

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 14 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0179-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DONNIE RAY FRANKS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100760001

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Donnie R. Franks

Tucson
In Propria Persona

ESPINOSA, Judge.

¶1 After a jury trial, petitioner Donnie Franks was convicted of second-degree burglary and theft by control. The trial court sentenced him to enhanced, presumptive, concurrent prison terms of 11.25 years for each offense. We affirmed his convictions and sentences on appeal. *State v. Franks*, No. 2 CA-CR 2010-0384 (memorandum decision filed Oct. 21, 2011). In his pro se petition for review, Franks challenges the court's dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R.

Crim. P., in which appointed counsel alleged trial counsel had been ineffective. Franks contends that, at the very least, he was entitled to an evidentiary hearing. Absent a clear abuse of discretion, we will not disturb the court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish counsel's performance fell below an objectively reasonable professional standard and the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397-98, 694 P.2d 222, 227-28 (1985). "[D]isagreements 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." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). A reviewing court should give great deference to tactical decisions made by counsel and should refrain from evaluating counsel's performance in the harsh light of hindsight. *See Nash*, 143 Ariz. at 398, 694 P.2d at 228. Like the ultimate decision whether to grant or deny post-conviction relief, whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶3 Franks argues on review, as he did in his petition below, that trial counsel was ineffective because he failed to contact or interview three potential defense witnesses, depriving him of a mere-presence defense. He contends he raised a colorable claim for relief and the trial court abused its discretion by denying relief without an evidentiary hearing. For the reasons stated by the court, however, it is at least equally plausible trial counsel had chosen the defense strategy based on his evaluation of the case

and had recognized that the chosen defense was appropriate in light of the “very strong” evidence against Franks. *Franks*, No. 2 CA-CR 2010-0384, ¶ 6.

¶4 Based on the record before us, we cannot say the trial court abused its discretion in denying Franks’s petition for post-conviction relief. The court did so in a detailed and thorough minute entry order that clearly identified Franks’s arguments and correctly ruled on them in a manner that will allow any court to understand their resolution in the future. We therefore approve and adopt the court’s ruling and see no need to restate it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶5 Because the trial court did not abuse its discretion by denying post-conviction relief, we grant the petition for review but 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