

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

DEC 12 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0290-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOSE ARMANDO VIRGEN,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20081252

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Jose Armando Virgen

Tucson
In Propria Persona

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

¶1 Following a jury trial, petitioner Jose Virgen was convicted of attempted first-degree burglary and attempted aggravated assault. The trial court sentenced him to presumptive, concurrent prison terms totaling ten years. We affirmed Virgen's convictions and sentences on appeal. *State v. Virgen*, No. 2 CA-CR 2009-0381 (memorandum decision filed Sept. 20, 2010). Virgen filed a petition for post-conviction

relief pursuant to Rule 32, Ariz. R. Crim. P., asserting trial counsel was ineffective. The court denied relief following an evidentiary hearing, and this petition for review followed.¹ Absent a clear abuse of discretion, we will not disturb the trial court's ruling on post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Virgen implicitly argues on review that trial counsel was ineffective for advising him to testify at trial, for failing to inform him of the risks of testifying, and for counsel's deficient conduct during closing argument.² 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). Reviewing courts indulge "a strong presumption" that counsel provided effective assistance. *Strickland*, 466 U.S. at 689; *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994). And "[m]atters of trial strategy and tactics are committed to defense counsel's judgment." *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988); accord *State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984) ("Actions which

¹After appointed counsel filed a petition for review on behalf of Virgen, his request to represent himself was granted; we thus treat his pro se opening brief as a petition for review.

²To the extent Virgen argues the evidence established an irreconcilable conflict or a total breakdown in communication with his attorney, because he did not raise this issue in his petition for post-conviction relief, we do not address it on review. See *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issue not presented first to trial court); see also Ariz. R. Crim. P. 32.9(c)(1)(ii).

appear to be a choice of trial tactics will not support an allegation of ineffective assistance of counsel.”). Thus, “disagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis.” *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), quoting *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987). And even if counsel’s strategy proves unsuccessful, tactical decisions normally will not constitute ineffective assistance of counsel. See *State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975).

¶3 In a thorough, well-reasoned, eight-page ruling, the trial court identified the claims Virgen had raised and resolved them correctly and in a manner permitting this court to review and determine the propriety of that order. See *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No purpose would be served by restating the court’s ruling in its entirety. See *id.* Rather, we adopt the ruling.

¶4 Accordingly, we grant the petition for review but deny relief.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge