FILED BY CLERK
AUG 17 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ROBERT STANFORD III, Petitioner.	2 CA-CR 2012-0250-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007151813001SE

Honorable Daniel G. Martin, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Catherine Leisch
Phoenix
Attorneys for Respondent

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Robert Stanford III seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief

absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Stanford has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Stanford was convicted of second-degree murder. The trial court sentenced him to an enhanced, aggravated, eighteen-year sentence. The conviction and sentence were affirmed on appeal. *State v. Stanford*, No. 1 CA-CR 09-0145 (memorandum decision filed May 25, 2010). While the appeal was pending, Stanford initiated a post-conviction relief proceeding, arguing in his petition that trial counsel had been ineffective "in failing to call an eye-witness to the shooting," "in failing to present evidence of the victim's aggressive nature and criminal background," and "in failing to test the driver's side window frame [of Stanford's vehicle] for the victim's DNA."[1] He also claimed newly discovered evidence entitled him to relief.[2] The trial court summarily denied relief.

¶3 On review, Stanford contends the trial court erred in rejecting his claims of ineffective assistance of counsel and newly discovered evidence, and he reasserts the related arguments he made below. But we agree with the court that Stanford has failed to

[1]Deoxyribonucleic acid.

[2]Stanford further asserted that "[t]he cumulative effect of defense counsel's failure to act on [his] behalf throughout this case amounts to ineffective assistance of counsel." In support of that argument he listed various other "tasks or actions" he asserted trial counsel had "failed to do" on his behalf. He also challenged the legality of his sentence and asserted claims of ineffective assistance of trial and appellate counsel in relation to that challenge. Stanford does not assert these claims on review, and we therefore do not address them. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "[t]he reasons why the petition should be granted" and "specific references to the record"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (argument not raised in accordance with procedural rules deemed waived).

overcome the presumption "that counsel's conduct falls within the wide range of reasonable professional assistance" that "'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S 668, 689 (1984), *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955); *see State v. Schurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993). Although Stanford argues about the wisdom of counsel's not calling the eyewitness at trial or having the vehicle subjected to testing, he has not shown these decisions resulted from "ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984).

¶4 We also reject Stanford's assertion that the trial court abused its discretion in rejecting his claim that counsel was ineffective in failing to introduce evidence about the victim on the ground that Stanford failed to provide the transcript of the proceeding at which the court apparently ruled such evidence inadmissible. Stanford claims "there is no [further] evidence to produce" in support of his claim because "[t]he orders that were entered on that date were contained in the minute entry." But the state had filed a motion to preclude evidence of "prior acts of violence committed by the victim," and the court's minute entry for the date Stanford alleges the motion was heard states, "Pretrial matters are discussed as set forth on the record." In the absence of that record neither the judge ruling on the Rule 32 petition, who was not the judge who presided over that hearing, nor this court can know what counsel argued or the reasons for the court's ruling. The court therefore correctly determined Stanford had failed to establish a colorable claim. *See State v. Wilson*, 179 Ariz. 17, 19 n.1, 875 P.2d 1322, 1324 n.1 (App. 1993) ("It is defendant's responsibility to see that the record contains the material to which he takes

exception, and the failure to provide relevant transcripts can result in the presumption that the missing material supports the action of the trial court."); *see also* Ariz. R. Crim. P. 32.4(d), 32.5.

¶5 Stanford also argues the trial court erred in concluding the eyewitness's testimony was not newly discovered evidence. The court found that the eyewitness's statement presented in the affidavit for the Rule 32 proceeding differed from what he had told counsel at the time of trial, and it therefore did not exist at the time of trial. But even if we were to accept Stanford's argument that the eyewitness's statements had remained consistent, the proposed testimony still would not be newly discovered evidence because Stanford did not "exercise due diligence in securing" it. Ariz. R. Crim. P. 32.1(e)(2). On review Stanford argues, without citation to the record, that a police detective testified at trial that he had looked extensively for the eyewitness and had been unable to find him. But, in his affidavit, the eyewitness stated he had attended Stanford's court hearings and had spoken with Stanford's counsel. Thus, both Stanford and his counsel were aware of the witness's potential to testify and could have secured his testimony had they so wished. But, as discussed above, trial counsel made a tactical decision not to use the testimony, and Stanford's claim of newly discovered evidence is essentially a veiled repetition of his claim of ineffective assistance of counsel. Such circumstances will not support a claim of newly discovered evidence, and the court did not abuse its discretion in rejecting the claim. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court's ruling on any correct basis).

¶6 The trial court's ruling otherwise correctly identified and addressed Stanford's claims in a manner permitting this court to review and determine the propriety of the order. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No purpose would be served by reiterating the remainder of the court's ruling; rather, we adopt it. *See id.* Therefore, although we grant the petition for review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge