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
SEP 13 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. FALISHA NICHOLE LONDON, Petitioner.	2 CA-CR 2012-0117-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20032066

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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

Patrick C. Coppen
Tucson
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Falisha London seeks review of the trial court's denial of her petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., after an

evidentiary hearing on her claim of ineffective assistance of counsel. For the following reasons, we grant review but deny relief.

¶2 After a jury trial, London was convicted of armed robbery, aggravated robbery, and twelve counts each of kidnapping and aggravated assault, all committed at a Tucson credit union in April 2003. The trial court sentenced her to aggravated, concurrent and consecutive prison terms totaling thirty years. We affirmed her convictions and sentences on appeal. *State v. London*, No. 2 CA-CR 2004-0107 (memorandum decision filed July 27, 2005). London filed a timely notice of post-conviction relief and, after appointed counsel notified the court that she could find no colorable claims pursuant to Rule 32, London filed a pro se petition alleging numerous claims. The court granted an evidentiary hearing on the sole issue of whether trial counsel had rendered ineffective assistance in failing to request a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969),[1] after trial testimony allegedly revealed that "witnesses were shown a single, enlarged mug shot of [London] instead of a multi-photo lineup featuring images of people of similar appearance commonly known as a 'sixpack.'"[2]

[1]In *Dessureault*, our supreme court held that where an in-court identification is challenged as tainted by an unduly suggestive procedure, the trial court must hold a hearing to determine the admissibility of the identification to ensure that it comports with due process. 104 Ariz. at 383-84, 453 P.2d at 954-55.

[2]The trial court denied London's petition as to her other claims, and she has not sought review of that ruling.

¶3 At the evidentiary hearing, trial counsel explained he had first met London after she had been arrested for another credit union robbery committed in June 2003 by a "crew that had come in from California" and "was relatively practiced" in such robberies. London and others subsequently were charged with the April incident in the instant case. Counsel stated "London had vehemently denied being involved in either case" or with her co-defendants. She had told him of another woman from her California neighborhood who was associated with the perpetrators and who resembled her so closely that she "was essentially almost a doppelganger" and that the two women often had "been mistaken for each other."

¶4 Counsel testified that, in light of this revelation, the defense theory was not based on "an issue of identification," as much as on evidence that London had been in California at the time of the April offense, recovering from a recent gunshot wound to her leg, making it unlikely that the person seen on a security videotape, who had walked without a limp, had been her. According to counsel, "It wasn't a matter that [witnesses] had misidentified [London] in the sense of the video not looking like her." Instead he pursued an alibi defense that would not impugn the credibility of "these people saying we saw somebody [who] looked like [her]" by "explain[ing] to the jury that of course [the witnesses are] wrong because there is a different person [who] looks just like her." When asked, counsel agreed that, even had he been aware before trial that particular witnesses had identified London based on a single mug shot shown to them after the June robbery, it would not "have raised in [his] mind . . . an idea that there might be an identification or

a *Dessureault* issue," but said it would instead have prompted him to think about "how [he] could use that to explain to the jury how people could be even . . . more wrong about the identification."

¶5 At the close of the hearing, the trial court found counsel had employed "a sound and reasonable strategy under the circumstances; that his performance did not fall below . . . objectively reasonable standards in the community and that, furthermore, his performance did not prejudice [London]." The court summarized the "ample evidence" presented in support of London's alibi, including testimony from London's mother and sister that she had been in California recovering from a gunshot wound throughout the month of April. And, it found counsel had believed in-court identifications by the witnesses "played into his defense," permitting him to argue that those identifications, albeit made in good faith, were "mistaken because there is this other woman out there . . . who actually committed the offense."

¶6 On review, London argues the trial court "erred in finding that former counsel's performance in this case was not deficient and did not prejudice" her. She maintains counsel's failure to request a *Dessureault* hearing under the circumstances here "constituted a failure to present even a minimally competent defense," because such a hearing would likely have resulted, at a minimum, in an instruction permitting the jury to disregard the tainted identifications.[3] *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955.

[3]At the evidentiary hearing, London's counsel suggested that trial counsel was ineffective in failing to request a *Dessureault* hearing after witnesses stated that they had been shown London's mug shot by one of the detectives. Because these statements were

This result, she contends, would have been "wholly consistent" with the alibi and misidentification defenses trial counsel had pursued.

¶7 In support of her allegation that she was prejudiced by counsel's performance, London cites the trial court's statement, in its order granting the evidentiary hearing, that "a *Dessurea*[*u*]*lt* hearing contesting the propriety of the pre-trial identification procedure may have significantly impacted the outcome of [her] case." She also argues a finding of prejudice was supported by "uncontroverted expert testimony at the hearing." Finally, relying on *Dessureault* and *State v. Edwards*, 139 Ariz. 217, 221, 677 P.2d 1325,1329 (App. 1983), she appears to argue she has established prejudice because "the State failed to show that the error was not harmless beyond a reasonable doubt."[4]

---

made after the witnesses had identified London in court, and suppression of those in-court identifications was not possible after they were already in evidence, the appropriate remedy, had counsel requested and prevailed after a *Dessureault* hearing, would appear to have been a jury instruction. *See Dessureault*, 104 Ariz. at 384, 453 P.2d at 955.

[4]London also asserts that, in *Glover v. United States*, 531 U.S. 198, 203 (2001), "the United States Supreme Court specifically held that the prejudice prong of the *Strickland*[*v. Washington*, 466 U.S. 668, 687-88 (1984)] test is met if deficient performance or error by counsel leads to *any* deprivation of a substantive or procedural right" and that "the failure to request the *Dessurea*[*u*]*lt* hearing in this case arguably obstructed one of [his] procedural rights at trial, whereby prejudice may be presumed" pursuant to *Glover*. We decline to consider this argument, which London did not raise below. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to consider "issues first presented in a petition for review . . . [which] have obviously never been presented to the trial court for its consideration"). In any event, London has misread *Glover*. *See Glover*, 531 U.S. at 202-03 ("[I]n some circumstances a mere difference in outcome [but for counsel's error] will not suffice to establish prejudice" under *Strickland*; reaffirming "'straightforward application of *Strickland*'" when counsel's ineffectiveness actually deprives defendant "'of a substantive or

¶8 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).

¶9 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that she suffered prejudice from this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (adopting *Strickland*). To demonstrate the requisite prejudice, she must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A

---

procedural right to which the law entitles him'"), *quoting Williams v. Taylor*, 529 U.S. 362, 393 (2000).

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶10 As an initial matter, from the citations to the trial record provided, we see no evidence supporting London's assertion that a detective had shown two of the witnesses "a single mug shot of [her]," rather than employing a less suggestive pretrial identification procedure. At trial, the detective confirmed that he had shown the two witnesses "some photographs," including a photograph of London, and that they had each identified London and another perpetrator. There was no testimony that the detective had shown the witnesses only those two pictures, in isolation, and neither the witnesses who had identified London nor police personnel who participated in the identification procedures were called to testify at the evidentiary hearing.[5]

¶11 Moreover, even assuming, arguendo, that trial counsel had performed deficiently in failing to request a *Dessureault* hearing, the trial court did not abuse its discretion in concluding London had failed to establish the prejudice required under *Strickland*. Notwithstanding London's argument regarding the court's comments in ordering an evidentiary hearing, those comments are of no import to the court's ultimate

[5]Similarly, London relies only on trial transcripts to support her argument that identifications made by bank employees could have been tainted if police had posted photographs of London, taken after the later, June robbery, on an "Operation Bank Safe" Internet website, and those photographs had been viewed by these witnesses. This is sheer speculation and is unsupported by evidence of either improper police procedures or any tainted identifications.

ruling.[6] At the hearing, trial counsel stated he had been "feeling really, really good" about the alibi defense until it had been "undercut" by "the Patty Hearst phone call." He explained that two of the witnesses had met a woman matching London's description when she and several of her male companions had spent the night at their apartment the night before the April robbery. When they later saw a videotape of the robbery on television, one of them recognized a piece of her own clothing being worn by the female perpetrator. Counsel stated that, although one of these witnesses could not identify London at trial, they reported that the woman's companions "kept referring to her as Patty Hearst." Then, "[r]ight at the end of the trial," the state had introduced a fifteen-second telephone call London had made on June 9, after her arrest, in which she had told the person she was speaking to that "Patty Hearst need[ed] him." Counsel testified that this evidence tying London to those who had stayed in the witnesses' local apartment the night before the April robbery "kind of deflated the whole argument" that London could not have been the perpetrator because she had been in California at the time of the robbery.

¶12 As the trial court noted, substantial evidence had been presented to support London's alibi defense and thus to impair the credibility of the eyewitness identifications. Because that evidence had been insufficient to counter the impact of "the Patty Hearst

[6]The trial court's minute entry also had stated, "Because it is questionable as to whether [London] has presented a colorable claim for post-conviction relief with respect to [the *Dessureault*] issue, she is entitled to an evidentiary hearing in order to resolve the matter."

phone call," the court reasonably could have concluded that an instruction permitting the jurors to consider whether some of the eyewitness identifications had been tainted, *see Dessureault*, 104 Ariz. at 384, 453 P.2d at 955, would have made little difference. Thus, the court did not abuse its discretion in finding London had failed to establish a reasonable probability that, but for counsel's failure to request a *Dessureault* hearing, the result of her trial would have been different. *See Strickland*, 466 U.S. at 694.

¶13 Although London suggests the state was required to establish that any failure to request a *Dessureault* hearing was harmless beyond a reasonable doubt, she is mistaken. She appears to have conflated the inquiry for ineffective assistance of counsel with the appellate review of a trial court's decision after a *Dessureault* hearing has been held. In *Dessureault*, our supreme court explained that "where . . . the in-court identification is challenged at the trial level," an appellate court may affirm "if it can be determined from the record on clear and convincing evidence that the in-court identification was not tainted by the prior identification procedures or from evidence beyond a reasonable doubt that it was harmless." *Dessureault*, 104 Ariz. at 383-84, 453 P.2d at 954-55. The court continued,

> [I]f the in-court identification is not challenged at the trial level, it will be presumed thereafter that prior identification procedures did not taint the in-court identification. This presumption we deem conclusive for the obvious reason that all litigation, even criminal, must end at some point. Matters which could have been determined by the mere asking, if not raised, will be deemed settled adversely to the accused.

Id. The appropriate standard for determining whether a petitioner has established the prejudice required to prevail on an ineffective assistance claim is set forth in *Strickland*. *Nash*, 143 Ariz. at 397, 694 P.2d at 227.[7] The trial court did not abuse its discretion in applying that standard here.

¶14 For the foregoing reasons, although we grant review, relief is denied.

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

CONCURRING:

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

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

[7]To the extent *Edwards* suggests a different analysis, 139 Ariz. at 221, 677 P.2d at 1329, we note that *Edwards* was decided in 1983, before the Supreme Court decided *Strickland* and before our own supreme court adopted *Strickland* in *Nash*.