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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GLENDA LORRAINE RUMSEY, Petitioner.	2 CA-CR 2012-0462-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20080258

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Law Offices of Erin E. Duffy, P.L.L.C.
By Erin E. Duffy
Tucson
Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Glenda Rumsey was convicted after a jury trial of manslaughter, aggravated assault of a minor under fifteen years of age, driving under the influence of an intoxicant (DUI) while impaired to the slightest degree, driving with an alcohol concentration (AC) of .08 or more, and driving while under the extreme influence of intoxicating liquor with an AC of .15 or more. In a published opinion on a portion of the direct appeal, *State v. Rumsey*, 225 Ariz. 324, 238 P.3d 642 (App. 2010), and a separately issued memorandum decision on remaining issues, this court affirmed the convictions of all but the .08-AC-related offense, which we vacated, and the sentences imposed, *State v. Rumsey*, No. 2 CA-CR 2009-0041 (memorandum decision filed Aug. 31, 2010). In this petition for review, Rumsey challenges the trial court's order rejecting the claims raised in her petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., that the court had abused its discretion when it imposed aggravated prison terms on two of the counts and that appellate counsel had been ineffective for failing to raise these claims on direct appeal.

¶2 We review the trial court's ruling for an abuse of discretion, keeping in mind that such an abuse includes an error of law. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Rumsey first contends on review that the trial court abused its discretion when it rejected her claim that it had erred by finding the victim's age an aggravating circumstance when it imposed a partially aggravated prison term of fourteen years on count one (manslaughter of J.R.), and in rejecting her argument based on *State v. Williams*, 175 Ariz. 98, 854 P.2d 131 (1993). And, she asserts the court erred when it denied her related claim that appellate counsel had been ineffective by not

properly asserting this claim on appeal. Rumsey also contends the court erred when it rejected her challenge to the sentence for aggravated assault of O.P. on the ground that emotional harm to J.R.'s family was an improper aggravating circumstance, suggesting summarily the court also erred in rejecting her related argument that appellate counsel had been ineffective in failing to raise this issue on appeal.

¶3 On appeal, appellate counsel had challenged the partially aggravated prison terms on both counts one and two on the ground they were excessive, particularly in light of the mitigating circumstances, and contending the court erroneously had relied on J.R.'s young age and Rumsey's high AC as aggravating circumstances. This court refused to consider the argument that J.R.'s age was an aggravating circumstance because the argument had not been developed appropriately in the briefs on appeal. *Rumsey*, No. 2 CA-CR 2009-0041 ¶ 42. We rejected the other challenges to the sentences.

¶4 To the extent Rumsey is raising claims of sentencing error independent of her claim of ineffective assistance of counsel, she has not established the trial court abused its discretion in rejecting them because the claims were clearly precluded; they could have been raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3). But Rumsey has also failed to establish the court erred when it rejected the related claim of ineffective assistance of appellate counsel. In order to be entitled to relief on that claim, Rumsey was required to demonstrate counsel's performance on appeal was deficient and there is a "reasonable probability . . . but for counsel's unprofessional errors, the outcome of the appeal would have been different." *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶5 We first address Rumsey's ineffective-assistance claim that relates to the trial court's reliance on the victim's age as an aggravating circumstance for the manslaughter charge. Even assuming Rumsey sustained her burden of establishing appellate counsel's performance had been deficient, she has not established the court abused its discretion in denying her relief. Rumsey did not demonstrate this deficient performance was prejudicial; rather, the outcome on appeal would have been no different had counsel presented the issue on appeal. In its minute entry denying post-conviction relief, the court clearly identified, thoroughly analyzed, and correctly resolved the underlying claim and concluded *Williams* did not require a different result. The court then correctly denied relief based on counsel's purportedly deficient performance. We adopt those portions of the court's ruling relating to this issue, finding no purpose would be served by setting forth the court's ruling in its entirety here, *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993), and conclude Rumsey did not establish on review that the court abused its discretion.

¶6 Nor has Rumsey sustained her burden of establishing the trial court erred in rejecting the claim that appellate counsel had been ineffective in failing to challenge the partially aggravated prison term on count two, aggravated assault of O.P. *See Herrera*, 183 Ariz. at 647, 905 P.2d at 1382. Before trial, the state filed a notice alleging as an aggravating circumstance the "physical, emotional, or financial harm" suffered by J.R.'s family as a consequence of his death. After the jury rendered its verdicts, the parties stipulated that J.R.'s family had suffered emotional harm and that this was an aggravating

circumstance; Rumsey waived her right to have a jury determine any aggravating circumstances.

¶7 At the beginning of the sentencing hearing, the trial court acknowledged this stipulation and the parties' further agreement that the court could base any additional findings it was to make related to sentencing on evidence that had been presented at trial. Without specifying whether it was referring to one or both counts, the court stated the aggravating circumstances it intended to find were emotional harm to J.R.'s family, the victim's age, and the fact that Rumsey's AC had been above .15. The court also made clear that after considering the matter extensively, it would be imposing concurrent sentences, not the consecutive terms the state had requested in its sentencing memorandum. Various individuals addressed the court, including O.P., members of J.R.'s family, and Rumsey. The prosecutor noted the trauma to the family was an aggravating circumstance but asked the court to consider as well the emotional trauma O.P. had experienced after watching his best friend die in the street. The prosecutor also noted Rumsey's high AC at the time she struck the victims.

¶8 Defense counsel presented evidence in mitigation, and asked the trial court not to rely on the victim's age as an aggravating circumstance based on the supreme court's reasoning in *Williams*. Counsel also commented, "As far as the emotional harm to the family, or the boys, there's no issue." The court then sentenced Rumsey, stating, "Relative to the charge of manslaughter, I have already stated the aggravating factors that I had found." The court found there were mitigating circumstances as well, and

sentenced Rumsey to the partially aggravated term of fourteen years.[1] Turning to count two, the court said, "Relative to the charge of aggravated assault, I've considered nearly the same factors, except for the age of the victim." The court then sentenced Rumsey to the partially aggravated prison term of thirteen years on that charge, ordering that it be served concurrently with the term on count one.

¶9 In her petition for post-conviction relief, Rumsey argued the trial court improperly had considered the emotional trauma to J.R.'s family in connection with count two. She asserted the state had not filed a notice that the "emotional impact on [O.P.] [was] an aggravating factor, the Petitioner did not stipulate to this as an aggravating factor . . . and the [c]ourt did not find it as an aggravating factor as the Court referenced emotional impact on [J.R.'s] family, and not on the victim himself." She contended appellate counsel had been ineffective in failing to raise this claim on appeal.

¶10 Rejecting this claim, the trial court stated in its minute entry that Rumsey had taken "too literally" the court's statement at sentencing that, with respect to count

[1]The sentencing minute entry identifies the same three aggravating circumstances but adds the violation of release conditions as well. But the transcript from the sentencing hearing shows the trial court found the three factors we have noted above were the ones it found to be aggravating circumstances for sentencing purposes, clarifying it had considered a number of other factors as well because it had "to be informed in [its] sentencing." The court stated that, although it had considered such other factors, including Rumsey's violation of release conditions, "they are not necessarily aggravating factors." Thus, given this conflict between the oral pronouncement of sentence and the minute entry, we rely on the sentencing transcript, *see State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989), and conclude the factors the court actually found aggravating circumstances as to the manslaughter charge were emotional harm suffered by J.R.'s family, to which the parties had stipulated, the victim's age, which the court expressly did not find to be a factor on count two, and Rumsey's high AC.

two, it had "considered nearly the same factors" it had considered in sentencing her on count one, "except for the age of the victim." The court added that it had not found the emotional harm to J.R.'s family an aggravating circumstance on count two but rather "[t]he aggravating factor relative to Count Two referred to the lifelong emotional impact suffered by [O.P.], who had to witness his friend die violently that night." The court rejected the related claim of ineffective assistance of appellate counsel. The court found Rumsey had not established counsel's performance had been deficient and that Rumsey had not raised a colorable claim entitling her to an evidentiary hearing because it had determined the appropriate sentence based on all of the relevant circumstances and had considered carefully whether to impose concurrent or consecutive terms. The court noted it had taken that into account that Rumsey's prison terms would be concurrent when determining that partially aggravated terms were appropriate.

¶11 In her petition for review, Rumsey contends the record does not support the trial court's ruling because it establishes the court clearly had been referring to the emotional harm to J.R.'s family during the sentencing hearing, not emotional harm suffered by O.P. in connection with the death of J.R. She argues, as she did below, that the state never had alleged, the parties had not stipulated, and the court had not found that emotional trauma to O.P. was an aggravating circumstance with respect to count two. In a wholly summary and indirect fashion, she asserts on review appellate counsel was ineffective for not challenging on appeal the improper aggravation of the sentence on count two. But even were we to agree with Rumsey that there was sentencing error here, we nevertheless must conclude she has not sustained her burden on review of showing

the court abused its discretion in summarily rejecting this claim. *Herrera*, 183 Ariz. at 647, 905 P.2d at 1382.

¶12 As we previously stated, as a claim that is independent of the ineffective-assistance claim, the challenge to the sentence on this charge was waived by Rumsey's failure to raise it on appeal; it is therefore precluded. Ariz. R. Crim. P. 32.2(a)(3). And in her petition for review, Rumsey focuses almost exclusively on that underlying claim, not the ineffective-assistance claim; she asserts only summarily at the end of the petition for review that the court "abused its discretion and committed reversible error in holding that [she] failed to state a colorable claim of sentencing errors and ineffective assistance of appellate counsel." Rumsey has not asserted, other than summarily and by inference, much less established how the court abused its discretion.

¶13 As noted above, a defendant is not entitled to relief on a claim of ineffective assistance of appellate counsel unless she can show counsel's performance was both deficient and prejudicial with respect to the outcome on appeal. *Herrera*, 183 Ariz. at 647, 905 P.2d at 1382; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To raise a colorable claim entitling her to an evidentiary hearing, the defendant must set forth in the petition "some factors that demonstrate that the attorney's representation fell below the prevailing objective standards." *State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985). "[T]he determination of what issues are appealable in view of the trial record is a matter of [appellate] counsel's judgment," which will not be second-guessed in a post-conviction proceeding with the benefit of hindsight. *State v. Stanley*, 123 Ariz. 95, 106, 597 P.2d 998, 1009 (App. 1979). "Appellate counsel is not ineffective for

selecting some issues and rejecting others." *Herrera*, 183 Ariz. at 647, 905 P.2d at 1382. And, appellate counsel is not required to raise all issues that can be raised; rather, the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986), *quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

¶14 Here, as in *Herrera*, Rumsey "did not supply any evidence" that by failing to raise this challenge to the sentence for aggravated assault, appellate counsel's performance "fell below prevailing professional norms and would have changed the outcome of the appeal," entitling her to relief or an evidentiary hearing. 183 Ariz. at 647, 905 P.2d at 1382. Nothing before us shows this choice was unprofessional, particularly in light of the fact that the state had urged the court to impose consecutive prison terms and the trial court chose instead to impose concurrent ones, and the additional fact that the sentence imposed on the aggravated assault charge was the shorter of the two. Neither below nor on review has Rumsey overcome the "strong presumption . . . that appellate counsel provided effective assistance." *State v. Bennett*, 213 Ariz. 562, ¶ 22, 146 P.3d 63, 68 (2006).

¶15 Rumsey stated in her petition for post-conviction relief that counsel had been ineffective simply because the error resulted in an illegal sentence, which is fundamental error. In addition to the fact that she does not make this assertion again on review, the mere fact appellate counsel chose not to raise this purported error does not establish counsel was ineffective. Rumsey provided no affidavits or other evidence in the

trial court suggesting counsel's failure to raise this issue on appeal falls below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."). She cites no authority in her petition for review, nor did she below, showing similar decisions by counsel have been found to constitute ineffectiveness. Her bald assertion that counsel erred is insufficient to sustain her burden of demonstrating the first requirement of the *Strickland* test. *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"). Thus, even were we to agree with Rumsey there was sentencing error, she has not established appellate counsel's performance was deficient or that there was a material issue of fact in this regard, warranting an evidentiary hearing. *See* Ariz. R. Crim. P. 32.6, 32.8.

¶16 For the reasons stated, we grant Rumsey's petition for review but deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

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