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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OF ARIZONA, Respondent, v. JOSE ALFREDO PERALTA, Petitioner.	2 CA-CR 2012-0318-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20010421

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts III
Tucson
Attorneys for Petitioner

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

¶1 Petitioner Jose Peralta seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., after an evidentiary hearing. For the following reasons, we grant review but deny relief.

¶2 After a jury trial in his absence, Peralta was convicted of burglary; three counts of aggravated assault; and four counts of aggravated assault on a minor under the

age of fifteen, which were dangerous crimes against children. The trial court imposed a combination of consecutive and concurrent, presumptive sentences totaling 78.5 years' imprisonment. This court affirmed Peralta's convictions and sentences on appeal. *State v. Peralta*, No. 2 CA-CR 2005-0167 (memorandum decision filed Apr. 24, 2006). Peralta thereafter initiated a Rule 32 proceeding, claiming ineffective assistance of counsel based on counsel allegedly having advised him to flee the country and having failed to advise him adequately of his right to testify. The court summarily denied relief, and Peralta petitioned this court for review. This court concluded the trial court had "made a factual finding" without holding an evidentiary hearing and granted Peralta relief, remanding the matter to the trial court. *State v. Peralta*, No. 2 CA-CR 2008-0382-PR, ¶¶ 7-8 (memorandum decision filed Mar. 27, 2009).

¶3 On remand, the trial court set an evidentiary hearing, at which Peralta, two of his sisters, and his trial counsel testified. The court ruled trial counsel's performance had not been deficient, and "even if the alleged ineffectiveness had existed, [it] would not have prejudiced the defendant." Peralta again petitioned for review.

¶4 On review, Peralta argues the trial court abused its discretion in determining counsel's performance had not been deficient and Peralta had not been prejudiced. He claims "[t]he trial court improperly ignored the weight of the evidence . . . and the credibility of the witnesses when deciding whether counsel [had] advised [him] to flee to another country." He also contends the court "failed to apply clearly established law regarding counsel's responsibility to ensure his client is aware of his right to testify at trial." 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). 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*.

¶5 In order to prevail on a claim of ineffective assistance of counsel, a petitioner must establish that counsel's performance fell below an objectively reasonable professional standard and that prejudice resulted from 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 demonstrate the requisite prejudice, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A petitioner's failure to establish either part of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶6 First, Peralta claims trial counsel was ineffective in failing to advise him "he had the right to testify about not targeting the children," thereby failing to discuss the possibility of an inconsistent defense that Peralta had not committed the charged offenses, but if he had, he had not targeted children.[1] Peralta had "the burden of proving

[1]At trial Peralta's defense was one of mistaken identification, arguing he was not the person who had committed the offenses. We note the situation here therefore differs from that in *State v. McPhaul*, on which Peralta relies for its statement that there is "nothing inconsistent, illogical or improper about a defendant saying, 'I was not the

the allegations of fact by a preponderance of the evidence." Ariz. R. Crim. P. 32.8(c). And there is "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). Although lacking a specific recollection of his discussion with Peralta on the topic, counsel testified at the hearing that he "would have gone through . . . impeachment with prior felony convictions, and [whether to testify] would have been [Peralta's] decision." Counsel also explained he had not believed an inconsistent defense or a defense specific to the dangerous crimes against children charges was possible "[u]nder the facts of the case." On the record before us, Peralta presented no evidence that counsel's performance in this regard fell below prevailing professional norms. *See Strickland*, 466 U.S. at 688; *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985) ("Disagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis."); *cf. State v. Soule*, 168 Ariz. 134, 136, 811 P.2d 1071, 1073 (1991) ("[A]llowing inconsistent defenses may confuse the jury."). We therefore cannot say the trial court abused its discretion in rejecting his claim.

¶7 We likewise cannot say the trial court abused its discretion in rejecting Peralta's claim that trial counsel had advised him to flee the country. Peralta's argument on review merely invites us to reweigh the evidence presented at the hearing. But it is the

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person who committed the robbery, but even if you do not believe me, the evidence shows that whoever did commit it was not armed.'" 174 Ariz. 561, 562, 851 P.2d 860, 861 (App. 1992). In view of the testimony at trial that the offender had pointed a gun at the children and threatened them, Peralta would have had to admit having been present in order to testify about whether he had directed the crime at the children.

trial court's role to resolve such conflicts; just as we do not reweigh trial evidence on appeal, *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997), we do not reweigh evidence presented at a post-conviction evidentiary hearing. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733; *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). Trial counsel expressly denied having told Peralta he should "go to Mexico instead of going to his trial." And, contrary to Peralta's sisters' testimony that counsel had made similar statements to them, counsel denied ever having had conversations with Peralta's sisters during trial. Thus, substantial evidence supports the court's decision, and, for all these reasons, 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*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.