IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JERRY FLYNN WALKER,
Petitioner.

No. 2 CA-CR 2014-0130-PR
Filed July 14, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20073435
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

The Law Offices of Stephanie K. Bond, P.C., Tucson
By Stephanie K. Bond
Counsel for Petitioner

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Olson[1] concurred.

V Á S Q U E Z, Judge:

¶1 Petitioner Jerry Walker seeks review of the trial court's order 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). Walker has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Walker was convicted of sale of a narcotic drug and possession of a narcotic drug for sale. The trial court then granted his motion for new trial on the possession count, and sentenced him to 15.75 years' imprisonment on the sale count. Walker filed a motion to vacate the judgment on the sale count, which the trial court granted, but this court reversed and remanded. The trial court resentenced Walker to the same term on the sale count and dismissed the possession count on the state's motion. Walker's conviction was affirmed on appeal after resentencing. *State v. Walker*, No. 2 CA-CR 2012-0128 (memorandum decision filed Mar. 13, 2013).

¶3 Walker thereafter initiated a proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of trial counsel because counsel had "fail[ed] to advise Walker that he had a right to testify and that the decision

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[1]The Hon. Robert Carter Olson, a retired judge of the Arizona Superior Court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

regarding whether or not to testify was his decision." The trial court determined his claim was colorable and ordered an evidentiary hearing. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) ("[A] defendant is entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome."). After the hearing, the court rejected Walker's claim that he had been unaware he could testify on his own behalf, citing Walker's past felony criminal proceedings, past advisements of his constitutional rights, and his competence while acting pro se during portions of the proceedings. The court therefore denied relief.

¶4 On review, Walker contends the trial court "err[ed] in denying [his] petition" for relief based on ineffective assistance of counsel because "the record showed he was not advised of his right to testify and previous counsel could not specifically remember discussing his right to testify."[2] In order to state a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the defendant suffered prejudice from this 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 defendant must show there is 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.

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[2]To the extent Walker also argues counsel was ineffective in that he did not allow Walker to make the decision to testify, he has not argued that he made any timely demand to his attorney or the court to take the stand. *Cf. State. v. Tillery*, 107 Ariz. 34, 37-38, 481 P.2d 271, 274-75 (1971) (judgment only reversed based on defendant's deprivation of right to testify if defendant "demanded the right to take the stand against the advice of his attorney"). Therefore, we only address whether counsel's actions deprived Walker of his right to testify because he was not adequately advised of his right to do so.

¶5 Our review of the trial court's factual findings made after an evidentiary hearing "is limited to a determination of whether those findings are clearly erroneous;" 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." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). When "the trial court's ruling is based on substantial evidence, this court will affirm." *Id.* And, "[e]vidence 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).

¶6 Walker had the burden of proving his factual allegations by a preponderance of the evidence. *See* Ariz. R. Crim. P. 32.8(c). And, the trial court was "the sole arbit[er] of the credibility of witnesses" at the evidentiary hearing. *Fritz*, 157 Ariz. at 141, 755 P.2d at 446; *see also Sasak*, 178 Ariz. at 186, 871 P.2d at 733 ("It is the duty of the trial court to resolve any conflicts in the evidence."). The court's factual determinations here were supported by evidence presented at the hearing.

¶7 At the evidentiary hearing, trial counsel testified that his practice in the "almost 500" trials he had been involved in was "absolutely" to discuss the defendant's testifying. He also testified he had discussed the benefits or downsides to testifying with Walker and Walker had "actively discuss[ed] th[e] case with [him]." He later stated, however, that he did not "specifically recall discussing" Walker's "right to testify at trial," but again testified he "always discuss[ed] it with [his] clients." On cross-examination he clarified that although he had "no specific recollection of being in the courtroom" and having a discussion with the trial court about Walker's right to testify, he did "recall leading up to the trial discussing with him that this was a decision that he was going to have to make at trial at some point. And having the exact same discussion that [he] just testified to."

¶8 Walker testified he and counsel "never had any conversation about testifying, not at trial." And he denied that he had been "aware that [he] had the right to testify." He also testified that he had approximately ten felony convictions before the current charges and "went to trial on some of them." And he agreed that in the case in which he had pled guilty he had been advised of and understood the rights he would give up by not going to trial. The trial court also noted that in the three and a half years the defendant had appeared before it, Walker had been "the most proficient pro se that [it had] ever come across." Thus, the court pointed out, "even if [counsel] didn't tell him" about his right to testify, the court could not imagine that Walker did not know he had a right to testify. And, in its under-advisement ruling, the court concluded it did "not believe that [Walker] was not aware that he could testify on his own behalf," and even if counsel had not informed Walker of his right to testify he was not prejudiced.

¶9 Walker's argument on review amounts to a request for this court to reweigh the evidence presented at the hearing, both as to whether counsel had discussed Walker's right to testify with him and as to whether Walker was prejudiced by the alleged failure to have that discussion in light of past experience in court. This court does not reweigh the evidence and, because the trial court's ruling is supported by substantial evidence on the record before us, we must affirm that ruling. *Sasak*, 178 Ariz. at 186, 871 P.2d at 733.

¶10 Therefore, although we grant the petition for review, we deny relief.