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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OF ARIZONA, Respondent, v. MARIA DE LOS ANGELES LEON, Petitioner.	2 CA-CR 2012-0474-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20084182

Honorable Scott Rash, Judge
Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

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M I L L E R, Judge.

¶1 Petitioner Maria de Los Angeles Leon was convicted after a jury trial of five counts of fraudulent scheme or practice, in violation of A.R.S. § 13-2311(A), in connection with her applications for government subsidized housing between 2003 and

2007. The trial court suspended the imposition of sentence, placed Leon on probation for three years, and ordered her to pay restitution. This court affirmed the convictions and probationary terms on appeal. *State v. Leon*, No. 2 CA-CR 2009-0235 (memorandum decision filed Dec. 22, 2010). She now seeks review of the trial court's orders dismissing her petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which she had raised claims of ineffective assistance of trial counsel and actual innocence, *see* Ariz. R. Crim. P. 32.1(h), and denying her motion for reconsideration. We will not disturb the trial court's rulings unless we find it clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 The evidence at trial established that in her initial application in 2002 for government subsidized housing and annual renewal applications through 2007, Leon had failed to disclose she owned a home. Leon contended in her petition for post-conviction relief that trial counsel had been ineffective for failing to assert a defense of equitable title and ownership and failing to present the testimony of an expert in support of that defense. She maintained in her petition that she had testified at trial she had owned a home but had sold it to her sister Rosa in 1992, not 2008 as the state had maintained, and that her sister had paid her $5,000 over about a year and had assumed responsibility for the mortgage and the monthly mortgage payments. Leon argued at trial that she had not defrauded anyone because even though she and her sister had not documented the 1992 sale in writing, both believed Rosa owned the home.

¶3 One of Leon's defenses at trial was that a city employee who had assisted her with her application had told her she did not need to indicate in the application she

owned a home, given her oral agreement with Rosa. The jury presumably accepted this defense because it acquitted her of count one of the indictment, which was related to the initial application. She also maintained she had sold the house to Rosa in 1992 but had remained on the mortgage because Rosa could not qualify for a loan and she had "formally" sold the home to Rosa in 2008 to remove herself from the mortgage because Rosa had not been making mortgage payments in a timely manner and was ruining Leon's credit rating. Thus, it was her position she had not knowingly made a false statement on the application or reapplications; she did not believe the home was hers during the period that gave rise to the charges.

¶4 In her Rule 32 petition, Leon asserted,

> Despite the case almost begging for expert testimony, defense counsel neither named nor called an expert on property or real estate transactions. Nor did he ask for any specialized jury instructions on the difference between legal rights and interests versus equitable rights and interests, or the definition of such terms as ownership, sale, trust, equity and beneficial.

Leon maintained counsel had been ineffective in failing to present a real estate expert as a witness on the issue of legal and equitable ownership rights and failing to request jury instructions relating to her defense that she had sold her home to her sister in 1992. She also asserted that based on the testimony of a qualified expert, no reasonable fact-finder would have found her guilty of the offenses, entitling her to relief pursuant to Rule 32.1(h), Ariz. R. Crim. P.

¶5 The trial court dismissed the petition without an evidentiary hearing. It found, inter alia, the claim of equitable title "without merit" and reasoned that,

consequently, it could not find counsel had been "ineffective in failing to raise that claim." Leon filed a motion for rehearing, which the court also denied. In her petition for review, Leon contends the court erred in finding the claim of equitable title lacked merit, asserting the court's conclusion reflects it did not consider the affidavit she had filed after she had filed the petition or the case law cited in that affidavit. She maintains, too, that trial counsel never made a tactical decision not to call an expert. In support of this position she relies on counsel's statement in an interview conducted in November 2011 that he had never considered hiring and presenting an expert witness. At the very least, she contends, she was entitled to an evidentiary hearing on the claim of ineffective assistance of counsel. Leon also reasserts her argument that counsel had been ineffective in failing to request instructions related to the defense of equitable ownership as well as mistake of fact, arguing the trial court erred by failing expressly to consider this argument. And, she contends, as to the last claim in her Rule 32 petition, at the very least she raised a colorable claim entitling her to an evidentiary hearing on the question whether, based on the expert's opinion, no reasonable trier of fact would have found her guilty.

¶6 As the trial court correctly noted, to be entitled to relief based on a claim of ineffective assistance of counsel, a defendant is required to establish counsel's performance was deficient, based on prevailing professional norms, and that this deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Thus, in order "[t]o state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable

standards and the deficient performance prejudiced the defendant." *State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635 (App. 2005). A colorable claim for relief is "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* Ariz. R. Crim. P. 32.6(c) (summary dismissal of petition appropriate unless material issue of fact or law exists).

¶7 Leon contends on review that the trial court erroneously concluded principles of equitable ownership and the testimony of an expert to support it would not have provided her with a viable defense to the charges in this case, a conclusion Leon claims is based in part on the court's equally incorrect comment that she had cited no authority. She maintains the authority was cited by the real estate expert in the affidavit she filed after she had filed the petition but before the state had filed its answer. She asserts the court must have refused to consider this affidavit.

¶8 First, we presume the trial court considered the affidavit that was presented to it. *Cf. Occidental Chem. Co. v. Connor*, 124 Ariz. 341, 344, 604 P.2d 605, 608 (1979) (presuming court considered affidavits that were part of record when it ruled on motion). Second, the court was correct that the principles discussed in the affidavit did not establish an absolute defense to the charges, given the evidence at trial. The authorities cited in the expert's affidavit are civil cases that pertain to the equitable rights and interests of a party to an oral contract for the sale of real estate based on partial performance and principles of equitable estoppel. *See, e.g.*, *Owens v. M.E. Schepp Ltd. P'ship*, 218 Ariz. 222, ¶¶ 14-16, 182 P.3d 664, 667-68 (2008); *Huish v. Lopez*, 70 Ariz. 201, 218 P.2d 727 (1950). The evidence, viewed in the light most favorable to sustaining

the convictions, *State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005), established the home was in Leon's name until 2008; Leon's name remained on the mortgage until what Leon has referred to as the "formal" sale of the home to Rosa; and, $25,000, proceeds from the sale, was deposited into Leon's account and used by Leon. It also included the damaging and apparently unexpected testimony of Leon's own witness, the mortgage broker who had assisted with the sale of the home in 2008. The broker testified that Leon knew the home belonged to her. The witness conceded Leon knew the arrangement with Rosa was informal and would not be "recognized by an outside authority."

¶9 As the state asserted in its response to the Rule 32 petition, expert testimony from a real estate attorney would not have changed these facts. The principle of equitable ownership and the doctrine of partial performance excepting an oral contract for the sale of real estate from application of the Statute of Frauds might provide Rosa with rights to the home as against Leon; but they would not have given Leon an unequivocal defense against the criminal charges at issue here.

¶10 Third, even assuming arguendo the trial court's conclusion that equitable principles regarding Rosa's ownership interest provided Leon with no viable defense was incorrect, Leon nevertheless failed to establish the trial court erred in finding she had not sustained her burden of showing counsel's performance had been deficient. Leon did not raise a colorable claim because she did not provide the court with relevant support, such as the affidavit of a criminal defense lawyer, establishing trial counsel's failure to raise this particular defense and present a real estate expert to support it was conduct that fell

below prevailing professional norms. *See Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d at 635 (to raise colorable claim and avoid summary dismissal of petition defendant must establish, inter alia, counsel's performance was objectively unreasonable based on applicable professional standards); *see also* 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."). The affidavit of Jeffrey Brei, an attorney who specializes in real estate law, arguably provided support for the general principles of equity such as equitable estoppel and the enforcement of oral contracts for the sale of real estate. But it did not establish a colorable claim that trial counsel's performance had fallen below the standard of care applicable to criminal defense attorneys.

¶11 We note, in addition, there is "a strong presumption" counsel provided effective assistance. *Strickland*, 466 U.S. at 689; *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994) (same); *see also State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985) (defendant must overcome strong presumption counsel's tactical decisions were reasonable under circumstances at time decisions made). A reviewing court should give great deference to counsel's tactical decisions and should not second-guess such decisions with the benefit hindsight. *See State v. Nash*, 143 Ariz. 392, 398, 694 P.2d 222, 228 (1985). "[D]isagreements as to trial strategy or errors in trial tactics will not support an effectiveness claim so long as the challenged conduct could have some reasoned basis." *State v. Meeker*, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). The Sixth Amendment "'entitles a criminal defendant to a fair trial, not a perfect one.'" *State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231, 239 (2003), *quoting Rose v.*

Clark, 478 U.S. 570, 579 (1986). A defendant is "not guaranteed perfect counsel, only competent counsel." *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989), *overruled on other grounds by Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d 1149, 1151 (1995).

¶12 Trial counsel's strategy here appears to have been to assert a defense that would accomplish precisely what Leon insists the principle of equitable ownership, presented through an expert, would have accomplished: to negate the state's efforts to prove Leon had knowingly made a false statement, *see* § 13-2311(A), by trying to show Leon had believed Rosa owned the home, despite the fact that title remained in Leon's name until 2008.[1] Trial counsel offered explanations for the fact that the $25,000 in sale proceeds had been deposited into Leon's bank account and that she had used a large part of the funds to pay student loans and purchase a car for her daughter and granddaughter. And Leon presented her own testimony as well as the testimony of Rosa and the mortgage broker to support the defense that she and Rosa had believed the home belonged to Rosa. For example, Leon testified she never claimed the mortgage interest deduction on her taxes after 1992 because she did not believe she owned the home,

[1]Leon contends on review that trial counsel "admitted in the November 17, 2011 interview that he never thought of presenting an expert witness," arguing that, consequently, "it cannot be said that counsel's conduct reflected a 'tactical decision.'" Leon referred to the same "interview" in her Rule 32 petition, maintaining she and trial counsel, who had been privately retained, had never discussed retaining an expert. But no transcript of such an interview or even an affidavit by Rule 32 counsel relating to this interview has been submitted in connection with this post-conviction proceeding. Thus, even assuming, without deciding, it has any relevancy to our review of the trial court's ruling, the interview is nothing more than an unsupported assertion that the trial court, in its discretion, implicitly gave little weight.

explaining with regard to the deposit of the proceeds in her bank account that Rosa had lent her the money, which she paid back in installments. Thus, trial counsel presented the defense in a manner that rendered superfluous and unavailing the testimony of an expert. Leon has not established the trial court erred in rejecting summarily this claim of ineffective assistance of counsel.

¶13 Leon next maintains the trial court failed to address the argument she raised in her Rule 32 petition that trial counsel had been ineffective for failing to request a jury instruction on mistake of fact, a claim she asserts is independent of her first claim for relief. Although Leon concedes she first raised this alternative claim in her reply to the state's response to her Rule 32 petition, she insists it was "raised by inference in the Petition." The portions of the Rule 32 petition she cites to, however, are part of the recitation of the facts, the case history, and the general overview of the claims, not the portion of the petition identifying and setting forth argument in support of the claims themselves. Moreover, there is no mention of the phrase "mistake of fact" in the cited portions of the petition. Because the claim appears to have been raised for the first time in the reply brief, the trial court was not required to consider it. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d 1052, 1054 (App. 2009).

¶14 But even assuming this claim was raised implicitly in the petition, we may presume, too, that the trial court considered and rejected it when it found Leon had raised no claims warranting relief and summarily dismissed the petition. And Leon's conclusory allegation in the petition for review that the court had abused its discretion by rejecting her claim that trial counsel had been ineffective in failing to request a variety of

instructions related primarily to real estate principles does not satisfy her burden on review. Again, she provided no support for her claim that counsel's performance fell below prevailing professional norms, thereby failing to raise a colorable claim for relief that would have warranted an evidentiary hearing.

¶15 Finally, Leon contends the trial court erred in failing to address and implicitly rejecting her claim that the expert's affidavit was clear and convincing evidence of her actual innocence, presumably a claim cognizable under Rule 32.1(h), Ariz. R. Crim. P. The claim is inextricably intertwined with the first claim. Leon did not establish the court abused its discretion by failing to address this claim separately and in further detail or in rejecting it implicitly, given that the court did not err in finding this was not an absolute defense. Based on the evidence presented at trial, the court did not err in rejecting the claim that no reasonable trier of fact would have found her guilty if the expert had testified.

¶16 Based on the foregoing, we grant Leon's petition for review but deny relief.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

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

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