

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

RAYSHALL THOMPSON, *Petitioner*.

No. 1 CA-CR 15-0127 PRPC
FILED 4-4-2017

Petition for Review from the Superior Court in Maricopa County
No. CR2010-158172-001 DT
The Honorable Steven P. Lynch, Judge *Pro Tempore*

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Karen Kemper
Counsel for Respondent

De Brigida Law Offices PLLC, Glendale
By Ronald M. De Brigida, Jr.
Counsel for Petitioner

STATE v. THOMPSON
Decision of the Court

MEMORANDUM DECISION

Chief Judge Michael J. Brown delivered the decision of the court, in which Presiding Judge Samuel A. Thumma and Judge Patricia A. Orozco¹ joined.

B R O W N, Chief Judge:

¶1 Rayshall Thompson petitions this court for review from the denial of his petition for post-conviction relief. A jury found Thompson guilty of possession or use of dangerous drugs, possession of drug paraphernalia and resisting arrest. The trial court sentenced Thompson to an aggregate term of ten years' imprisonment and this court affirmed his convictions and sentences on direct appeal. *State v. Thompson*, 1 CA-CR 11-0906, 2013 WL 440613 (Ariz. App. Feb. 5, 2013) (mem. decision).

¶2 Thompson filed a petition for post-conviction relief, asserting his trial counsel was ineffective by failing to file a motion to suppress based on an alleged illegal pursuit, stop, and seizure of Thompson. The trial court found Thompson presented colorable claims for relief and held an evidentiary hearing, after which the court denied relief. In his petition for review, Thompson again asserts that trial counsel was ineffective when counsel failed to file a motion to suppress.

¶3 We review the denial of post-conviction relief for an abuse of discretion. *State v. Jenkins*, 193 Ariz. 115, 118, ¶ 5 (App. 1998). To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When a trial court makes findings of fact after an evidentiary hearing, we review those findings to determine if they are clearly erroneous. *State v. Herrera*, 183 Ariz. 642, 648 (App. 1995).

¶4 Following the evidentiary hearing, the trial court found that Thompson failed to prove counsel's performance was deficient or that any action or inaction of counsel prejudiced Thompson. Specifically, the court found counsel's testimony credible as to why he believed there was no good

¹ The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

STATE v. THOMPSON
Decision of the Court

faith basis to file a motion to suppress. The court further noted that trial counsel made his decision after discussing the viability of a motion to suppress with other members of the public defender's office. "The decision whether to seek a motion to suppress items of evidence is a matter of trial strategy." *State v. Nirschel*, 155 Ariz. 206, 208 (1987). Strategic choices made after adequate investigation of the law and facts "are virtually unchallengeable." *Strickland*, 466 U.S. at 690-91. Further, the determination of the credibility of a witness at an evidentiary hearing in a post-conviction relief proceeding rests solely with the superior court. *State v. Fritz*, 157 Ariz. 139, 141 (App. 1988). The court did not abuse its discretion when it denied relief.

¶5 Moreover, the record on review does not include a transcript of the evidentiary hearing and therefore we must rely on the trial court's explanation and evaluation of trial counsel's testimony. Unless a defendant is indigent, the defendant must timely request preparation of the hearing transcript, which apparently was not done here. Ariz. R. Crim. P. 32.8(e). When matters are not included in the record on review, we presume the missing portions of the record support the decision of the trial court. See *State v. Mendoza*, 181 Ariz. 472, 474 (App. 1995).

¶6 For the reasons stated above, we grant review, but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA