

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 12 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0278-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
VLADIMIR B. RIVERO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007008924011DT

Honorable Lisa M. Roberts, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel

Phoenix
Attorneys for Respondent

Vladimir Rivero

Buckeye
In Propria Persona

B R A M M E R, Judge.

¶1 After a jury trial, petitioner Vladimir Rivero was convicted of trafficking in stolen property in the second degree. The trial court found Rivero had three prior felony convictions and sentenced him to a slightly aggravated, twelve-year prison term. Rivero appealed, challenging the jury instructions on the definitions of “intentionally” and

“knowingly,” and this court affirmed. *State v. Rivero*, No. 1 CA-CR 2009-0154 (memorandum decision filed Apr. 20, 2010). Rivero filed a pro se notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and appointed counsel filed a notice informing the court he was unable to find any viable issues to raise in a petition for post-conviction relief. Rivero then filed a pro se petition in which he raised claims of ineffective assistance of trial, appellate, and Rule 32 counsel, as well as other claims for relief. The court summarily dismissed the petition and Rivero’s motion for rehearing. This pro se petition for review followed. We will not disturb a trial court’s denial of post-conviction relief unless the court clearly has abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 On review, Rivero appears to reiterate most of the claims he had raised below. He claims he is entitled to an evidentiary hearing to show, inter alia, there was insufficient evidence to support his conviction; his confrontation rights were violated; trial, appellate and Rule 32 counsel were ineffective; and, he is entitled to assert a newly discovered theory of “false memory syndrome.”¹ With the exception of the claims of ineffective assistance of counsel, and to the extent we understand the additional asserted claims, they are precluded because Rivero failed to raise them on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief on any ground “waived at trial, on

¹Although Rivero refers to his claim of “false memory syndrome” as one of newly discovered evidence, because he has not presented it as such, we do not treat it as such, and it is, therefore, precluded because he did not raise it on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).

appeal, or in any previous collateral proceeding”). As a result, the trial court properly dismissed those claims.

¶3 As to Rivero’s claim of ineffective assistance of Rule 32 counsel, he clearly failed to raise a colorable claim for relief. Rivero has no cognizable claim under Rule 32 because, as a non-pleading defendant, he has no constitutional right to effective representation in a Rule 32 proceeding. *See Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18, 250 P.3d 551, 556 (App. 2011). Moreover, we question the propriety of raising such a claim in the very same proceeding as that in which the attorney whose conduct is at issue is representing him.

¶4 Regarding Rivero’s claims that trial and appellate counsel were ineffective, to establish a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). “To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel,” a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also* Ariz. R. Crim. P. 32.6(c) (summary dismissal appropriate unless material issue of fact or law exists). A colorable claim is “one that, if the allegations are true, might have changed the outcome.” *State v. Runnigeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶5 On review, as he did below, Rivero essentially asserts general complaints about the caliber of criminal defense attorneys in Arizona, pointing out the general deficiencies of his attorneys in this matter. For example, he asserts “[a]ppellate attorney did not study the transcripts or the law . . . [and a]pparently Arizona attorneys, most of which the state admitted[,] are not . . . competent in criminal law.” Nor were the few specific claims Rivero presented colorable. For example, Rivero asserted trial counsel was ineffective for failing to request the matter be remanded to the grand jury to determine the propriety of allegations of prior convictions and aggravating factors. *See* Ariz. R. Crim. P. 13.5(a) (prosecutor may amend indictment, information or complaint to add allegation of prior convictions or other non-capital sentencing allegations). Nor did Rivero provide “[a]ffidavits, records, or other evidence” to support the “allegations of the petition,” as Rule 32.5 requires. Accordingly, the trial court correctly found Rivero had “failed to demonstrate a colorable claim for post[-]conviction relief.”

¶6 Additionally, to the extent Rivero’s claims could be construed as challenges to counsel’s trial strategy, we find them unpersuasive, as did the trial court. A disagreement about “trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct ha[d] some reasoned basis.” *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987). A reviewing court should give deference to tactical decisions made by counsel and should refrain from evaluating counsel’s performance in the harsh light of hindsight. *Nash*, 143 Ariz. at 398, 694 P.2d at 228. “A strong presumption exists that appellate counsel provided effective assistance. Appellate counsel is responsible for reviewing the record and selecting the most promising issues to

raise on appeal. As a general rule, “[a]ppellate counsel is not ineffective for selecting some issues and rejecting others.” *State v. Bennett*, 213 Ariz. 562, ¶ 22, 146 P.3d 63, 68 (2006) (citations omitted; alteration in *Bennett*), quoting *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶7 Accordingly, although we grant Rivero’s petition for 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