IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. TYRONE JAMES KESSLER, Petitioner.	2 CA-CR 2011-0145-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20052694

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

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E S P I N O S A, Judge.

¶1 Petitioner Tyrone Kessler was convicted after a 2007 jury trial of first-degree murder for an offense that occurred in 1987. The trial court sentenced him to life in prison with the possibility of release after twenty-five years. On appeal, we affirmed

the conviction and sentence. *State v. Kessler*, No. 2 CA-CR 2007-0341 (memorandum decision filed Dec. 11, 2009). In 2010, Kessler filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing his trial counsel, Larry Lingeman, had been ineffective in advising him not to testify and that he is entitled to an evidentiary hearing on this claim. The court denied relief without an evidentiary hearing, and this petition for review followed. We will reverse a summary disposition of a petition for post-conviction relief only if an abuse of discretion affirmatively appears. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶2 Whether a post-conviction claim warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). We therefore review a court's decision to deny an evidentiary hearing for an abuse of discretion. *See State v. Sanchez*, 200 Ariz. 163, ¶ 10, 24 P.3d 610, 613 (App. 2001). A defendant is "entitled to an evidentiary hearing only when he presents a colorable claim" for post-conviction relief, "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993); *see also Watton*, 164 Ariz. at 328, 793 P.2d at 85. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). To demonstrate 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 v. Washington*, 466 U.S. 668, 694 (1984).

¶3 If the trial court determines, however, that the defendant's claim does not present a "'material issue of fact or law . . . which would entitle petitioner to relief,'" the court may summarily dismiss the claim without an evidentiary hearing. *State v. Andersen*, 177 Ariz. 381, 385, 868 P.2d 964, 968 (App. 1993), *quoting* Ariz. R. Crim. P. 32.6(c). In determining whether a defendant is entitled to an evidentiary hearing, the court must be mindful that, "when doubt exists, 'a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review.'" *D'Ambrosio*, 156 Ariz. at 73, 750 P.2d at 16, *quoting State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶4 As stated in our memorandum decision in Kessler's appeal, the evidence at trial established that in 1987 the victim, who lived next door to Kessler, "was found beaten, gagged, and strangled to death . . . the victim of an apparent sexual assault." *Kessler*, No. 2 CA-CR 2007-0341, ¶ 3. DNA[1] matching Kessler's was found in semen on the victim's nightgown, a blanket, and the mattress pad in her bedroom. His DNA profile also matched hairs found at the scene and his fingerprints were found in the victim's home. Although Kessler had denied knowing the victim when he was interviewed at the time of the incident in 1987, he told detectives during a 2005 interview in Florida (the "Florida statements"), after the DNA profile had been obtained, that "he had met the victim, and had sex with her on two occasions, including the evening of her murder, but

[1]Deoxyribonucleic acid.

that he did not commit the murder."[2] The state filed an unopposed pretrial motion to preclude the Florida statements, which the trial court granted.[3]

¶5 Also before trial, an anonymous letter was sent from the Pima County Adult Detention Center to Kim Smith, a reporter for the Arizona Daily Star, from an individual who claimed to have murdered the victim (the "Kim Smith" letter).[4] Finding there was insufficient evidence to lay a proper foundation or authenticate the letter, the trial court granted Kessler's pretrial motion to preclude the Kim Smith letter, which the court stated contained "graphic details of the assault and homicide." At trial, counsel asserted that, although Kessler had engaged in consensual sex with the victim before someone else had killed her, he had been asleep with his girlfriend and their newborn baby when the murder took place. The girlfriend testified on Kessler's behalf at trial. On the eighth day of trial, Kessler told the judge he had voluntarily decided, after conferring with his attorney, not to testify at trial.

¶6 On review, Kessler asserts a number of reasons Lingeman was deficient in advising him not to testify at trial. Kessler first contends the success of his alibi defense necessarily required his testimony to explain why his DNA was found at the scene of the

[2]Although the record does not include the transcript of the 2005 interview, the general contents of Kessler's statements to the detectives appear to be undisputed.

[3]Kessler asserts, and the state apparently does not dispute, that this ruling was made outside Kessler's presence.

[4]According to Lingeman's affidavit, attached as an exhibit to the state's opposition to the petition for post-conviction relief, Kessler admitted having sent a similar letter to Lingeman, purportedly written by a prisoner named "Juan Valdez," as well as having sent the Kim Smith letter.

murder. Second, Kessler asserts that the defense team, which consisted of Lingeman, paralegal Debbie Gaynes, and investigator Weaver Barkman, never explained to him that the trial court had granted the state's motion to preclude the Florida statements, and that had he understood this, he would have testified. Finally, Kessler contends that Lingeman was "extremely reckless" in pursuing an alibi defense since this theory required him to testify and risk the impeachment potential of the Kim Smith letter. He asserts Lingeman should have "used [something other than the alibi] defense . . . to challenge all the State's evidence, especially the DNA in a far more aggressive manner," asserting, however, that "the best course would have been to simply call [him to testify] and use the defense available."

¶7 Kessler submitted his own affidavit in support of the allegations in his petition for post-conviction relief, attesting he would have testified had Lingeman told him the Florida statements would not be admitted at trial. *See* Ariz. R. Crim. P. 32.5. In the affidavits which the state attached to its opposition to the petition for post-conviction relief, Lingeman, Gaynes and Barkman directly contradicted Kessler's affidavit. Notably they stated that they had, in fact, informed him that the Florida statements could not be used at trial, and that the Kim Smith letter could not be used unless Kessler testified.

¶8 In its ruling on Kessler's petition for post-conviction relief, the trial court determined:

> Defense counsel was correct in his assessment that had his client testified, he would have been impeached with his multiple contradictory statements to law enforcement and that the trial court would have permitted the State to use the manufactured "Kim Smith" letter. The letter, which

> purported to be a confession filled with undisclosed grisly details about how [the victim] was raped and strangled, was sent to a reporter at the Arizona Daily Star under the guise that it was authored by another inmate at the Pima County Jail when it was actually the creation of the Defendant. It did not take the talents and experience of Defendant's trial attorney to recognize the damage the letter would have done to the defense case once the jury heard the details in the letter and surmised that it was the Defendant who wrote the letter. Defendant has not established that the advice he received from trial counsel was ineffective so he has failed the first prong of *Strickland* . . . . He has also failed the second prong, that he was prejudiced by the advice of counsel and that there was a reasonable probability that the outcome would have been different but for counsel's alleged ineffective assistance. . . . In light of the affidavits filed by attorney Larry Lingeman, paralegal Debbie Gaynes, and trial investigator Weaver Barkman, the Court finds that the Defendant has been less than candid with the Court in his Petition. However, even if taken as true, [he] has not established a colorable claim for relief.

¶9 Whether Lingeman informed Kessler that the trial court had precluded the admission of the Florida statements and explained the ramifications of that ruling to him is not a material issue of fact. *See* Ariz. R. Crim. P. 32.6(c); *Andersen*, 177 Ariz. at 385, 868 P.2d at 968. Even assuming Kessler's allegations that Lingeman failed to advise him about the admissibility of the Florida statements are true, *see Runningeagle*, 176 Ariz. at 63, 859 P.2d at 173, and that Lingeman's conduct constituted deficient performance, because Kessler has not shown prejudice, he has not alleged a colorable claim of ineffective assistance of counsel. While primarily complaining that his right to testify was vitiated by Lingeman's deficient performance, Kessler all but concedes he could not have taken the stand because he would have been impeached with the Kim Smith letter, impliedly without any reasonable possibility of rehabilitation. He then argues generally

that Lingeman should have used a different defense strategy, inferentially acknowledging, again, that he could not take the stand for reasons having nothing to do with whether or not he had been advised of the admissibility of his Florida statements.

¶10 Accordingly, even assuming Lingeman's representation was deficient in failing to inform Kessler about the ruling on the Florida statements, Kessler simply has not shown he was prejudiced thereby. Moreover, even had Kessler testified at trial, in light of his inevitable impeachment and the "more than sufficient" evidence of his guilt, *Kessler*, No. 2 CA-CR 2007-0341, ¶ 3, there is no reasonable probability the outcome would have been different, *see Strickland*, 466 U.S. at 694. We therefore grant the petition for review but deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

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

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