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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STATE OF ARIZONA, Respondent, v. RUSSELL LEE GARCIA, Petitioner.	2 CA-CR 2012-0251-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20081442

Honorable Celé Hancock, Judge

REVIEW GRANTED; RELIEF DENIED

Sheila Sullivan Polk, Yavapai County Attorney
By Dana E. Owens
Prescott
Attorneys for Respondent

Russell Garcia
Los Banos, CA
In Propria Persona

E S P I N O S A, Judge.

¶1 Petitioner Russell Garcia was charged with aggravated assault on a child less than fifteen years of age, child abuse, criminal damage, four counts of disorderly conduct, and two counts of disobeying a court order. He was convicted of the aggravated-assault charge following a jury trial, and disorderly conduct and criminal damage following a bench trial. After appointed counsel filed an *Anders*[1] brief on appeal and Garcia filed a pro se supplemental brief, this court affirmed the convictions and the sentences imposed. *State v. Garcia*, No. 1 CA-CR 09-0468 (memorandum decision filed Apr. 13, 2010). Garcia then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming trial counsel had rendered ineffective assistance. The trial court denied the petition after an evidentiary hearing, and this petition for review followed.

¶2 It is for the trial court to determine, in the exercise of its discretion, whether to grant post-conviction relief, and absent an abuse of that discretion, we will not disturb its ruling. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). In reviewing a court's ruling following an evidentiary hearing, we defer to its factual findings, *see State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993), mindful that the trial court "'is in the best position to evaluate credibility and accuracy, as well as draw inferences, weigh, and balance'" the evidence that was presented at the evidentiary hearing, *see State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993). *See also State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988) (trial court sole arbitrator of credibility of witnesses at Rule 32 evidentiary hearing). Consequently, we

[1]*Anders v. California*, 386 U.S. 738 (1967); *see also State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

do not reweigh the evidence, *see State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003), rather, "[w]e examine a trial court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous," *see State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994). As a corollary to these principles, we view the evidence that was presented at the evidentiary hearing in the light most favorable to sustaining the court's ruling. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733.

¶3 The trial court began its ten-page minute entry by summarizing the procedural history of this case and stating it had "considered the entire file . . . , the pre-trial and post-trial transcripts and the evidence presented by both the Defense and the State at the evidentiary hearing." The court then articulated the proper standard for evaluating Garcia's claims of ineffective assistance of counsel, citing *Strickland v. Washington*, 466 U.S. 668 (1984), and other relevant case law. As the court correctly noted, in order to be entitled to relief, Garcia was required to establish counsel's performance had been deficient, based on prevailing professional norms, and there was a reasonable probability the outcome of the case would have been different but for this deficiency. *Strickland*, 466 U.S. at 687-88; *see also State v. Vaughn*, 163 Ariz. 200, 205, 786 P.2d 1051, 1056 (App. 1989). The court addressed each instance of allegedly deficient performance under the proper test. The record and the applicable law support the court's determination that Garcia failed to sustain his burden of proving he was entitled to relief, and Garcia has not persuaded us otherwise on review. We see no purpose in rehashing the court's decision in its entirety here; instead, we adopt its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Therefore,

we reject Garcia's argument on review that the court abused its discretion when it found the performance of trial counsel Casey Martin had not been deficient and prejudicial with respect to his trial preparation and performance during trial.

¶4 In addition to essentially reasserting the claims he had raised in the trial court, Garcia contends on review the court erred when it refused Rule 32 counsel's request for an order releasing the records pertaining to Terri Folger's counseling of the victim. Folger testified at trial that Garcia had told her he was not interested in participating in counseling with the victim and the victim's mother and what the victim needed "was a good ass beating." She also testified she had seen the victim on November 13 and noticed his neck was red and bruised. When Folger was asked what was contained in her records, she stated her notes might support some of her testimony but she had not brought them with her to court.

¶5 After the counseling center refused Rule 32 counsel's request for Folger's records on the ground that they were confidential, he filed a motion for release of the records, and asked for Folger's treatment notes from October and November 2008, including notes about a telephone conversation she had with the victim's mother and Garcia, and meetings and telephone conversations about the aggravated assault allegations on November 13 and 14, 2008. Citing A.R.S. § 32-3283, Rule 32 counsel argued any confidentiality had been waived by the trial testimony of the victim, his mother in her capacity as the victim's guardian, and Folger. Counsel further argued the records were discoverable under Rule 15.1, Ariz. R. Crim. P., and *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 836 P.2d 445 (App. 1992), because they might contain

evidence that would have been potentially exculpatory or could have been used to impeach Folger, evidence that Rule 32 counsel viewed as necessary to support the claim that Martin had been ineffective. And, Rule 32 counsel insisted Garcia's due process rights outweighed any statutory privilege that existed.[2]

¶6 The trial court heard the motion at the beginning of the first day of the Rule 32 evidentiary hearing. Rule 32 counsel confirmed he was not asking for all of the counseling records but only those that pertained "specifically to the incident that occurred on [November 13, 2008,] . . . discussed in testimony elicited by the State from Ms. Folger, and . . . the records that lead up to [November 13] which might either confirm or discredit Ms. Folger's testimony . . . ." He argued he needed the records to support the claim that trial counsel Casey Martin had been ineffective in failing to interview Folger before trial or to request the records before Folger testified, particularly after the state called her as its witness; Garcia and Martin initially had planned on calling her as

[2]Garcia took an inconsistent position on appeal, claiming the trial court had erred by permitting Folger to testify about her counseling of the victim because the communications were privileged under § 32-3283. This court rejected that argument on the grounds Garcia lacked standing to assert the privilege and the privilege had been waived as to the testimony provided. *Garcia*, No. 1 CA-CR 09-0468, ¶ 10. But we did not address the question raised in this post-conviction proceeding below and on review: in light of the limited waiver as to testimony, did the trial court abuse its discretion when it denied Rule 32 counsel's request for the counseling records and rejected Garcia's claim that trial counsel had been ineffective for not requesting the records in preparing for trial? Our conclusion here that the court did not abuse its discretion by refusing to compel the disclosure of these records is not inconsistent with this court's decision on appeal; any limited waiver that resulted from Folger's, the victim's, and the victim's mother's testimony, did not necessarily mean Garcia needed and was entitled to the counseling records in the post-conviction proceeding.

Garcia's witness because he anticipated her testimony would be favorable to him and would show the victim despised Garcia, and did not want him to live in the home.

¶7 The state responded that it believed Martin's forthcoming testimony at the evidentiary hearing would establish why he did certain things before and during trial and would explain why he did not try to interview Folger or request the counseling records. The court deferred ruling on the motion until after Martin testified, stating, "I suspect and hope the testimony today will clear up that issue."

¶8 Martin testified at the evidentiary hearing that he thought the clinic records would be irrelevant to the defense strategy he had chosen. His "primary strategy in this case," he said, was to establish the assault did not happen. Martin tried to show there was no physical evidence, relying in part on the police officer's testimony that he had not seen any injuries on the victim; the victim was a troubled boy who "hated" Garcia, as did the victim's younger brother; and, the victim and his brother wanted Garcia out of the home. Martin testified further he believed the most damaging evidence against Garcia was the testimony and statements of the victim's mother (Garcia's former wife), the victim, and the victim's younger brother. Martin explained that because Garcia thought Folger would be a favorable witness to the defense, there was no reason to interview her, although he added that, "[i]n retrospec[t]," he wished he had asked for the counseling records. Although he also conceded, again "in retrospect," that things could have been done differently, such as requesting the records, interviewing Folger, and raising an issue about the admission of improper character evidence in the form of Garcia's criminal history, he clarified he was not suggesting these things "would have changed the outcome

of the trial at all." He added that it was "pure speculation" to state that the outcome of the case would have been different.

¶9 The trial court implicitly denied the motion after Martin testified by not granting it and subsequently ruling on the petition for post-conviction relief. Garcia filed a motion for clarification given the lack of an express ruling on his request for the records and asked the court to revisit the question whether the records were discoverable. The court denied the motion, finding it "moot pursuant to" its order denying post-conviction relief. As previously noted, Garcia is challenging that ruling on review.

¶10 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 certain discovery should be permitted. *Id.* ¶ 4. We agree with the state that any waiver based on the testimony of the victim, his mother and Folger was limited solely to the assault, because the victim's entire counseling history was never placed at issue. *See Bain v. Superior Court*, 148 Ariz. 331, 335, 714 P.2d 824, 828 (1986).

¶11 More importantly, however, based on the record before us, which includes Folger's testimony, Martin's cross-examination of Folger, and Martin's own testimony at the Rule 32 evidentiary hearing about why he did not insist on interviewing Folger or getting the counseling records, we cannot say the trial court erred in implicitly finding the records were not essential to Garcia's defense at trial or to his ability to support his Rule 32 petition. *See Romley*, 172 Ariz. at 240-41, 836 P.2d at 453-54 (acknowledging

balancing of defendant's due process rights and victim's medical privilege required to determine whether victim's medical records not in prosecutor's possession should be subject to compulsory disclosure; records subject to disclosure if privilege waived and if essential to presentation of defendant's theory of case, or necessary for impeachment of victim relevant to defense theory). As the state argued at the end of the Rule 32 evidentiary hearing, the case turned "on what happened that morning," and the crucial witnesses were the victim, his brother, his sister, and his mother. "What Terri Folger thought, . . . [she] heard the defendant say in the past, . . . pale[s] in . . . comparison [with] what happened . . . that morning with the four witnesses that were there" and the testimony of what they heard. Moreover, the record supports the court's finding that Martin had cross-examined Folger effectively, eliciting testimony that children do lie to their therapists, the victim had lied to her, he had behavioral issues before Garcia had moved into the home, and he had been in foster care. Thus, we see no error in the court's refusal to order the counseling clinic to disclose the records in the Rule 32 proceeding or in rejecting the related claim of ineffective assistance of counsel.

¶12 We note, too, that in addressing a claim of ineffective assistance of counsel, "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. Thus, the fact that Martin, or any other attorney evaluating with the benefit of hindsight the course of defense Martin chose, may

have concluded that, in retrospect, things could have been done differently, does not mean Martin's performance was deficient.

¶13 For the reasons stated, we grant the petition for review but deny relief.

/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