

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 29 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0044-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
KENNARY NOP,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080090

Honorable Gus Aragón, Judge

REVIEW GRANTED; RELIEF DENIED

Patrick C. Coppen

Tucson  
Attorney for Petitioner

B R A M M E R, Judge.

¶1 Petitioner Kennary Nop seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., after an evidentiary hearing on his claims. For the following reasons, we grant review but deny relief.

¶2 Pursuant to a plea agreement, Nop was convicted of negligent child abuse, based on his “failing to seek prompt medical attention” for Talia G., a child in his care who had suffered second-degree burns on her feet and legs, and thereby had “placed [her] in a situation where her person or health was endangered.” The trial court suspended the imposition of sentence and placed him on a three-year term of probation in June 2008.

¶3 In July 2009, Nop filed a pro se petition for post-conviction relief, which the trial court appears to have construed as the notice of post-conviction relief required by Rule 32.4(a). In a supplemental petition filed by counsel, Nop argued, “pursuant to Rule 32.1(a) and (h),” that his counsel had rendered ineffective assistance in conducting pretrial investigation and during the plea negotiation process, that he had been denied due process “based upon [a] lack of true factual basis” for his guilty plea, and that he “is actually innocent” of the crime for which he was convicted. After an evidentiary hearing that spanned five days, the trial court denied relief, concluding:

Petitioner has not established grounds for post conviction relief on any of his claims. Trial counsel was not ineffective. His performance was above the minimum threshold of competence. There is not a reasonable probability that the result of the proceedings would have been different but for trial counsel’s performance. Petitioner has failed to show actual innocence. Finally, Petitioner was not denied due process[,] because his guilty plea was knowing, voluntary, and intelligent.

This petition for review followed.

¶4 On review, Nop contends the trial court abused its discretion in denying relief, arguing the evidence presented “supported the conclusion that former trial counsel was prejudicially ineffective” in his investigation of the case and during plea

negotiations; counsel's performance should be presumed ineffective because his previous employment as an assistant attorney general created a conflict of interest; he was denied due process because, at the direction of counsel, he lied to the court to establish a factual basis for the plea; and "the facts underlying the claim of actual innocence would be sufficient to establish that no reasonable fact-finder would . . . have found the defendant guilty of the offense beyond a reasonable doubt."

¶5 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the court has held an evidentiary hearing, we defer to the court's factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). In our review, we "view the facts in the light most favorable to sustaining the lower court's ruling, and we must resolve all reasonable inferences against the defendant," and when "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* "Evidence is not insubstantial merely because testimony is conflicting or reasonable persons may draw different conclusions from the evidence." *Id.*; see also *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbiter of witness credibility in post-conviction proceeding).

¶6 In a detailed order denying relief, the trial court thoroughly explained the basis for its ruling, stating that, in resolving conflicts in testimony offered by Nop and his trial counsel, it found counsel's testimony credible and did not find Nop's testimony credible. Similarly, in finding Nop had failed to establish his claim of actual innocence under Rule 32.1(h), the court acknowledged that Nop "took some steps to address his

daughter's burns," but also noted the testimony of the pediatric forensic nurse examiner who had examined Talia and stated she had been "very concerned" about the potential for lasting damage to the child's joints and had recommended further evaluation. The examiner also opined that, had Talia been taken for emergency care at the time of her injury, she "would have been directed to the burn center . . . for fluid replacement; for antibiotics; for wound management . . . ; and [for] intense physical therapy." The examiner agreed such actions could "lessen [the] risk to a child's future development." On review, Nop cites the testimony of an emergency room physician he called as a witness, who opined that, based on his review of photographs, the burns had required only "supportive care" that might "be provided adequately at home" and showed no signs of infection. But we do not reweigh the evidence on review, *cf. State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (direct appeal), and the court did not abuse its discretion in concluding that Nop had failed to "demonstrate[] by clear and convincing evidence that . . . no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt." Ariz. R. Crim. P. 32.1(h).

¶7 In its ruling, the trial court clearly identified and thoroughly addressed each of Nop's claims and resolved them in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Ample evidence supported the court's findings, and no purpose would be served by repeating the court's analysis here. *See id.* Based on the record before us, the applicable law, and the court's assessment of the testimony presented at the evidentiary hearing, the court did not abuse its discretion in denying relief on Nop's

claims. In addition to finding no abuse of discretion in the court’s ruling on the merits, we add only that Nop’s claims of ineffective assistance of counsel and due process violations were also precluded as untimely. *See* Ariz. R. Crim. P. 32.4(a) (notice of post-conviction relief “must be filed within ninety days after the entry of judgment and sentence,” and “[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)”).

¶8 Accordingly, although we grant review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge