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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

DAVID EUGENE ROWELL, *Petitioner*.

No. 1 CA-CR 16-0713 PRPC
FILED 10-31-2017

Appeal from the Superior Court in Yuma County
No. S1400CR200901289
The Honorable Mark W. Reeves, Judge

REVIEW GRANTED, RELIEF GRANTED IN PART

COUNSEL

Yuma County Attorney's Office, Yuma
By William P. Katz
Counsel for Respondent

Elizabeth Brown Attorney at Law, Goodyear
By Elizabeth Brown
Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Peter B. Swann and Chief Judge Samuel A. Thumma joined.

M c M U R D I E, Judge:

¶1 David Eugene Rowell petitions for review of the superior court's dismissal of his petition for post-conviction relief filed pursuant to Arizona Rule of Criminal Procedure 32. For the following reasons, we grant review and grant relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 Rowell's niece, E.B., accused Rowell of molesting her on multiple occasions between May 2003 and July 2003. On May 15, 2010, the State filed an amended indictment against Rowell, charging him with five counts of sexual conduct with a minor under 12 years of age and one count of molestation of a child, all Class 2 felonies. During the trial, Rowell moved for a directed verdict on all counts, and the superior granted the motion concerning molestation of a child and two counts of sexual conduct with a minor. After the eight-day trial, a jury convicted Rowell of two counts of sexual conduct with a minor and acquitted Rowell of the remaining count of sexual conduct with a minor. Rowell was sentenced to two consecutive terms of life imprisonment. Rowell's convictions and sentences were affirmed on appeal. *State v. Rowell*, 1 CA-CR 10-0424, 2011 WL 1204838 (Ariz. App. March 31, 2011) (mem. decision).

¶3 Rowell then filed a petition for post-conviction relief, arguing he received ineffective assistance of counsel at trial. The superior court found Rowell failed to state a claim that would entitle him to relief under Rule 32.6(c) and dismissed his petition without holding an evidentiary hearing. Rowell moved to re-open his petition for post-conviction relief to "allow counsel time to investigate claims of ineffective assistance of counsel and the denial of due process when a cause-struck juror apparently remained on the jury panel." The superior court granted the motion to allow counsel to investigate whether a struck juror remained on the panel. The parties were permitted to view the recording of the jury selection process, but Rowell did not file anything else related to the issue. When nothing else was filed by the parties, the superior court dismissed Rowell's

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petition for post-conviction relief. Rowell then petitioned this court to review the dismissal of his petition for post-conviction relief.

DISCUSSION

¶4 In his petition for review, Rowell argued the superior court erred by not granting an evidentiary hearing on his claim of ineffective assistance of counsel and whether a struck juror remained on the panel. We review a superior court's summary dismissal of a post-conviction relief proceeding for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, 566, ¶ 17 (2006). A summary dismissal of a petition for post-conviction relief is appropriate if the court determines the defendant has failed to present a colorable claim for relief. Ariz. R. Crim. P. 32.6(c). A colorable claim is a claim that, if true, might have changed the outcome. *State v. Runningeagle*, 176 Ariz. 59, 63 (1993). Whether a petition for post-conviction relief presents a colorable claim "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73 (1988). However, 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." *State v. Schrock*, 149 Ariz. 433, 441 (1986).

A. Rowell Stated a Colorable Claim of Ineffective Assistance of Counsel regarding Counsel's Failure to Present Impeachment Evidence.

¶5 Rowell argues the superior court "erred in summarily denying Mr. Rowell's ineffective assistance claim without an evidentiary hearing." Rowell argued he received ineffective assistance of counsel because trial counsel: (1) ineffectively presented E.B.'s history of accusing other men of molesting her and then recanting; (2) ineffectively investigated and examined witnesses, including E.B.'s mother, L.B., regarding L.B.'s history of making false accusations; (3) ineffectively examined E.B.'s grandmother and father; and (4) failed to present a meaningful defense using an expert witness. Rowell also argues he was prejudiced by counsel's deficient performance and that defense counsel's decisions "cannot be considered strategic decisions."

¶6 To state a colorable claim of ineffective assistance of counsel, a petitioner must show counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the petitioner. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a petitioner must show that, but for counsel's deficient

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performance, there is a reasonable probability that the results of the case would have been different. *Id.*

¶7 To support his claims of ineffective assistance of counsel, Rowell primarily relied on an affidavit from E.B.'s grandmother. In her affidavit, she stated: (1) she had direct knowledge of instances where E.B. and her mother accused other men of sexual molestation; (2) she gave Rowell's trial attorney contact information for people who would attest to the allegations; (3) E.B. had a history of "attention-seeking behaviors"; (4) Rowell's family asked for and offered to pay for an expert witness; (5) an alibi for Rowell could have been established; and (6) she and her other son, E.B.'s father, could have testified about E.B.'s false allegations against other men. Rowell also alleges trial counsel failed to investigate sexual abuse allegations by E.B. that were disclosed to counsel in police reports; failed to request relevant "Child Protective Services (CPS) documents;" and failed to investigate whether L.B. accused E.B. of perjury in a domestic relations case.

¶8 The record also indicates the superior court asked trial counsel during the trial if he planned to offer a transference defense because another family member was also charged with a similar allegation, but that trial counsel responded "no, that actually had not really been developed." The record does not indicate trial counsel talked with L.B., investigated E.B.'s alleged history of false accusations, or provided a reason for not investigating further. The State did not respond to Rowell's petition for review, although it did reply to Rowell's petition for post-conviction relief below.

¶9 Assuming the allegations in Rowell's petition are true, we cannot say to a reasonable probability the outcome of the trial would not have been different. E.B.'s credibility was crucial to the charges. Yet, based on the allegations in the petition, the jury did not hear significant available impeachment evidence regarding E.B. Whether the decision to not pursue such evidence was a tactical or strategic decision is unknown as defense counsel did not provide an affidavit explaining his failure to pursue an apparently viable defense with the available impeachment. *See* Ariz. R. Crim. P. 32.6(a) (after the filing of a petition for post-conviction relief, "the state shall file . . . a response. Affidavits, records or other evidence available to the state contradicting the allegations of the petition shall be attached to it").

¶10 It appears the evidence was not overwhelming as the superior court dismissed three counts against Rowell and the jury acquitted him on another count. We hold Rowell stated a colorable claim of ineffective

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assistance of counsel and the superior court erred by summarily dismissing Rowell's petition for post-conviction relief. We remand this case for the superior court to hold an evidentiary hearing on whether Rowell received ineffective assistance of counsel.

B. The Superior Court Did Not Abuse Its Discretion by Denying an Evidentiary Hearing on the Issue of Whether a Struck Juror Remained on the Jury Panel.

¶11 Rowell also argues a juror struck for cause by the superior court remained on the jury panel and that the superior court should have granted an evidentiary hearing on this issue. Rowell also argues the superior court should have "made it clear" whether a struck juror remained on the jury panel. The superior court granted Rowell's motion to re-open his petition for post-conviction relief to allow Rowell to investigate whether a struck juror remained on the panel and both parties had access to a recording of the jury selection process. However, Rowell never made any additional filings on this issue. In its order dismissing Rowell's petition for post-conviction relief, the superior court stated it reviewed all pleadings by counsel, "carefully reviewed the . . . recording of the jury selection process," and found no remaining claim presenting a material issue of fact or law that entitled Rowell to relief. We therefore hold the superior court did not err by finding Rowell failed to state a colorable claim on this issue.

CONCLUSION

¶12 For the foregoing reasons, we grant review and remand for an evidentiary hearing on Rowell's ineffective assistance of counsel claim.



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