IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BENJAMIN HALE HAMILTON,
Petitioner.

No. 2 CA-CR 2016-0009-PR
Filed May 23, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Coconino County
No. CR20080596
The Honorable Mark R. Moran, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

David Rozema, Coconino County Attorney
By Heather A. Mosher, Deputy County Attorney, Flagstaff
Counsel for Respondent

David Goldberg, Fort Collins, Colorado
Counsel for Petitioner

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 Petitioner Benjamin Hamilton seeks review of the trial court's partial summary denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett,* 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no such abuse here.

Background

¶2 Following a jury trial in 2010, Hamilton was convicted of first-degree murder, armed robbery, kidnapping, aggravated robbery, and possession of marijuana for sale, arising from a murder in a secluded area near Flagstaff, Arizona.[1] The trial court sentenced Hamilton to a 2.5-year sentence to be followed by concurrent sentences, the longest of which is life in prison without the possibility of release for twenty-five years. We affirmed the convictions and sentences on appeal. *State v. Hamilton,* No. 1 CA-CR 10-0867 (memorandum decision filed May 8, 2012).

¶3 Hamilton filed a petition for post-conviction relief, in which he raised claims based on newly discovered evidence, ineffective assistance of trial counsel, and sentencing error. He also filed a motion for a protective order asking that any disclosure of matters subject to the attorney-client privilege be limited to the claims raised in his petition. The trial court permitted the attorneys

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[1]The trial court vacated an additional conviction for second-degree murder.

to conduct an unsworn interview of Hamilton's trial attorney, Stephen Glazer. Pursuant to Hamilton's request, the court limited the scope of that recorded and transcribed interview to Hamilton's "claim that Mr. Glazer was ineffective when he allegedly failed to track down, interview, or call as [alibi] witnesses [J.P. and M.H.]," and further noted the "attorney/client privilege remains in effect as to any communications between [Hamilton] and [Glazer] on any other matter not connected or related to Mr. Glazer's knowledge, actions or trial strategy on the issue of these alibi witnesses."

¶4 Hamilton did not argue in his Rule 32 petition that Glazer was ineffective for failing to investigate and assert a defense based on mere presence, the primary claim he raises on review. Rather, he presented that claim for the first time in his reply to the state's response to his Rule 32 petition. In support of that new claim, Hamilton attached a new affidavit by J.P. to either amend or replace the first affidavit he had attached to his Rule 32 petition.[2]

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[2]J.P.'s first affidavit, which he avowed "accurately reflected" the statements he had given to the defense investigator who prepared it, was markedly different from his second one. Most notably, in his first affidavit J.P. attested he remembered having met Hamilton the night of the murder, July 10, 2008, to buy marijuana from him "shortly after 7:00 [p.m.]"(testimony at trial suggested the murder occurred at approximately "7:15, 7:20"p.m.) at J.P.'s place of employment, just after he "got off work at 7:00." In his second affidavit, presumably in response to the timesheet records kept by J.P.'s employer showing he had not worked on July 10, 2008, J.P. stated that perhaps he had been working that evening "or" possibly had "the day off," and "concede[d] that [he] may have been mistaken about being at work on July 10." He also stated in the second affidavit that he had learned about the murder when he "return[ed] to work after smoking marijuana with [Hamilton] the *previous evening* [*Thursday*, July 10]," while in the same affidavit he attested he was "sure [he] learned of the murder through published media which is consistent with [his] reading about it on *Saturday*, July 12, 2008, when [he] arrived at work." (Emphasis added.) Aside from the inconsistencies between the first and second affidavits and within the second affidavit itself, the timesheet records kept by J.P.'s

¶5 The trial court summarily denied the claims based on newly discovered evidence and ineffective assistance of counsel, but granted relief as to the sentencing claim.[3] In denying Hamilton's claim that the alibi witnesses' affidavits were newly discovered evidence that would have established an alibi defense, the court concluded that such evidence would probably not have changed the verdict or sentence and did not establish "an 'alibi' for [Hamilton] for his whereabouts at the time of the murder." In addition, the Rule 32 judge, who had presided over the trial and "was very cognizant of the performance of trial counsel," determined that "[t]he majority" of Hamilton's claims of ineffective assistance were based on trial strategy, that trial counsel's decisions were not based on "'ineptitude, inexperience[,] or lack of preparation,'" *see State v. Goswick,* 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984), and that Hamilton had not been prejudiced by counsel's performance. *See Strickland v. Washington,* 466 U.S. 668, 687-88 (1984) (to state colorable claim of ineffective assistance of counsel, defendant must establish counsel's performance fell below objectively reasonable professional standard and that deficient performance prejudiced defendant). A defendant is entitled to an evidentiary hearing only if his or her claim is colorable, that is, when the "allegations, if true, would have changed the verdict" or sentence. *State v. Krum,* 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995). This petition for review, in which Hamilton challenges only the denial of his claims of ineffective assistance of trial counsel, followed.

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employer showed he did not work the day of or the day after the murder.

[3]In its amended sentencing order, the trial court corrected Hamilton's sentence to provide the life sentence was to be served "without the possibility of release until [Hamilton] has served twenty-five (25) years," and also ordered Hamilton to serve the 2.5-year sentence before the other sentences.

Claim of Ineffective Assistance Based on Mere Presence Defense

¶6 On review, Hamilton generally asserts the trial court abused its discretion by assuming, based on an "unsworn interview that was constrained by court order to questions involving [Glazer's] decision not to investigate and pursue an *alibi* defense," that Glazer's conduct was based on strategic decisions, and points out that the court did not have "statements of record by Glazer indicating why he chose to do or not do what was at issue." We note that the scope of the unsworn interview with Glazer was limited to the alibi defense at Hamilton's own request pursuant to his motion for a protective order. Thus, any complaint he now has with that limitation cannot be directed at the court. Moreover, it was Hamilton's responsibility to provide "statements of record by Glazer" establishing why he elected to proceed as he did and to support his claim that Glazer "never considered" a mere presence defense. *See State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983) (claimant bears burden of establishing ineffective assistance of counsel).

¶7 Hamilton argues, at length, that he presented a colorable claim that trial counsel was ineffective "for failing to investigate and present the testimony of [the alibi witnesses] which with phone records would have supported a mere presence defense." As we previously noted, Hamilton raised the mere presence argument for the first time in his reply, relying instead on an alibi claim in his Rule 32 petition. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 5-7, 221 P.3d 1052, 1053-54 (App. 2009) ("Rule 32.5 requires the petition itself 'to include every ground known'" for relief), *quoting* Ariz. R. Crim. P. 32.5.[4] Hamilton not only failed to request leave to amend his Rule 32 petition *before* he presented his mere presence claim for the first time in his reply, but when he acknowledged in his reply that the mere presence argument might constitute "a new

[4]Rule 32.5 was revised effective January 1, 2014. We cite the version of the rule in effect at the time Hamilton filed his petition for post-conviction relief. *See* Ariz. Sup. Ct. Order R-13-0009 (Nov. 14, 2013).

claim of ineffective assistance," he cited no cause whatsoever for not having raised it in his original petition.[5] *See* Ariz. R. Crim. P 32.6(d) (prohibiting amendment to Rule 32 petition "except by leave of court upon a showing of good cause"); *see also State v. Rogers,* 113 Ariz. 6, 8, 545 P.2d 930, 932 (1976) (although "Rule 32.6(d) adopts a liberal policy toward amendments of post-conviction pleadings," it requires leave of the court).

¶8 The trial court granted the state's motion to submit a surreply to address the "new issues" raised in Hamilton's reply. In its surreply, the state asserted Hamilton "appears to believe that a Reply is his opportunity to change his claims once the State has demonstrated the frivolous nature of his 'alibi' defense," and challenged in detail the credibility of J.P.'s "new" affidavit. And, although the court referred to Hamilton's alibi argument in its ruling denying post-conviction relief, notably absent from that ruling is any mention of the mere presence argument. Hamilton nonetheless maintains on review that his "claim was amended to conform to the actual evidence . . . [to assert] a defense of mere presence." Because issues raised for the first time in a reply in a Rule 32 proceeding are waived, *see Lopez,* 223 Ariz. 238, ¶¶ 6-7, 221 P.3d at 1054, and in light of the record before us, we do not address Hamilton's mere presence argument.

¶9 Moreover, because Hamilton apparently does not challenge on review the trial court's dismissal of his claim that Glazer should have presented an alibi defense, we do not address it. We note, in any event, that the record supports the court's conclusion that Glazer's conduct can "be attributed to trial strategy."[6] As the court correctly noted in its ruling denying post-

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[5]In a footnote in the reply to his Rule 32 petition Hamilton stated, "To the extent the Court believes this argument [mere presence defense] raises a new claim of ineffective assistance Petitioner requests that the Court amend the original PCR under Rule 32.6(d), [Ariz. R. Crim. P.]"

[6]During Glazer's interview, he repeatedly stated Hamilton consistently told him he had been present at the murder scene, and

conviction relief, the "newly discovered evidence" that Hamilton had spent the evening with the alibi witnesses and had sold marijuana to J.P. close to the time of the murder was not newly discovered and did not, in any event, provide an alibi. In addition, the inconsistencies between J.P.'s first and second affidavits made him, at best, an incredible witness.

Additional Claims of Ineffective Assistance of Counsel

¶10 Hamilton also argues Glazer was ineffective for failing to object to the state's motion to admit hearsay statements by codefendant Micah Neumann that Hamilton had killed the victim.[7] However, the record shows that Glazer impeached Neumann and codefendant Jesse Collier at length with the favorable plea deals they had accepted, and this fact, along with evidence Glazer had

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explained that his description of what had occurred "in no way shape or form . . . involve[d] an alibi defense"; nor had Hamilton ever told Glazer he spent the entire evening of the murder with the alibi witnesses, including the time of the murder, nor does Hamilton's affidavit so state. Glazer also stated he had "stayed as far away from [Hamilton's cellular] phone records as possible, strategically, because there was an issue whether or not [Hamilton] had his phone at particular times" on the evening of the murder, and added that he believed looking into the telephone records "hurt [Hamilton] more so than helped him."

[7]Additionally, Neumann testified at trial that although he had been looking at the victim rather than Hamilton when he "heard the gunshot go off," he had seen the victim's head go "down" and saw blood, and then saw Hamilton standing with "his right hand . . . still outstretched, still aimed at the victim's head . . . the barrel was smoking." He testified neither he nor codefendant Jesse Collier had shot the victim, and stated he was "100 percent" sure he had seen "Hamilton holding a smoking gun right after [the victim] was shot in the head." Similarly, Collier testified that although he had not seen Hamilton shoot the victim, he heard a gunshot and then saw the victim on the ground bleeding from the head and saw Hamilton "holding the gun" with his arm extended toward the victim's head.

conferred with the prosecutor before deciding not to object to the state's motion, supports the trial court's conclusion that Glazer's decision was based on trial strategy.

¶11 Although Hamilton argues to the contrary, the conduct he describes falls within the panoply of tactical and strategic choices made by trial counsel. *See generally State v. Moreno,* 153 Ariz. 67, 69-70, 734 P.2d 609, 611-12 (App. 1986) (discussing tactical decisions by counsel involving objections and witnesses). "[W]e must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz,* 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting Strickland,* 466 U.S. at 689. And "[d]isagreements as to trial strategy . . . will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis." *State v. Meeker,* 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984).

¶12 Hamilton next argues that, although the trial court vacated his second-degree murder conviction as duplicitous before sentencing, Glazer's failure to move to dismiss that charge before trial caused the jury to believe him "more likely guilty" on the other charges and to "confuse the issues." On appeal, we rejected Hamilton's related argument challenging the convictions for first-degree felony murder and for the lesser included offense of second-degree murder, and concluded that the "verdicts in this case [did not] lack integrity." *Hamilton,* 1 CA-CR 10-0867, ¶¶ 7, 10. Based on our reasoning on appeal, we find no abuse of discretion in the trial court's rejection of this claim of ineffective assistance.

¶13 Hamilton further argues Glazer was ineffective for questioning Detective Casey Rucker about Collier's truthfulness in his first free talk with police and about Collier's knowledge that Hamilton intended to kill the victim. However, in light of Collier's having changed his testimony the day after his free talk with police, it is reasonable to believe Glazer offered the challenged testimony to establish that Collier was not a reliable witness, a tactical decision based on trial strategy, as the trial court found. *See Denz,* 232 Ariz. 441, ¶ 7, 306 P.3d at 101; *see also Meeker,* 143 Ariz. at 260, 693 P.2d at 915.

¶14 Hamilton similarly asserts Glazer failed to object to Rucker's testimony in response to a jury question asking him to explain why he believed Hamilton was guilty and whether he was "basing [his guilty] assumption on what others have said." He asserts Rucker vouched for the truthfulness of Collier's and Neumann's testimony, and in so doing, "offer[ed] an expert opinion on the ultimate legal issue" of Hamilton's guilt. However, a review of the challenged testimony shows that Rucker summarized the state's evidence, and although he explained how the pieces of evidence fit together, as the state correctly noted in its response to the petition for review, Rucker never testified about the ultimate issue of Hamilton's guilt. Nor does Hamilton show how he was prejudiced by Rucker's testimony. *See Strickland*, 466 U.S. at 687.

¶15 Finally, Hamilton asserts Glazer did not adequately object to the trial court's response to a jury question regarding accomplice liability. Over Glazer's repeated objections that the answer to the jury's question could be found in the instructions the jury had been given, which were based on approved Revised Arizona Jury Instructions, the court nonetheless provided the jury with a clarifying instruction. To the extent Hamilton argues Glazer should have objected specifically that the court was improperly commenting on the evidence, the record is clear that regardless of whatever additional ground Glazer may have offered to support his strenuous objections, the court was not inclined to rule in his favor. Accordingly, the court properly rejected this claim of ineffective assistance.

¶16 For all of these reasons, we grant review but deny relief.