

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

AUG -6 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0092-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
EDWARD ABRAN MOLINA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061795

Honorable Gus Aragón, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Stephan McCaffery

Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Following a jury trial, which was held in his absence, petitioner Edward Molina was convicted of two counts of aggravated assault. On appeal, this court affirmed Molina's convictions and concurrent, mitigated, ten-year prison terms. *State v. Molina*, No. 2 CA-CR 2008-0222 (memorandum decision filed May 14, 2009). Molina filed a notice of post-conviction relief in June 2009 pursuant to Rule 32, Ariz. R. Crim. P., and appointed counsel filed a notice stating he had found no colorable claims to raise. Molina's family then retained attorney Creighton Cornell, who filed a petition for post-conviction relief in which he claimed trial counsel, Monique Lyon, had rendered ineffective assistance. Following an evidentiary hearing and Molina's withdrawal of some of the claims, the trial court denied relief on all but one claim, agreeing Lyon had been ineffective in failing to provide the court with information shortly after the sentencing hearing establishing Molina was entitled to additional presentence incarceration credit. In granting post-conviction relief, the court gave Molina the additional credit. This petition for review followed.

¶2 We will not disturb the trial court's ruling unless it abused the broad discretion vested in it to decide whether post-conviction relief is warranted. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). And in reviewing Molina's arguments on review, we are mindful that a defendant has the burden of establishing by a preponderance of the evidence the factual allegations of his petition for post-conviction relief. Ariz. R. Crim. P. 32.8(c). We review the trial court's factual findings following a Rule 32 evidentiary hearing for clear error. *State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995).

¶3 In order to be entitled to relief based on a claim of ineffective assistance of counsel, the defendant must establish counsel’s performance was deficient, based on prevailing professional norms, and that this deficiency was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). “Actions which appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel.” *State v. Espinosa-Games*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984). A defendant must overcome the strong presumption that counsel’s tactical decisions were reasonable under the circumstances that existed at the time counsel made those decisions. *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985); *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). If a defendant fails to establish either of the two elements of the *Strickland* test, the court need not decide whether the defendant sustained his burden of proving the other element. *Salazar*, 146 Ariz. at 541, 707 P.2d at 945. With respect to the prejudice portion of the *Strickland* test, the defendant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694.

¶4 At the end of December 2010, Molina filed a motion requesting that the trial court authorize funding for “a Strickland expert to opine about the standard of care” so that he could support his claim that trial counsel’s performance had been deficient and prejudicial. Relying on the Fifth and Fourteenth Amendments of the United States Constitution, article II, § 4 of the Arizona Constitution, and Rule 15.9, Ariz. R. Crim. P., Molina argued he needed and was entitled to an expert to support his claim that “[a]

reasonable attorney does not give up an instruction that the jury cannot consider their client's absence as evidence of guilt.”

¶5 The issue was discussed at a review hearing on January 11, 2011, during which the court confirmed colorable claims had been raised and the case would be set for an evidentiary hearing. Cornell stated he needed the expert for broader purposes, explaining that although he had been retained by Molina's family, his retention fee did not cover the cost of a *Strickland* expert; he estimated it would cost about \$2,000 to have an attorney review the record, evaluate trial counsel's conduct, determine the standard of care, and testify at an evidentiary hearing. In its January 24, 2011 minute entry order, the court found, with respect to the “*Strickland*/ineffective assistance of counsel issue . . . that there ha[d] not yet been a sufficient showing that a *Strickland* expert [was] needed.” The court added that it would “first evaluate the post-conviction relief testimony of Petitioner's defense counsel and then evaluate whether a *Strickland* expert would assist the Court.”

¶6 The evidentiary hearing was conducted over days between February and June 2011; on May 25, at a hearing that related only to pending motions, Molina renewed his request for expert counsel. The trial court again denied the request for funds to retain an expert, stating, “I find that a *Strickland* expert is not necessary under the rules of this case, because it would not be helpful to me.” The court added, “I have a sufficient background in the criminal law myself to allow me to evaluate whether or not a lawyer fell below the standard of care. I will be the ultimate arbiter on that. I'm not going to preclude a *Strickland* expert, because I don't think it's appropriate for me to do that, but

I'm not going to order funding for one.” Counsel again made it clear that Molina did not have funding to retain such an expert on his own. The court analyzed the claims in the March 2011 minute entry order and found only with regard to presentence-incarceration-credit claim, had Molina raised a claim entitling him to relief. After additional hearing, the court entered a final minute entry order in July.

¶7 Molina contends in his petition for review he had been required to establish counsel's performance had fallen below prevailing professional norms but was prevented from doing so because the trial court refused his request for funding so that he could hire an expert. Molina relies on Rule 32.5, Ariz. R. Crim. P., and this court's memorandum decision in *State v. Washington*, No. 2 CA-CR 2011-0209 (memorandum decision filed Nov. 18, 2011). He maintains the court abused its discretion when it denied his request for funds to secure the services of an expert, and thereby inhibited him from establishing a necessary element of his claim.

¶8 As Molina acknowledges, this court's unpublished decision in another case has no precedential value. *See* Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24. His citation to and reliance on our memorandum decision here was improper. Ariz. R. Crim. P. 31.24; *see also State v. Johnson*, ___ Ariz. ___, ¶ 23, 276 P.3d 544, 551 (App. 2012). We will not discuss that case further.

¶9 The request for funding in this context is similar to a request by a Rule 32 petitioner to conduct discovery. And, as our supreme court stated in *Canion v. Cole*, 210 Ariz. 598, ¶ 10, 115 P.3d 1261, 1263 (2005), “trial judges have inherent authority to grant discovery requests in [post-conviction] proceedings upon a showing of good cause.” It is

for the trial court to determine, in the exercise of its discretion, whether additional discovery should be permitted. *Id.* ¶ 10. Moreover, the “decision to expend public monies to assist the defense rests within the trial court’s sound discretion.” *State v. Cornell*, 179 Ariz. 314, 321, 878 P.2d 1352, 1359 (1994). “[C]ourts cannot, consistent with limited budgets, be put in the position of having to pay for every item a defendant thinks may be useful.” *Id.* Thus, trial courts must decide, in the exercise of their discretion, whether expenditures are necessary. *Id.* at 320-21, 878 P.2d at 1358-59.

¶10 Our supreme court’s decision in *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985), also is instructive here. There, the court adopted the *Strickland* test for evaluating claims of ineffective assistance of counsel in criminal cases. *Id.* at 398-99, 694 P.2d at 228-29. The court commented that in order to determine what is the prevailing professional norm in a given circumstance, a court may consider a variety of sources, including American Bar Association standards and the opinion of an expert. *Id.* at 397-98, 694 P.2d at 227-28. Case law provides trial courts with further guidance in applying the *Strickland* test. “In assessing deficient performance, an effort is made to ‘eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’” *State v. Valdez*, 167 Ariz. 328, 331, 806 P.2d 1376, 1379 (1991), quoting *Strickland*, 466 U.S. at 689.

¶11 Molina cites no authority to support his suggestion that a court may not draw on its own experience in determining whether counsel’s decisions were reasonable. Indeed, in *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994), our supreme

court implicitly suggested trial judges are equipped to make such determinations. Decided before the court directed in *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002), that all claims of ineffective assistance of counsel be presented first to the trial court in a petition for post-conviction relief pursuant to Rule 32, rather than on direct appeal, the court recognized in *Woods* that such claims “are fact-intensive and often involve matters of trial tactics and strategy,” concluding that trial judges are “far better-situated to address these issues.” *Wood*, 180 Ariz. at 61, 881 P.2d at 1166.

¶12 The instances of trial counsel’s allegedly deficient performance in this case were largely fact-based and required that the trial court evaluate counsel’s performance in the context of the entire trial. The court found her approach reasonable in most respects, and concluded her performance had not been prejudicial, relying on its knowledge and understanding of the record and law. Given the nature of the claims and the court’s evaluation of them, we cannot say the court abused its discretion by concluding it was not necessary to provide Molina with funds to retain an expert.

¶13 Nor did the trial court abuse its discretion when it rejected the various claims of ineffective assistance of counsel. In this regard, no purpose would be served by restating the court’s ruling in its entirety in this decision; rather, we adopt that ruling because it is supported by the record, *see State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶14 Molina also contends the trial court erred when it failed to vacate his sentences and resentence him after finding trial counsel had been ineffective with respect to the issue of presentence incarceration credit. In its March 25, 2011 minute entry, the

court acknowledged counsel appeared to have been ineffective with respect to the issue of presentence incarceration credit and invited the parties to either enter an agreement as to the additional credit to which Molina was entitled or to present evidence. On April 20, the state filed a memorandum regarding presentence incarceration credit. On June 13, 2011, the court found in a separate minute entry order that Molina was entitled to additional presentence incarceration credit and gave the parties another week to submit any corrections to the computations the court had made. On July 15, when the court ruled on all claims after the evidentiary hearing, it gave Molina an additional sixty-six days of incarceration credit. Molina asserts the court should have conducted a hearing on this issue and should have resentenced him. He argues that by not resentencing him the court effectively deprived him of the right to an appeal from that resentencing.

¶15 First, the trial court had no reason to vacate the entire sentence. The matter of presentence incarceration was corrected when the court granted post-conviction relief after having given the parties ample opportunity to present it with information relating to the additional credit Molina claimed he should have been given and that trial counsel should have provided the court after alerting it at sentencing that Molina might be entitled to more credit. Molina has not been deprived of an opportunity to obtain review of the court's ruling, rather he has received such review pursuant to Rule 32.9. And, more importantly, he has not established in his petition for review how he was prejudiced by the lack of an additional hearing. Not only was he given the opportunity to provide the court with any information he believed was relevant to and supportive of his claim, but he

has not established on review how the court erred in calculating the additional amount of credit to which he was entitled.

¶16 For the reasons stated, we grant Molina's 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