have changed the outcome of the case. *See Strickland*, 466 U.S. at 687 (defendant must show performance deficient and resulted in prejudice); *see also* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "[t]he reasons why the petition should be granted"). And, Celaya likewise presents no evidence or authority to support his assertion that counsel's performance was deficient because he did not move to preclude mention of Celaya's prior conviction in the event that Celaya testified when, apparently, a decision had been made for Celaya not to testify. *See* Ariz. R. Crim. P. 32.9(c)(1).

¶13 As to Celaya's remaining claims of ineffective assistance, we note that, even accepting as true Celaya's assertion that counsel appeared to have used cocaine

before a visit with him at the jail, that bare allegation is not sufficient to establish ineffective assistance. *See State v. Vickers*, 180 Ariz. 521, 525, 885 P.2d 1086, 1090 (1994). And we agree with the trial court that, in regard to his remaining claims, Celaya either failed to overcome the "strong presumption" that counsel's actions were based on tactical decisions,[1] *Strickland*, 466 U.S. at 689, failed to establish counsel's performance had been deficient, or failed to show he was prejudiced by counsel's allegedly deficient performance. We therefore need not repeat the court's analysis here. *See Whipple*, 177 Ariz. at 274, 866 P.2d at 1360. For these reasons, we grant the petition for review, but deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

[1]Indeed the state included an affidavit from trial counsel with its response to Celaya's petition for post-conviction relief indicating counsel had made tactical decisions in relation to certain evidence. *See State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984) (court will not find counsel acted improperly "[u]nless the defendant is able to show that counsel's decision was not a tactical one but, rather, revealed ineptitude, inexperience or lack of preparation").