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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STATE OF ARIZONA, Respondent, v. ERIC JOSEPH NATZEL, Petitioner.	2 CA-CR 2012-0081-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2006008656001DT

Honorable Roland J. Steinle, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Adam Susser
Phoenix
Attorneys for Respondent

Eric J. Natzel
Buckeye
In Propria Persona

K E L L Y, Judge.

¶1 After a jury trial, petitioner Eric Natzel was convicted of two counts of child abuse and sentenced to the maximum prison term of twenty-four years on count one, followed by a consecutive, presumptive term of 2.5 years on count two. This court

affirmed the convictions and sentences on appeal, rejecting Natzel's arguments that the consecutive sentences were improper and that the trial court had erred when it imposed the aggravated prison term, admitted evidence of "the uncharged crime of homicide" and photographs of the deceased victim, and instructed the jury on reasonable doubt. *See State v. Natzel*, No. 1 CA-CR 2008-0547, ¶¶ 1, 42 (memorandum decision filed Sept. 29, 2009). Natzel then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., raising claims of trial court error, ineffective assistance of counsel, and newly discovered evidence. The trial court denied the petition, and this petition for review followed.

¶2 It is for the trial court to determine in the exercise of its discretion whether post-conviction relief is warranted and unless it abuses that discretion, we will not disturb its ruling. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). The facts supporting the convictions are set forth in this court's memorandum decision on appeal. Briefly, the deceased victim was Natzel's daughter, who was just under three years old. The evidence established she had been struck on the head and back, resulting in non-life-threatening injuries that supported count two, and that Natzel had then stuffed her into a toy box and latched it, resulting in her death by asphyxiation, which was the basis for count one. In his pro se petition for post-conviction relief,[1] Natzel contended trial counsel had been ineffective in a variety of respects: he had "prosecut[ed]" Natzel for count two; he failed to ask for a lesser-included jury instruction on count one, which Natzel claims the court should have given sua sponte, in any event; he did not object to

[1]Natzel stated in his form petition that he did not request the appointment of counsel at that time but would if the court were to conduct an evidentiary hearing.

the qualifications of the pediatrician to testify as a forensic pathologist, resulting in a denial of the motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., and he did not adequately investigate the state's medical evidence or call available medical experts to testify on his behalf. Natzel also claimed he was deprived of his right to a fair trial because his convictions had been based on "tainted expert testimony that had no scientific support" and he had obtained newly discovered expert evidence that will establish he is entitled to a new trial.

¶3 Stating it had reviewed Natzel's petition for post-conviction relief and the state's response, the trial court summarily denied relief and dismissed the petition pursuant to Rule 32.6(c) "[f]or the reasons stated in the State's written response." Although Natzel essentially reasserts on review the claims he raised below, at the beginning of his petition for review he identified four specific issues he intended to raise in his petition that directly challenged the propriety of the court's ruling denying and dismissing his petition for post-conviction relief: whether the court erred by ruling without considering his reply to the state's response to his petition for post-conviction relief; whether the court erred by "failing to decide the lesser jury instruction fundamental error claim and the federal fair trial claim"; whether the court erroneously applied the pre-1992 version of the rule and related statutory provision in rejecting his newly-discovered-evidence claim; and, in denying relief on his "Fed[eral]" claims of ineffective assistance of counsel and "his state law [new] evidence claims."

¶4 We first reject Natzel's contention that the trial court violated A.R.S. § 13-4236(C) by denying relief without first considering his reply to the state's response to the

petition. That the court did not specify it had reviewed Natzel's reply does not mean the court did not consider it. The reply was filed on March 24, 2011, and the court entered its order denying relief on April 21, 2011. Thus, we infer from the record before us that the court had the reply before it, and we presume the court considered it before denying post-conviction relief. *See Flynn v. Cornoyer-Hedrick Architects & Planners, Inc.*, 160 Ariz. 187, 193, 772 P.2d 10, 16 (App. 1988) (rejecting claim that court had not read reply to response to motion, despite absence in minute entry of express statement by court it had read reply); *cf. Occidental Chem. Co. v. Connor*, 124 Ariz. 341, 344, 604 P.2d 605, 608 (1979) (presuming court considered affidavits that were part of record when it ruled on motion); *State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991) (rejecting defendant's claim trial court erred in failing to expressly state it had considered evidence in mitigation and presuming sentencing court had considered all relevant factors before it, including evidence in mitigation).

¶5 Natzel next contends the trial court erred by "failing to decide the lesser jury instruction fundamental error claim and the federal fair trial claim." He had argued in his petition for post-conviction relief that trial counsel had been ineffective in failing to request "lesser-included jury instructions for count one," given conflicting evidence relating to count one as to whether he had intentionally put the victim in the toy box and latched it or whether the offense could have been "the result of reckless or negligent conduct by Natzel," warranting an instruction pursuant to "A.R.S. [§] 13-3623(A)(2),(3)." Natzel argued, "both the court and Natzel's lawyers erred by not providing these lesser instructions to the jury."

¶6 We disagree with Natzel's contention that the trial court failed to consider these claims. We presume the court rejected the claim that trial counsel had been ineffective in this regard because it denied the petition. Additionally, we reject Natzel's apparent suggestion that we can infer the court did not consider this claim because the state conceded error on this issue and the court had stated in its minute entry it had denied the petition for post-conviction relief for the reasons set forth in the state's response. The state did not concede counsel had been ineffective for not requesting the instruction; it asserted counsel had made a reasonable tactical decision, which is not a viable basis for granting relief. Additionally, the court would not have been required to address the merits of the lesser-instruction claim because it could have been raised on direct appeal and Natzel was precluded from raising it. *See* Ariz. R. Crim. P. 32.2.

¶7 With respect to Natzel's claims of newly discovered evidence, he contends the trial court erred by applying the "old pre-1992 repeal[]ed" version of the rule and A.R.S. § 13-4221(5)(b), "rather th[a]n the new [A.R.S. §] 13-4231(5)(b)(1) version." He also essentially reurges the claim he raised below, presenting evidence that purportedly would have shown the pediatrician who had testified for the state, Dr. Daniel Kessler, was not qualified to give his opinion as to how the victim had died, as well as evidence she had not died because of a lack of oxygen in the toy box, but because the way in which she had wedged herself inside the box did not allow her sufficient room to breathe. He insists the state conceded the claim had merit in its response to the petition for post-conviction relief.

¶8 First, we presume a trial court knows and correctly applies the law. *State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008). And, nothing in the record supports Natzel's claim that the court applied an incorrect standard in evaluating the claim of newly discovered evidence. Presumably, this argument is based on Natzel's contention that the state had relied on an outdated standard in responding to the petition for post-conviction relief and the fact the court denied Natzel's petition for the reasons stated in that response. But the state did not respond to the claim under an incorrect standard. Based on the clear language of the current rule and relevant case law, a defendant is not entitled to relief pursuant to Rule 32.1(e) unless he shows the evidence existed at the time of trial but was discovered after the trial and could not have been discovered previously with the exercise of reasonable diligence; the evidence is neither merely cumulative nor impeaching; the evidence is material and if introduced at trial, "probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e); *see also State v. Bilke*, 162 Ariz. 51, 52–53, 781 P.2d 28, 29–30 (1989). Natzel has not established the court abused its discretion by denying relief on this claim; he has not shown why the evidence could not have been discovered with due diligence, the evidence appears to be cumulative and merely impeachment evidence, and as the court implicitly found, the evidence would not have changed the outcome at trial.

¶9 Additionally, in its response to the petition for review the state denies it conceded Natzel had raised a meritorious claim for relief. The response bears out that contention. We also reject Natzel's contention that the state was required to provide affidavits in support of its opposition to his petition. As the state correctly points out in

its response to Natzel's petition for review, Natzel had the burden of supporting his claims for relief and was required to provide affidavits in certain circumstances. *See* Ariz. R. Crim. P. 32.8(c).

¶10 Finally, Naztel did not sustain his burden of establishing the trial court had abused its discretion by denying relief on his various claims of ineffective assistance of trial counsel. "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). Natzel failed to raise a colorable claim that counsel's performance had been deficient and that any deficiency had prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (setting forth standard for establishing claim of ineffective assistance entitling defendant to relief); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998) (same). Many of his claims amount to second-guessing of what appear to have been reasonable tactical decisions made by counsel; such claims do not entitle a defendant to relief. *See State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984) ("disagreements as to trial strategy or errors in trial tactics will not support an effectiveness claim so long as the challenged conduct could have some reasoned basis"). Natzel has not overcome the strong presumption that these decisions were tactical and had a reasoned basis. *See Strickland*, 466 U.S. at 689 (cautioning against second-guessing counsel's tactical decisions with benefit of hindsight; stating, "a court must indulge a strong presumption" when evaluating claim of ineffective assistance "that counsel's conduct falls within the wide range of reasonable professional assistance" and

requiring defendant to "overcome the presumption" that counsel had made sound decision regarding trial strategy); *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984) (noting counsel will not be found to have 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").

¶11 We grant the petition for review but, for the reasons stated, deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge