FILED BY CLERK
SEP 21 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JORGE ALCANTAR, Petitioner.	2 CA-CR 2011-0118-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. OC98239

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena and Stephan McCaffery
Tucson
Attorneys for Petitioner

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

¶1 Jorge Alcantar petitions this court for review of the trial court's denial of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Alcantar and Sylvia Estrella were convicted of the first-degree murder of Estrella's husband. Alcantar was sentenced to life imprisonment with the possibility of parole after twenty-five years, and we affirmed his conviction and sentence on appeal. *State v. Alcantar*, No. 2 CA-CR 2001-0064 (memorandum decision filed Jan. 14, 2003). Alcantar then sought post-conviction relief, arguing his trial counsel had been ineffective in failing to advise him of a plea offer and in failing to investigate potential alibi witnesses, and that his second-chair attorney, Saji Vettiyil, had a conflict of interest. The trial court rejected those claims after an evidentiary hearing. Alcantar also filed a supplemental petition arguing his lead attorney, William Rothstein, had made an unreasonable choice of defense strategy.[1] The trial court dismissed the supplemental petition as untimely filed but nevertheless addressed the merits of Alcantar's claim, determining it was not colorable.

¶3 Alcantar petitioned this court for review of the trial court's decision, and we granted relief on Alcantar's claim that Rothstein had chosen an unreasonable defense strategy, but otherwise denied relief. *State v. Alcantar*, No. 2 CA-CR 2008-0108-PR (memorandum decision filed Mar. 24, 2009). The substance of Alcantar's claim was that Rothstein had pursued a "unified defense" strategy linking Alcantar with Estrella and attempting to prove neither had committed the murder. He asserted that Rothstein should have pursued a defense theory that Estrella had committed the murder alone and that

[1]Rothstein passed away before the petition for post-conviction relief was filed.

Rothstein had chosen the unified theory to assist Estrella's defense.[2] We first determined the court had erred in finding his supplemental petition untimely filed and ordered the court to determine on remand whether Alcantar had shown good cause to amend his petition to add that claim. We then determined the claim was colorable and therefore, if the amendment was proper, that Alcantar was entitled to an evidentiary hearing. We observed that, "[i]f Rothstein's motive was to assist Estrella, then his performance was deficient," and that deficiency arguably prejudiced Alcantar because the jury might have found a theory that Estrella had acted alone more plausible.

¶4 After an evidentiary hearing, the trial court found Alcantar had failed to demonstrate Rothstein's performance had been deficient because Alcantar had not shown Rothstein chose the unified defense strategy in order to assist Estrella's defense. It further found Rothstein's choice of defense strategy was reasonable. The court noted that a defense strategy attempting to show Estrella had acted alone could have failed because, based on the forensic evidence, the jury might have concluded that Estrella could not have committed the murder without assistance and, based on calls Estrella had made to Alcantar's pager and their romantic relationship, that Alcantar had assisted Estrella in killing her husband. It also detailed the evidence supporting Rothstein's defense strategy and observed that Rothstein apparently had considered and rejected a strategy seeking to inculpate Estrella.

[2]Alcantar and Estrella were tried at the same proceeding before two separate juries.

¶5 On review, Alcantar generally asserts the trial court's findings were erroneous. Although he contends the court "abused its discretion," he identifies no legal error, focusing only on the court's factual findings. And he fails to provide a standard of review or citation to authority relevant to the court's determination or our review. In some circumstances, the failure to cite relevant authority would justify our summary denial of a defendant's petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review must contain "reasons why the petition should be granted"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review). However, because the legal substance of Alcantar's claim was addressed in detail in our previous memorandum decision and the trial court's decision here is largely grounded in factual findings, we grant review.

¶6 Our review of the trial court's factual findings "is limited to a determination of whether those findings are clearly erroneous," and 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). Furthermore, "[i]t is the duty of the trial court to resolve any conflicts in the evidence, and where 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); *cf. State v. Lee*, 189

Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (reviewing court does not reweigh trial evidence on appeal).

¶7 In order to prevail on his claim of ineffective assistance of trial counsel, Alcantar had to demonstrate Rothstein's conduct fell below prevailing professional norms and that the conduct prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). As we have noted, Alcantar's claim is grounded in Rothstein's choice of trial strategy. In these circumstances, because disagreements about trial strategy generally will not support a claim of ineffective assistance of counsel, Alcantar's claim fails if Rothstein's strategy had some reasoned basis.[3] *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985). And he must "overcome a 'strong' presumption that the challenged action was sound trial strategy under the circumstances." *Id.*, *quoting State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985).

¶8 The trial court's ruling makes clear that, in considering Alcantar's claim, it considered all of the evidence presented at the evidentiary hearing, as well as the voluminous record and evidence produced during Alcantar's sixteen-day jury trial. We have evaluated that ruling and conclude that the court clearly and correctly addressed Alcantar's claim, that its reasoning is amply supported by the record, and that it is not necessary to repeat the entirety of the court's analysis here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has identified and

[3]Alcantar does not assert, nor does the record suggest, that Rothstein's trial strategy was a result of "ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984).

ruled correctly on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision"). Accordingly, we adopt the court's ruling. *See id.* We write further, however, to address issues warranting additional discussion.

¶9 Alcantar asserts on review that "Vettiyil's testimony established that Rothstein was . . . motivated to assist Estrella." As we noted in our memorandum decision concluding Alcantar was entitled to an evidentiary hearing, selecting a trial strategy based on a motive to help Estrella would not constitute a reasoned basis for that strategy. Vettiyil testified that Rothstein had expressed a desire to assist in Estrella's defense, had been confident the jury would acquit Alcantar, and that at one point had criticized him for cross-examination that appeared to hurt Estrella's defense because it suggested a single person might have committed the murder. But we reject Alcantar's position that those facts require the inference that Rothstein chose his defense strategy, even partially, on the basis that it would help Estrella's defense. As the trial court noted, Vettiyil also testified Rothstein's primary focus was to insure Alcantar's acquittal, and that Rothstein had not made decisions harmful to Alcantar in order to benefit Estrella. For the reasons detailed by the court, it is at least equally plausible Rothstein had chosen the defense strategy based on his evaluation of the case and had recognized that chosen defense was not inconsistent with Estrella's innocence.

¶10 Evidence that there may have been a more effective defense available does not establish ineffective assistance of counsel. *See Gerlaugh*, 144 Ariz. at 455, 698 P.2d

at 700. There must also be a showing that the defense strategy chosen had no reasoned basis. *Id.* We reject Alcantar's argument that the trial court erred in concluding Rothstein's choice of defense strategy had some reasonable basis. Alcantar presented testimony by attorney Michael Bloom that Rothstein's defense theory was not "particularly . . . coherent" and that a theory that Estrella had acted alone was more consistent with the physical evidence, and that therefore there was no reason to adopt the strategy Rothstein had used at trial.[4] But, despite Alcantar's contrary suggestion, the court was not required to accept Bloom's testimony as absolute and could rely on its own experience and knowledge in evaluating Rothstein's strategic choices. *Cf. State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994) (trial court in best position to decide claims of ineffective assistance of counsel, which "are fact-intensive and often involve matters of trial tactics and strategy").

¶11 The trial court detailed sound reasons why Rothstein might have rejected a defense theory that Estrella had acted alone as well as reasons why Rothstein might have adopted the strategy he did. Although Alcantar questions the court's conclusions, he cannot reasonably argue those conclusions have no support in the record. His argument instead, at its core, merely disagrees with the inferences the trial court drew from the evidence—inferences to which we must defer. *See Sasak*, 178 Ariz. at 186, 871 P.2d at 733. At best, Alcantar has demonstrated only that a superior defense strategy had been

[4]Bloom characterized Rothstein's strategy as "scattershot," meaning Rothstein raised several challenges to the state's evidence without developing a consistent theory of the case.

available, not that the defense strategy Rothstein used was manifestly unreasonable. Consequently, his claim fails.

¶12 For the reasons stated, although we grant review, we 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