

FILED BY CLERK

MAY 30 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | | |
|-----------------------|---|----------------------------|
| THE STATE OF ARIZONA, |) | 2 CA-CR 2013-0142-PR |
| |) | DEPARTMENT A |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| MATT DRIVER, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2004043107001SE

Honorable David K. Udall, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin

Phoenix
Attorneys for Respondent

Law Offices of Michael J. Dew
By Michael J. Dew

Phoenix
Attorney for Petitioner

M I L L E R, Judge.

¶1 Petitioner Matt Driver seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged he had received ineffective assistance of counsel. "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). Driver has not sustained his burden of establishing such abuse here.

¶2 After a jury trial at which he did not testify, Driver was convicted of five counts of sexual abuse based on his having fondled several women in his role as a police officer. The trial court imposed aggravated, consecutive and concurrent sentences totaling six years' imprisonment on four of the counts and, on the other, suspended the imposition of sentence and placed Driver on lifetime probation, to begin upon his release from prison. Driver's convictions and sentences were affirmed on appeal. *State v. Driver*, No. 1 CA-CR 08-0135 (memorandum decision filed Apr. 28, 2009).

¶3 Driver initiated a proceeding for post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel based on “counsel's erroneous advice to [Driver] not to testify.” The trial court summarily denied relief. On review, Driver essentially repeats his arguments made below and contends the court should have granted him an evidentiary hearing.

¶4 To state a colorable claim of ineffective assistance of counsel, a petitioner must establish that counsel's performance fell below an objectively reasonable professional standard and that prejudice resulted from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To demonstrate the requisite prejudice, the petitioner must show “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different.” *Strickland*, 466 U.S. at 694. There is “[a] strong presumption” that counsel “provided effective assistance,” *State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005), which the defendant must overcome by providing evidence that counsel’s conduct did not comport with prevailing professional norms, *see State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995).

¶5 Although “disagreements in trial strategy will not support a claim of ineffective assistance of counsel, . . . certain basic decisions transcend the label ‘trial strategy’ and are exclusively the province of the accused: namely, the ultimate decisions on whether to plead guilty, whether to waive a jury trial, and whether to testify.” *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987), *quoting State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). “Counsel is encouraged to provide guidance and to urge the client to follow professional advice.” *Lee*, 142 Ariz. at 215, 689 P.2d at 158. A problem arises, however, when “the defendant unretreatingly demands that he be given the opportunity to testify but his counsel in direct contradiction to the defendant’s wishes refuses to put him on the stand.” *State v. Martin*, 102 Ariz. 142, 147, 426 P.2d 639, 644 (1967). That is not the case here.

¶6 Driver does not contend counsel prohibited him from testifying, indeed the record shows Driver’s testifying was discussed at several points during the trial and he did not voice any desire to testify. And at sentencing Driver acknowledged he had spoken with counsel about whether to testify, saying, “we figured that the evidence was enough to create reasonable doubt, but I was wrong; it wasn’t enough, but I can’t fix that now.” Rather than asserting a claim he had been kept from testifying, Driver contends

that counsel's advice not to testify was "erroneous." But, mere regrets about the decision not to testify are insufficient to raise a colorable claim of ineffective assistance. *State v. Schurz*, 176 Ariz. 46, 58, 850 P.2d 156, 168 (1993). "[W]hen the defendant and his counsel come to the conclusion for any reason that it would be better for the defendant not to testify, the defendant cannot later claim with the benefit of hindsight that the decision to keep him off the stand constituted reversible error." *Martin*, 102 Ariz. at 147, 426 P.2d at 644. Furthermore, although Driver broadly asserts counsel's advice in this regard constituted deficient performance, he provided no affidavits or other evidence in the trial court suggesting counsel's advice fell 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."); *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"). 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/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge