

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 22 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2013-0032-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
MICHAEL RAY WEEKS,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200500442

Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

Thomas J. Phalen

Phoenix  
Attorney for Petitioner

MILLER, Judge.

¶1 Petitioner Michael Weeks seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Weeks has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Weeks was convicted of kidnapping, six counts of sexual assault, and three counts of aggravated assault. The trial court imposed a combination of consecutive and concurrent, presumptive terms, totaling 44.5 years' imprisonment. This court affirmed Weeks's convictions and sentences on appeal. *State v. Weeks*, No. 2 CA-CR 2007-0252 (memorandum decision filed Jan. 27, 2009).

¶3 Weeks initiated a proceeding for post-conviction relief, arguing in his petition that he had not been competent to stand trial or to accept or reject a plea offer, that the trial court should have ordered a competency hearing, and that trial counsel was ineffective in failing to "bring to the court's attention [his] incompetency to stand trial" or "to recognize and take into account [his] incompetency when explaining [a] plea offer[] to him." Weeks filed his petition on May 28, 2010 and on August 9, 2010, the state moved to extend the time to file a response. The trial court initially granted the motion, but after Weeks objected to the untimeliness of the state's request under Rule 32.6(a), the court reconsidered and ordered that the state could not file a response.<sup>1</sup> The court thereafter ordered a psychiatric evaluation of Weeks and an evidentiary hearing. After a six-day hearing, the court denied relief, concluding the state's failure to respond "waived any issue which the State must plead and prove such as preclusion under Rule 32.2," but that Weeks had nonetheless failed to establish he was incompetent at the time of trial and, as a result, his claims failed.

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<sup>1</sup>We note, however, that when a trial court has discretion to extend the time for the filing of a motion, "it has the discretion to hear late motions." *State v. Vincent*, 147 Ariz. 6, 8, 708 P.2d 97, 99 (App. 1985).

¶4 On review, Weeks contends the trial court should have treated the state's failure to file a timely response to his petition as a total waiver of opposition and abused its discretion in rejecting his claim that he had not been competent at the time of trial. In regard to the state's failure to file a response, both Weeks and the court are mistaken about the effect of the state's failure to plead preclusion. Before Rule 32.2(c) was amended in 2000, *see* 198 Ariz. CXIII (2000), if the state failed to plead preclusion, "this court [wa]s not at liberty to base its decision on preclusion." *State v. Thompson*, 120 Ariz. 202, 203, 584 P.2d 1193, 1194 (App. 1978). But the current rule allows "any court on review of the record [to] determine and hold that an issue is precluded regardless of whether the state raises preclusion." Ariz. R. Crim. P. 32.2(c). Thus, the court could have found, and we do find, that Weeks's claims of trial error, relating to his competency to stand trial and the court's duty to order a competency evaluation sua sponte, are precluded because he did not raise them on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3),(c). Weeks has not established that these claims fall within any of the exceptions to preclusion.

¶5 We turn then to Weeks's claim of ineffective assistance of counsel. First, we disagree with Weeks's implicit assertion that the state's failure to respond to his petition for post-conviction relief entitled him to relief. This court has stated, "the trial court is not bound to grant [a defendant's] motion just because the state failed to respond to it." *State v. Cawley*, 133 Ariz. 27, 29, 648 P.2d 142, 144 (App. 1982). And, because there is sufficient evidence to support the trial court's conclusions as to Weeks's claims of ineffective assistance of counsel in the testimony presented by Weeks's own

witnesses, we need not determine whether the court abused its discretion in allowing the state to present evidence at the hearing.

¶6 It is the defendant's burden to prove by a preponderance of the evidence all factual allegations raised in his petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.8(c). In reviewing a trial court's ruling after an evidentiary hearing, we defer to that court with respect to its assessment of the witnesses' credibility and its resolution of any conflicts in the evidence. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). Consequently, we do not reweigh the evidence. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993) (appellate court reviews evidence at post-conviction-relief hearing favorable to trial court's ruling and defers to trial court in resolving conflicts in evidence). Rather, "[w]e examine a trial court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous." *State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994).

¶7 In order to establish a claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Relevant here, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691; *cf. State v. Gerlaugh*, 144 Ariz. 449, 459, 698 P.2d 694, 704 (1985) (counsel not ineffective when petitioner refused psychological examination). In this case, there was substantial evidence at the evidentiary hearing, including his own testimony, that Weeks had "actively hid[den]" his drug use and its effects, including its alleged effects on his mental

health, from his trial attorneys. And, in affidavits submitted with Weeks's petition for post-conviction relief, both attorneys who had represented Weeks at trial averred that they were not aware of his suffering from any mental health issues, current drug use, suicidal ideation, or hallucinations around the time of his trial. In view of this evidence, we cannot say the court abused its discretion in concluding counsel's performance had not been deficient. Therefore, although we grant the petition for review, relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge