

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

JUL 30 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | 2 CA-CR 2013-0113-PR |
| |) | DEPARTMENT B |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| JOHNATHON ALLEN STERKESON, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007156796001DT

Honorable Steven P. Lynch, Commissioner

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Linda Van Brakel

Phoenix
Attorneys for Respondent

The Ferragut Law Firm, P.C.
By Ulises A. Ferragut Jr.

Phoenix
Attorney for Petitioner

K E L L Y, Presiding Judge.

¶1 Petitioner Johnathon Sterkeson was convicted after a jury trial of aggravated assault and unlawful discharge of a firearm. The convictions and sentences

were affirmed on appeal. *State v. Sterkeson*, No. 1 CA-CR 09-0058 (memorandum decision filed Mar. 11, 2010). Sterkeson subsequently sought post-conviction relief, claiming his trial counsel had been ineffective in a variety of respects and requesting a new trial. The trial court denied relief following an evidentiary hearing and Sterkeson now seeks review of that ruling. We will not disturb the court's ruling unless it clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In order to be entitled to relief based on ineffective assistance of counsel, the defendant must establish counsel's performance was deficient, based on prevailing professional norms, and the deficiency was prejudicial; that is, the defendant must establish a reasonable probability exists that the outcome of the case would have been different but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Reviewing courts indulge "a strong presumption" that counsel provided effective assistance. *Strickland*, 466 U.S. at 689; *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994). And "[m]atters of trial strategy and tactics are committed to defense counsel's judgment." *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988). Thus, "disagreements [over] trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis." *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), quoting *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987). And even if counsel's strategy proves unsuccessful, tactical decisions normally will not constitute ineffective assistance of counsel. *See State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975). In addition, "[i]n assessing deficient performance, an effort is made to 'eliminate the distorting effects

of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *State v. Valdez*, 167 Ariz. 328, 331, 806 P.2d 1376, 1379 (1991), *quoting Strickland*, 466 U.S. at 689.

¶3 If a defendant has raised a colorable claim for relief and is granted an evidentiary hearing, as Sterkeson was here, he has the burden of proving the factual allegations raised in his petition for post-conviction relief by a preponderance of the evidence. Ariz. R. Crim. P. 32.8(c). We defer to the trial court with respect to its factual findings and will not disturb them on review if they are supported by the record and are not clearly erroneous. *See State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994). Thus, when the court has denied post-conviction relief, we “view the facts in the light most favorable to sustaining the . . . ruling, . . . resolv[ing] all reasonable inferences against the defendant.” *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). We are mindful that “the trial court is the sole arbitrator of the credibility of witnesses” in post-conviction proceedings. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). It is for the trial court, not this court, to resolve conflicts in the evidence that may exist with respect to counsel’s performance and the issue of whether that performance was deficient. *See State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995). We will not reweigh the evidence on review. *See State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003).

¶4 After the evidentiary hearing, at which defense counsel testified, the trial court noted it had presided over the trial and found defense counsel’s “performance to be highly competent.” The court identified the primary instances that were the bases for Sterkeson’s claim. For example, addressing Sterkeson’s contention that counsel had not properly impeached J.H., who was the victim, and J.C., who had been Sterkeson’s

roommate, the court noted counsel had conceded at the evidentiary hearing that he had made a mistake by not impeaching J.H. with his illegal drug use. But, the court found, “[t]heir credibility was severely undermined during . . . cross-examination.” Referring to this and other allegations of ineffective assistance, the court concluded Sterkeson had not sustained his burden of establishing a reasonable probability the outcome at trial would have been different but for counsel’s allegedly deficient performance. The court added, “No testimony was presented by legal experts to establish [trial counsel’s] performance was unreasonable under prevailing professional standards.”

¶5 On review, Sterkeson contends the trial court abused its discretion in denying relief. He essentially reasserts his claims that trial counsel had been ineffective for failing to impeach J.H. with his illegal drug use;¹ failing to impeach J.C. by introducing the recording of the 9-1-1 telephone call; and, failing to introduce photographs depicting injuries and the testimony of a medical expert about injuries Sterkeson had sustained during his altercation with J.H. With respect to the latter claim, Sterkeson argues the court abused its discretion in denying relief in part because he did

¹At the evidentiary hearing, trial counsel testified that the trial court initially granted the state’s motion in limine to preclude him from impeaching victim J.H. with evidence that blood tests taken at the hospital established the presence of opiates, tranquilizers, cannabinoids, and alcohol. Although the court later permitted counsel to impeach J.H. with medical records showing drug and alcohol use if J.H. were to dispute this at trial, counsel did not question him about it and did not recall why, admitting it probably was not the result of a strategic decision. But the trial court essentially found that counsel’s failure to impeach J.H. with drug-use evidence was not prejudicial, that is, it is not probable such impeachment would have changed the outcome of the trial. As we conclude below, based on the record before us, Sterkeson has not established the court abused its discretion. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (failure of one part of the *Strickland* test results in failure of claim). Finally, J.H. admitted he had been drinking alcohol that night and apparently the hospital had given him pain medication.

not present an expert establishing counsel's performance had been unprofessional. He suggests he did not need to present expert testimony here because there was no evidence counsel had made a tactical or strategic decision. Citing no authority for the proposition, Sterkeson argues that "[t]estimony by legal experts as to whether trial counsel's performance was unreasonable under prevailing professional standards is needed only when there is some question about whether the conduct might be considered sound strategy or a legitimate tactical decision, neither of which is implicated in this case."

¶6 The record, which includes transcripts from the trial and the Rule 32 evidentiary hearing, supports the trial court's determination that Sterkeson did not sustain his burden of proving the allegations of his petition. And the court's ruling reflects that it applied the correct standard and exercised its discretion properly in applying that standard, contrary to Sterkeson's argument in his petition. Additionally, Sterkeson essentially appears to be asking us to reweigh the evidence on review and reapply the standard. This we will not do. Rather, because the record supports the court's ruling in its entirety, the salient portions of which we have summarized or quoted in this decision, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 Nor did the trial court err in finding Sterkeson failed to sustain his burden in part because he did not present expert testimony establishing counsel's performance fell below prevailing professional norms. Although a defendant is not required to support a claim of ineffective assistance of counsel with expert testimony, such testimony is among various evidentiary sources that may be used to establish this essential element of the *Strickland* test. *Nash*, 143 Ariz. at 397-98, 694 P.2d at 227-28 (in order to determine prevailing professional norm in given circumstance, court may consider various sources, including American Bar Association standards and opinion of expert). The absence of an

expert was only one reason the court denied relief. It additionally found, based on its own assessment, that counsel did not perform deficiently. Moreover, the court also found counsel's purported omissions had not been prejudicial. Therefore, the court did not deny Sterkeson's petition solely because he had failed to support his claim with expert testimony. The court did not abuse its discretion by denying Sterkeson's petition for post-conviction relief.

¶8 We grant the petition for review. But for the reasons stated, we deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge