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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THE STATE OF ARIZONA, Respondent, v. BRIAN DICK, Petitioner.	2 CA-CR 2012-0325-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090837001

Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED

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

K E L L Y, Judge.

¶1 Petitioner Brian Dick seeks review of the trial court's order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 Dick was convicted after a jury trial of sexual assault and sentenced to a prison term of 5.25 years. We affirmed his conviction and sentence on appeal. *State v. Dick*, No. 2 CA-CR 2010-0044 (memorandum decision filed June 8, 2011). Dick then filed a notice of and petition for post-conviction relief. He argued his trial counsel was ineffective for failing to: (1) adequately develop evidence, including obtaining an expert witness, that an abrasion injury to the victim's vagina could have occurred during earlier consensual intercourse with another man, thus allowing him to admit evidence of the victim's earlier intercourse at trial pursuant to A.R.S. § 13-1421(A)(2); (2) argue that the presence of Dick's DNA[1] on samples taken from the victim's mouth and vagina were consistent with his contention that the intercourse was consensual, contrary to the victim's testimony: it showed that he and the victim had kissed and, because his saliva contained more DNA than his ejaculate, that he had performed oral sex on her; (3) provide Dick with "sufficient information" to determine whether to testify.

¶3 The trial court summarily denied Dick's petition. It concluded that evidence of the previous consensual encounter was "probative of nothing" because there was evidence the vaginal abrasion could have been caused by consensual or non-consensual intercourse with Dick and the fact the victim had consensual sex with another man was "irrelevant." The court further determined that trial counsel's decision to forgo an argument based on the DNA evidence and in fact suggest the jury discount that evidence was "trial strategy . . . entitled to a presumption of professional assistance" that Dick had failed to overcome. Finally, the court concluded counsel's decision to advise

[1]Deoxyribonucleic acid.

Dick not to testify was strategic in nature, and that Dick was aware of his right to testify and chose not to exercise it. The court denied Dick's subsequent motion for rehearing filed pursuant to Rule 32.9(a), and this petition for review followed.

¶4 On review, Dick asserts he was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel regarding the victim's previous consensual sexual intercourse and the presence of his DNA in her vagina.[2] To avoid the summary dismissal of a petition for post-conviction relief raising claims of ineffective assistance of counsel, a defendant must raise a colorable claim that counsel's performance was both deficient and prejudicial. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶5 However, "disagreements as to trial strategy or errors in trial tactics will not support an effectiveness claim so long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). And we will presume counsel's decisions were tactical and had a reasoned basis. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("a court must indulge a strong presumption" when evaluating claim of ineffective assistance "that counsel's conduct falls within the wide range of reasonable professional assistance" and defendant must "overcome the

[2]Dick does not seek review of the trial court's denial of his claims based on the presence of his DNA on the victim's mouth and his decision not to testify.

presumption" counsel made sound decision regarding trial strategy); *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984) (defendant must "show that counsel's decision was not a tactical one but, rather, revealed ineptitude, inexperience or lack of preparation").

¶6 Dick argues that the fact the victim previously had consensual sexual intercourse that could have resulted in the vaginal abrasion was relevant because there was evidence that type of injury most commonly occurs from forced intercourse. *See* § 13-1421(A)(2). But, in light of Dick's defense that the intercourse was consensual, we agree with the trial court that the fact the injury might have occurred from some other consensual intercourse would have been of virtually no value to the jury. Thus, Dick has not shown any prejudice resulted from counsel's purportedly deficient conduct and we find no error in the court's summary rejection of that claim.

¶7 Dick also reasserts his argument that counsel was ineffective by failing to argue the presence of his DNA in the victim's vagina supported his claim that he had performed oral sex on the victim. Counsel instead had argued the DNA evidence "gives you nothing" and "doesn't say anything about whether there was oral sex."

¶8 The victim testified that she, Dick, and another co-worker went to the co-worker's apartment after drinking in a bar. After she went to sleep alone in a bedroom, she awoke to find Dick removing her pants. She attempted to push him off of her, but he held her hands above her head and penetrated her vagina with his penis. Dick claimed the encounter was consensual—that he had entered the bedroom and laid down in the bed with the victim, and that they began kissing when she put her head on his shoulder. He

stated that he performed oral sex on her and that they then had intercourse.[3] The victim denied Dick had performed oral sex on her. Thus, Dick reasons, had his counsel argued that the DNA evidence suggested he had performed oral sex, it would have "supported his version of the events" and called the victim's credibility into question.

¶9 Consistent with Dick's assertion that he had a vasectomy, the vaginal swab taken of the victim's vagina contained semen but not sperm. A DNA analyst testified that, due to the absence of sperm, it was less likely that Dick's DNA would be found in the victim's vagina as a result of intercourse. The analyst additionally stated that saliva contains a high amount of DNA.

¶10 But Dick's DNA was not found on the vaginal swab "using standard DNA analysis." Instead, when standard testing failed to provide usable data, the analyst used a different, more sensitive test focused on the male chromosome—YSTR analysis. YSTR analysis is used when there is a "very small level[]" of genetic material present. That analysis linked Dick to the samples taken from the victim's vagina.

¶11 Dick claims that counsel had no reasoned basis to forgo an argument that the presence of his genetic material in the victim's vagina supported his version of events. *See Meeker*, 143 Ariz. at 262, 693 P.2d at 917. We disagree. The evidence clearly supports the inference that saliva deposited during oral sex would have

[3]In his petition for post-conviction relief and his petition for review, Dick provides no citation to evidence supporting his assertions that he had claimed to have had consensual sex with the victim, that he had performed oral sex on her, or that he had a vasectomy. However, because those assertions appear consistent with the evidence in the record before us, for the purposes of review, we will assume they are true.

transmitted a larger amount of genetic material than ejaculation during intercourse. The small amount of genetic material present readily could lead the jury to conclude Dick had not performed oral sex on the victim—thereby supporting her testimony. Indeed, the state made that argument in its closing. Thus, counsel's decision to suggest to the jury that it should disregard the YSTR evidence as unhelpful plainly had a reasoned tactical basis and rebuts, not supports, the claim of ineffective assistance. *See id.*

¶12 Dick additionally asserts the trial court applied the wrong standard in rejecting his claims. He claims the court, by citing *Strickland* and *State v. Nash*, 143 Ariz. 392, 694 P.2d (1985), did not properly accept his allegations as true and consider whether his claim was colorable. But, although the court did not expressly state the test for colorable claims, it correctly cited Rule 32.6(c), which permits the summary dismissal of claims that are not colorable. And we presume trial courts know and follow the law. *State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008). In any event, we have reviewed Dick's claims and have concluded they are not colorable.

¶13 Dick further suggests the trial court failed to assume the truth of statements in an attorney's affidavit Dick had attached to his petition. The affiant stated that, "in light of the DNA testimony offered by [the analyst], the failure of trial counsel to argue in closing [that] the likelihood that [Dick's] DNA was found on [the victim]'s vagina because he had performed oral sex upon her[] was ineffective." He also claimed trial counsel had not "adequately represent[ed]" the defendant at the suppression hearing concerning the evidence of the victims' previous sexual conduct by failing to demonstrate

the vaginal abrasion could have been caused by her earlier intercourse. Finally, the affiant stated that counsel's purported errors "prejudiced the defendant."

¶14 But, although we must treat Dick's assertions as true when determining whether he has presented a colorable claim, *see Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d at 114, the affiant's conclusory statements are insufficient, *cf. State v. Krum*, 183 Ariz. 288, 294, 903 P.2d 596, 602 (1995) (court may disregard "conclusory" affidavit "completely lacking in detail"). And, the affiant's unsupported legal conclusions are unsupported by the record. As we have explained, the record flatly belies the affiant's claim that Dick had been prejudiced by the preclusion of evidence of the victim's previous consensual sexual encounter. Moreover, the affidavit is grounded in the incorrect conclusion that the presence of a small amount of Dick's genetic material on a sample taken from the victim's vagina necessarily was beneficial to his theory of the case. Dick must do more than simply contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant's claimed unawareness sentence "must be served without possibility of early release" not colorable when "directly contradicted by the record").

¶15 Dick also claims the trial court was required to find his claims "frivolous" before it could summarily deny his petition. He relies on the comment to Rule 32.6(c), which states: "If the court finds from the pleadings and record that all of the petitioner's claims are frivolous and that it would not be beneficial to continue the proceedings, it may dismiss the petition." This argument is specious. Rule 32.6(c) clearly directs the court to dispose of a petition summarily upon its determination "that no remaining claim

presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings." That is precisely what the court did here. Nothing in the rule requires a trial court to make an express finding that the claims are "frivolous."

¶16 For the reasons stated, review is granted but relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding 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.