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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OF ARIZONA, Respondent, v. HOWARD NED MCMONIGAL III, Petitioner.	2 CA-CR 2012-0217-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20073959

Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED IN PART AND GRANTED IN PART AND REMANDED

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

Howard Ned McMonigal III
Florence
In Propria Persona

E S P I N O S A, Judge.

¶1 Petitioner Howard McMonigal seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32,

Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 McMonigal was convicted after a twenty-three day jury trial of one count of illegally conducting an enterprise, three counts of theft, one count of possessing a motor vehicle with an altered identification number, five counts of kidnapping, three counts of sexual assault, one count of aggravated assault, and one count of possession of methamphetamine. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 128.75 years. We affirmed his convictions and sentences on appeal. *State v. McMonigal*, No. 2 CA-CR 2009-0099 (memorandum decision filed Apr. 22, 2010).

¶3 McMonigal filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and had found "no basis in fact and/or law for post-conviction relief." McMonigal then filed a pro se petition, asserting: (1) the indictment did not give sufficient information regarding the criminal enterprise count and the evidence did not support a conviction on that count; (2) the trial court had improperly permitted the state to amend the indictment to change the alleged dates of several charges; (3) a search of his residence had been illegal; (4) the state had used perjured testimony during trial; and (5) trial counsel had been ineffective by failing to raise the foregoing issues, object to the criminal enterprise jury instruction, request a hearing pursuant to *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976),

concerning one of the victims, call certain witnesses at trial, and seek a continuance based on evidence disclosed during trial.

¶4 The trial court summarily dismissed McMonigal's petition. It concluded that all of the claims except ineffective assistance of counsel were precluded because they could have been raised on appeal. The court also rejected each of McMonigal's ineffective assistance of counsel claims, concluding McMonigal in each instance had not demonstrated counsel's performance had been deficient and/or that he had been prejudiced by counsel's purportedly deficient conduct. The court denied McMonigal's subsequent motion for rehearing, and this petition for review followed.

¶5 On review, McMonigal repeats several of the claims he raised below.[1] We first observe that, to the extent he seeks to incorporate by reference the arguments made in his petition below, that procedure is not permitted by our rules and we do not consider those portions of his clams. Ariz. R. Crim. P. 32.9(c)(1)(iv). We next address McMonigal's argument that the trial court erred in finding his claims precluded for failing to raise them on appeal. He asserts the claims are of sufficient constitutional magnitude that he must knowingly, voluntarily, and intelligently waive them and therefore they are not subject to the preclusive effect of Rule 32.2(a)(3). *See Swoopes*, 216 Ariz. 390, ¶ 21, 166 P.3d at 951. But he cites no authority suggesting the rights central to those claims require such waiver, and therefore we do not address this

[1]McMonigal does not reurge his claims based on defects in the indictment and jury instructions related to the criminal enterprise charge or his claim that counsel should have requested a *Pope* hearing.

argument further. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must contain "reasons why the petition should be granted"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).

¶6 Generally, "[t]o state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). "Proof of ineffectiveness must be a demonstrable reality rather than a matter of speculation." *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984). There is "[a] strong presumption" that counsel "provided effective assistance," *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant must overcome by providing evidence that counsel's conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). Moreover, tactical or strategic decisions rest with counsel, *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984), and we will presume "that the challenged action was sound trial strategy under the circumstances," *State v. Stone*, 151 Ariz. 455, 461, 728 P.2d 674, 680 (App. 1986). To overcome this presumption, a petitioner must show that counsel's decisions were not tactical in nature, but the result of "ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Thus, "[d]isagreements as to trial strategy or errors in trial [tactics] will not support a claim of ineffective assistance of counsel as long

as the challenged conduct could have some reasoned basis." *Meeker*, 143 Ariz. at 260, 693 P.2d at 915.

¶7 McMonigal contends the trial court erred in finding that his trial counsel's decision not to call several witnesses on his behalf was strategic and therefore could not give rise to a claim of ineffective assistance of counsel. But we must presume counsel's decision not to call those witnesses was strategic. *See Stone*, 151 Ariz. at 461, 728 P.2d at 680. Thus, McMonigal's bare claim that the other witnesses would have rebutted portions of the state's case against him does not establish that counsel lacked a reasoned basis for not calling those witnesses. *See Goswick*, 142 Ariz. at 586, 691 P.2d at 677. But, McMonigal argues that, concerning one of those prospective witnesses, Ashley Delima, the record demonstrates that counsel had improperly prepared a writ to have the in-custody witness transported for trial. Thus, he asserts, he has demonstrated that, because counsel did not obtain a proper writ, her failure to call Delima at trial was "due to incompetence" instead of strategy. Counsel had requested the court sign a writ to require that witness to be transported but, because it had not been notarized, counsel volunteered to resubmit the writ for signature the following day. Counsel apparently did not do so.

¶8 A colorable claim is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And, in general, trial courts should "err on the side of granting an evidentiary hearing." *State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996). With these

guiding principles in mind, we agree with McMonigal that counsel's apparent failure to obtain the necessary writ permits the inference that counsel's failure to call Delima was not a strategic decision but instead was a result of "ineptitude, inexperience or lack of preparation." *Goswick*, 142 Ariz. at 586, 691 P.2d at 677. Indeed, the trial court noted it was "unclear whether the alleged error is the actual reason that Ms. Delima did not testify." And McMonigal has raised a colorable claim that Delima's testimony could have altered the result at trial. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. He filed an affidavit signed by Delima in which she avowed she knew several of the alleged victims and the various assaults to which they had testified had not occurred, the victims had been free to leave McMonigal's residence in spite of their claims they were unable to do so, and one of the victims had spoken favorably about McMonigal after the time of the alleged assault. Accordingly, we conclude the trial court erred in determining McMonigal had not presented a colorable claim of ineffective assistance of counsel on this basis.

¶9 McMonigal next asserts trial counsel was ineffective in failing to object to various amendments to the indictment.[2] But, as the trial court correctly pointed out, McMonigal does not identify how the amendments prejudiced him or interfered with his ability to defend against the charges. *See State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980) (indictment amendment permitted if it "does not operate to change the nature

[2]Although he additionally asserts appellate counsel should have raised this claim on appeal, he did not raise this claim below and we do not address it.

of the offense charged or to prejudice the defendant in any way"; change of offense date permitted absent prejudice); *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996) (defendant must show resulting prejudice), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012); *see also* Ariz. R. Crim. P. 13.5; *Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 (to prevail on ineffective assistance claim, defendant must show resulting prejudice).

¶10 McMonigal also contends the trial court erred in rejecting his claim that trial counsel had been ineffective in failing to move to suppress evidence seized during an August 2007 search of his home. He claims the court failed to address his arguments that officers had entered his home before the warrant was issued and used information obtained in that illegal search to support the warrant application, and that the warrant did not include permission to search his residence. McMonigal has identified evidence suggesting at least one officer entered his home before the warrant was issued. But, even assuming that entry was unlawful, he has not identified what improper information was subsequently used to support the warrant affidavit. *See generally State v. Martin*, 139 Ariz. 466, 476-77, 679 P.2d 489, 499-500 (1984). Thus, he has not adequately supported his claim the warrant was invalid. We agree, however, that the warrant itself at least arguably did not include McMonigal's residence, as it specifically permitted only "a search of the person, and or vehicles" on the property. *See State v. Coats*, 165 Ariz. 154, 159, 797 P.2d 693, 698 (App. 1990) ("A search warrant must particularly describe the place to be searched.").

¶11 We nonetheless reject McMonigal's argument because he has not met his burden of demonstrating prejudice caused by counsel's failure to file a suppression motion. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68. He has not shown what evidence could have been or should have been suppressed had his counsel raised this argument below. He vaguely refers to "ambiguous but tangible physical evidence" and a "substance" found in his home that "could be used as a cutting agent for methamphetamine." But his citations to the record are wholly inadequate—he cites hundreds of pages of transcript without explanation or specificity, and his reference to the record concerning the "cutting agent" does not include any indication that the substance had been seized during the August search. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must include "specific references to the record").

¶12 McMonigal next asserts the trial court "circumvent[ed]" "the issue of [the] state's use of known perjury" in concluding that his trial counsel had adequately impeached the state's witnesses based on inconsistencies between their trial testimony and previous statements. His argument here is difficult to parse—although he claims several witness statements constituted perjury,[3] he asserts only that counsel was ineffective by failing to adequately impeach the witnesses. He acknowledges that counsel had pointed out "many inconsistencies" in the witnesses' testimony but asserts counsel nonetheless failed to raise other "numerous substantial" inconsistencies. We

[3]To the extent McMonigal claims the state's use of allegedly perjured testimony constituted prosecutorial misconduct, and to the extent he raised this claim below, it is precluded because he could have raised it on appeal but did not. Ariz. R. Crim. P. 32.2(a)(1), (3).

again conclude McMonigal has not adequately supported his claim—although he identifies several purported inconsistencies, he does not identify the inconsistencies counsel did point out, nor does he provide citations to the cross-examination of any witnesses in order to demonstrate that counsel's examination was inadequate. *See* Ariz. R. Crim. P. 32.9(c)(1). Accordingly, we cannot evaluate whether counsel's performance was deficient and we therefore reject this claim.

¶13 Last, McMonigal argues his counsel was ineffective in failing to request a continuance based on newly disclosed evidence, specifically, a witness interview the prosecutor disclosed during trial in which the witness had made several statements inconsistent with her earlier interviews. McMonigal asserts counsel should have requested a continuance to investigate that witness's purported psychological problems. But he notes the witness disclosed her psychological impairments in a pretrial interview. McMonigal identifies no reason counsel would have needed a continuance to further investigate those impairments. Nor does he identify any reason for us to conclude counsel's decision not to question the witness about those impairments at trial was anything other than a reasoned tactical decision. *See Stone*, 151 Ariz. at 461, 728 P.2d at 680. Accordingly, he has not demonstrated counsel's conduct fell below prevailing professional norms.[4] *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

[4]While McMonigal states in passing that the evidence was insufficient to support his kidnapping conviction, he does not support this claim and, in any event, it is precluded pursuant to Rule 32.2(a), and we therefore do not address it further. *See* Ariz. R. Crim. P. 32.9(c)(1); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶14 For the reasons stated, although review is granted, we grant relief solely on McMonigal's claim that trial counsel was ineffective in failing to call Delima as a witness at trial. We therefore remand this case to the trial court for an evidentiary hearing to resolve the merits of that claim. Relief is otherwise denied.

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

CONCURRING:

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

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge