

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

AUG 14 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0252-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
GINO SALVATORE GAGLIARDI,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR200900986

Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

Jill L. Evans, Mohave County Appellate Defender  
By Diane S. McCoy

Kingman  
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 Petitioner Gino Gagliardi seeks review of the trial court's denial, after an evidentiary hearing, of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. For the reasons that follow, we grant review but deny relief.

¶2 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." *Id.* 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).

¶3 Gagliardi pled guilty to manslaughter, attempted leaving the scene of an accident involving injury or death, and driving under the influence (DUI). The trial court sentenced him to consecutive prison terms totaling thirteen years for the first two counts, and to a concurrent six-month jail term for the DUI conviction.

¶4 Gagliardi filed a notice of and petition for post-conviction relief, arguing that trial counsel had been ineffective in failing to seek to suppress blood and preliminary breath test results and in failing to give accurate advice concerning the potential sentences Gagliardi could face. In its response, the state claimed, *inter alia*, that Gagliardi's counsel would have had no reason to seek suppression of the blood and breath test results because the state had informed counsel it would not seek admission of those results at trial. Gagliardi replied that, if that had been the case, counsel had not informed him of that fact and that, had counsel done so, he would not have pled guilty.

¶5 The trial court summarily denied the bulk of Gagliardi's claims, but determined he had presented a "colorable claim that he would not have pled guilty if he had known that the State did not intend to use the alcohol tests at trial and that he [wa]s entitled to an evidentiary hearing on this claim alone." After that evidentiary hearing, the court found that counsel had been aware the state did not intend to seek admission of the test results and had informed Gagliardi of that fact and, in any event, Gagliardi had not demonstrated he would have rejected the state's plea offer had he known the test results would not be admitted at trial. Accordingly, the court denied Gagliardi's petition for post-conviction relief.

¶6 Gagliardi asserts on review that the trial court erred in rejecting his claim of ineffective assistance of counsel based on counsel's alleged failure to inform him the test results would not have been admitted at trial. To prevail on that claim, Gagliardi must prove that his counsel's conduct fell below prevailing professional norms and that he was prejudiced by counsel's conduct. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Thus, in these circumstances, Gagliardi must demonstrate that his counsel failed to provide him information necessary to evaluate the state's plea offer and that he would have rejected the plea had he received adequate advice from counsel. *See State v. Donald*, 198 Ariz. 406, ¶¶ 16, 20, 10 P.3d 1193, 1200, 1201 (App. 2000).

¶7 Gagliardi argues the trial court erred in finding his trial counsel had informed him the state would not seek to admit the test results. He first points to counsel's response to a bar complaint filed by Gagliardi's family. He claims that, if it were true counsel had told him about the state's position, counsel would have stated that

fact in his response, because it “would have shown compliance” with the ethical rules, specifically ER 1.4, Ariz. R. Prof’l Conduct, Ariz. R. Sup. Ct. 42, which require that counsel “keep the client reasonably informed about the status of the matter.”

¶8 We do not find it remarkable that counsel did not mention in that response that he had informed Gagliardi the test results would not be admitted. Although the complaint broadly accused counsel of failing to inform the family adequately about the case, it did not meaningfully discuss counsel’s interaction with Gagliardi, and counsel noted in his response that he “at various times talked at length [with Gagliardi] about the risks and benefits of a plea agreement vs. a trial.” In any event, the trial court found credible counsel’s testimony that he had informed Gagliardi of the state’s decision not to seek admission of the test results. Counsel’s omission of that fact from his response to the Gagliardi family’s bar complaint is, at best, inconsistent evidence. Gagliardi essentially asks us to reweigh the evidence on review; we will not do so. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733.

¶9 Gagliardi also suggests the trial court erred in finding counsel informed him the test results would not be admitted because counsel did not memorialize that fact and permitted Gagliardi to admit, as part of the plea agreement, that his alcohol concentration was .15. But these facts at most contradict counsel’s testimony and, again, we will not reweigh the evidence on review.<sup>1</sup> *See id.* Because substantial evidence supports the court’s finding that his counsel informed him the test results would not be admitted at

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<sup>1</sup>For the same reason, we reject Gagliardi’s claim that the trial court erred in finding his counsel was aware the state would not seek admission of the test results at trial.

trial, Gagliardi's claim of ineffective assistance of counsel fails. *See Donald*, 198 Ariz. 406, ¶ 16, 10 P.3d at 1200. Accordingly, we need not address Gagliardi's contention the court erred in concluding Gagliardi would not have rejected the plea agreement even assuming he had been informed the test results would not be presented at trial.

¶10 For the reasons stated, although we grant review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge