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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THE STATE OF ARIZONA, Respondent, v. MARK GOUDEAU, Petitioner.	2 CA-CR 2013-0174-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2006155081001DT

Honorable Andrew G. Klein, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin
Phoenix
Attorneys for Respondent

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By Tyrone Mitchell
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V Á S Q U E Z, Presiding Judge.

¶1 Mark Goudeau petitions this court for review of the trial court's order dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. He additionally claims the court erred in rejecting his motion requesting the

court's recusal. We will not disturb those rulings absent a clear abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007); *State v. Thompson*, 150 Ariz. 554, 557-58, 724 P.2d 1223, 1226-27 (App. 1986). Goudeau has not met his burden of establishing such abuse here.

¶2 Goudeau was convicted after a jury trial of one count of possession or use of a narcotic drug; two counts each of kidnapping, aggravated assault with a deadly weapon, sexual abuse, and attempted sexual assault; and ten counts of sexual assault. He was sentenced to a combination of concurrent and consecutive presumptive and aggravated prison terms exceeding 400 years' imprisonment. This court affirmed his convictions and sentences on appeal. *State v. Goudeau*, No. 1 CA-CR 07-1069 (memorandum decision filed Dec. 17, 2009).

¶3 Goudeau then sought post-conviction relief, arguing his trial counsel had been ineffective in failing to renew a motion for change of venue and that his appellate counsel had been ineffective in failing to raise the change-of-venue issue on appeal. He additionally claimed his appellate counsel had been ineffective in failing to advise him that he had the "right to seek review before the Arizona Supreme Court." Finally, Goudeau raised a claim of newly discovered material facts pursuant to Rule 32.1(e) based on a previously undisclosed report by a police detective identifying an alternate suspect in several murders for which Goudeau had been charged. He asserted that report "could have likely uncovered that [suspect] was responsible" for the assaults in this case.

¶4 The trial court summarily dismissed Goudeau's petition. Goudeau then filed a "motion for recusal and motion for reconsideration," stating the court had, approximately four years earlier, recused itself from proceedings in Goudeau's then-pending murder prosecution and claiming the court "had made personal comments" to him and "conveyed . . . that because of [the court's] personal feelings . . . [it] could no longer preside over the murder case." Goudeau's counsel asserted he had only recently learned of that recusal order and argued the court was required to recuse itself from his post-conviction proceeding, and requested that the petition be reassigned to another judge to be "reconsidered on its merits." The court denied the motion, stating that it had recused from the murder case shortly after sentencing Goudeau in the instant case "to avoid any appearance of impropriety" and that it had based its post-conviction ruling "solely on the record and not on any bias or prejudice."

¶5 On review, Goudeau reurges his claims and argues the trial court erred in denying his motion for recusal. We first address his claim of ineffective assistance of trial counsel. To prevail on such a claim, Goudeau was required to demonstrate both that counsel's performance fell below prevailing professional norms and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (failure to meet both elements of *Strickland* test fatal to claim of ineffective assistance of counsel). Establishing prejudice requires a showing that, but for the ineffectiveness of counsel, the

outcome of the trial or the sentence imposed would have been different. *State v. Carver*, 160 Ariz. 167, 174, 771 P.2d 1382, 1389 (1989).

¶6 Trial counsel filed a motion seeking a change of venue, which the trial court determined was "not a ripe issue" that "[w]e can take that up at another time, if necessary." Goudeau asserts counsel should have renewed that motion before or following jury selection. In support of his claim, Goudeau recounts portions of jury selection, identifying several jurors who had been exposed to the considerable media coverage of the case and had not been removed for cause. The essential thrust of his argument is that a change of venue was appropriate due to the media coverage, "several jurors" remained on the jury panel despite having heard Goudeau's name in media reports, and the court erred in "belie[ving]" those jurors' avowals that they could be fair and impartial.

¶7 Even if we agreed with Goudeau that a motion for change of venue was likely to have been granted, he identifies nothing in the record and cites no authority suggesting that an attorney falls below prevailing professional norms by failing to renew such a motion in these circumstances. Counsel's decision not to renew the motion clearly could have had a reasoned tactical basis. *See State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985) ("Disagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis."). And "[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of

speculation." *State v. Meeker*, 143 Ariz. 256, 264, 693 P.2d 911, 919 (1984). Thus, the trial court did not err in summarily rejecting this claim.

¶8 We also reject Goudeau's related argument that appellate counsel was ineffective for failing to raise a change-of-venue claim on appeal. As the trial court pointed out, it never ruled on counsel's motion because counsel did not renew it. *See State v. Mays*, 96 Ariz. 366, 370, 395 P.2d 719, 722 (1964) (failure to obtain ruling on prior objection waived issue on appeal). Even assuming, as Goudeau suggests, that fundamental error review of the issue would have been appropriate on appeal, he does not argue that the court's failure to order a change of venue sua sponte constitutes such error or that relief likely would have been granted on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (claim not raised below forfeited save fundamental, prejudicial error); *cf. State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued). Thus, Goudeau has not demonstrated appellate counsel's performance was deficient or that he suffered resulting prejudice. *See Strickland*, 466 U.S. at 687-88.

¶9 Goudeau additionally claims appellate counsel was ineffective in failing to advise him that he had the right to file a petition seeking our supreme court's review of this court's decision affirming his conviction and sentences.[1] First, Goudeau has cited no

[1]This claim does not appear cognizable pursuant to Rule 32.1(f), which permits post-conviction relief when "[t]he defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part," but does not include the failure to file a petition for certiorari. *Cf. State v. Diaz*, 228 Ariz. 541, ¶ 10, 269 P.3d 717, 720 (App. 2012) (noting Rule 32.1(f) "makes

authority or evidence suggesting appellate counsel falls below prevailing professional norms in failing to advise a client of the right to seek further review. Indeed, we find authority holding otherwise. *See Pena v. United States*, 534 F.3d 92, 95 (2nd Cir. 2008) ("[The] right to the effective assistance of counsel on first-tier appeal [does not] encompass[] a requirement that his attorney inform him of the possibility of certiorari review and assist him with filing a petition"). This claim additionally fails because Goudeau has not identified resulting prejudice. And Goudeau has not identified what claims he would have raised in a petition for review, much less established a reasonable likelihood our supreme court would have accepted review or granted relief. *See State v. Shattuck*, 140 Ariz. 582, 584, 684 P.2d 154, 156 (1984) (supreme court review discretionary "except in cases in which . . . the death penalty is imposed"). Finally, Goudeau has cited no authority to support his suggestion that the mere loss of opportunity to seek review constitutes sufficient prejudice in these circumstances. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).

¶10 Goudeau also reasserts his claim of newly discovered evidence, again claiming the police detective's report identifying a different suspect in other crimes of which Goudeau was accused and ultimately convicted "could have likely uncovered that [the suspect] was responsible" for the assaults at issue here. A defendant presents a

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no . . . provision for [non-pleading] defendants . . . who share no culpability in the untimely filing of their first post-conviction petitions").

colorable claim of newly discovered evidence case if the following five requirements are met:

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial; (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention; (3) the evidence must not simply be cumulative or impeaching; (4) the evidence must be relevant to the case; (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53, 781 P.2d 28, 29-30 (1989).

¶11 Even assuming the report otherwise meets these requirements, Goudeau has not demonstrated there is any possibility that it could have resulted in a different verdict. Goudeau ignores the trial court's determination that he failed to show the report suggested the suspect had committed those assaults instead of Goudeau.[2] His claim instead relies entirely on speculation that, merely because there was a possible alternate suspect in other crimes Goudeau had been accused of committing, that same alternate suspect could have committed the crimes at issue here. This is insufficient to make a colorable claim for post-conviction relief. Moreover, Goudeau disregards the court's reliance on evidence submitted by the state that appears to eliminate any speculative possibility the suspect could have been responsible for those assaults. Specifically, the police detective acknowledged during an interview that there was no reason to believe

[2]It appears Goudeau did not provide the trial court with a copy of the report, only with several letters and a partial interview transcript discussing its contents.

that suspect had committed those assaults. And DNA[3] testing excluded that suspect from DNA samples taken from the victims—the same samples that contained Goudeau's DNA.

¶12 Last, we address Goudeau's claim that the trial court erred in denying his motion for recusal. Rule 10.1, Ariz. R. Crim. P., governs motions for a change of judge for cause and requires the motion to be filed "prior to the commencement of a hearing or trial" and "[w]ithin 10 days after discovery that grounds exist for change of judge." Goudeau's motion was patently untimely, having been filed not only after the court had ruled, but more than two weeks after Goudeau's counsel purportedly had learned of the motion's basis. And the motion alleges that the comments showing the court's bias were made to Goudeau directly, which significantly weakens counsel's claim that he had only recently discovered the basis for the recusal motion. *Cf. State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) (evidence not newly discovered if known to defendant at time of trial).

¶13 Moreover, Goudeau's recusal motion does not meaningfully comply with Rule 10.1(b), which requires the moving party to "alleg[e] specifically the grounds for the change" by a verified affidavit. The motion contained only a nonspecific reference to comments purportedly showing bias and included no supporting affidavit. Accordingly,

[3]Deoxyribonucleic acid.

Goudeau has not met his burden of demonstrating the court erred in rejecting his recusal motion.[4]

¶14 For the reasons stated, although review is granted, relief is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge

[4]Rule 10.1(c) requires that the presiding judge "provide for a hearing" on a motion for change of judge "before a judge other than the judge challenged." Goudeau does not argue the trial court erred in rejecting his motion in light of Rule 10.1(c). In any event, because Goudeau's motion did not comply with Rule 10.1's requirements, any error was harmless; he would not have been entitled to a hearing in any event. *See State v. Clabourne*, 194 Ariz. 379, ¶¶ 49, 51, 983 P.2d 748, 758 (1999) (defendant not entitled to evidentiary hearing on motion for change of judge because motion unsupported by evidence).