IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CHRISTOPHER ANTHONY TRUJILLO,
Petitioner.

No. 2 CA-CR 2013-0280-PR
Filed December 5, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24

Petition for Review from the Superior Court in Pima County
No. CR20084897
The Honorable K. C. Stanford, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Lori J. Lefferts, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Petitioner

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Christopher Trujillo seeks review of the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review and, for the following reasons, we deny relief.

¶2 After a jury trial, Trujillo was convicted of one count of aggravated robbery and one count of theft of means of transportation. The trial court sentenced him to concurrent, slightly mitigated, five-year terms of imprisonment. We affirmed his convictions and sentences on appeal, and our mandate issued on August 19, 2010. *See State v. Trujillo*, No. 2 CA–CR 2009-0390 (memorandum decision filed June 25, 2010).

¶3 On January 26, 2012, Trujillo filed a notice of post-conviction relief in which he alleged his failure to file the notice within prescribed time limits was "without fault on [his] part," because his appellate counsel had failed to file the notice after informing Trujillo he would do so. In a petition for post-conviction relief filed by appointed counsel, Trujillo alleged his trial counsel had rendered ineffective assistance by failing to call Trujillo's co-defendant, Mark Francisco, as a witness at trial. The trial court denied relief in a detailed ruling, finding Trujillo had failed to state a colorable claim and had raised no material issue of fact or law that would entitle him to relief. *See* Ariz. R. Crim. P. 32.6(c). This petition for review followed.

¶4 On review, Trujillo repeats the arguments raised in his petition below and asserts "[c]ounsel was ineffective in not presenting testimony by Mr. Francisco" because it would have

bolstered Trujillo's defense that he was "merely present" when Francisco "decided to take the vehicle without . . . ever even having discussed the matter" with Trujillo. Evidence at trial established D.E. had been outside his vehicle when three men got out of a car that had pulled up behind him. While Trujillo accosted him and began "throwing punches," another man pulled D.E. away from the vehicle, and Francisco got in D.E.'s vehicle and drove away. Trujillo and the second man "immediately" left D.E. and drove away in their car. A short time later, a police officer saw two men moving between D.E.'s stolen vehicle and another car in the parking lot of an apartment complex. Officers located and arrested Trujillo at the same complex. According to Trujillo, Francisco would have testified that he had been with Trujillo but was drunk and suffering from blackouts when he unilaterally availed himself of the victim's vehicle—with its open door and running engine—as a means of getting home. Trujillo asks that we remand the case for an evidentiary hearing.

¶5 We review the summary dismissal of Rule 32 claims for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶6 As an initial matter, although the court below determined Trujillo's ineffective-assistance claim was not colorable, that claim also was properly denied because it is precluded—not because it was omitted on appeal, but because it was raised in an untimely Rule 32 proceeding.[1] *See* Ariz. R. Crim. P. 32.4(a) (notice of post-conviction relief for non-pleading defendants "must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later"; untimely notice "may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)");[2] *see also*

[1]Notably, the state did not challenge the filing of the Rule 32 proceedings on the basis of untimeliness.

[2]In his untimely, pro se notice of post-conviction relief, Trujillo urged the trial court to excuse the untimely filing because it had occurred "without fault" on Trujillo's part. Although Rule 32.1(f)

Ariz. R. Crim. P. 32.2(c) ("[A]ny court on review of the record may determine and hold that an issue is precluded.").

¶7 Additionally, we find no abuse of discretion in the trial court's summary denial on the merits of Trujillo's claims. Although Trujillo argues "the trial court erred in finding there was no prejudice" from counsel's decision, the court clearly found Trujillo had failed to state a colorable claim that his attorney's performance had been deficient, as required "to justify further inquiry." We agree.

¶8 The trial court posited numerous tactical considerations that may have influenced counsel's decision, which was made after reviewing an interview conducted with Francisco at counsel's request.[3] In addressing the sufficiency of counsel's performance, a court "must presume 'counsel's conduct falls within the wide range of reasonable professional assistance' that 'might be considered sound trial strategy.'" *State v. Denz*, 232 Ariz. 441, ¶ 7, 306 P.3d 98, 101 (App. 2013), *quoting Strickland v. Washington*, 466 U.S. 668, 689 (1984). "To overcome this presumption," a petitioner is "required to show counsel's decisions were not tactical in nature, but were instead the result of 'ineptitude, inexperience or lack of preparation.'" *Id.*, *quoting State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Generally, "the decision as to what witnesses to call is a tactical, strategic decision," *State v. Lee*, 142 Ariz. 210, 215,

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excuses a "failure to file a notice of post-conviction relief of-right . . . within the prescribed time" when that failure "was without fault on the defendant's part," that rule only applies to "of-right" proceedings. It does not provide a non-pleading defendant like Trujillo, who has already been afforded a direct appeal, relief from the preclusive effect of Rule 32.4(a). *See* Ariz. R. Crim. P. 32.1 (defining "of-right" proceedings).

[3]Trujillo does not dispute that, at his trial attorney's direction, an investigator conducted a tape-recorded interview with Francisco. In fact, Trujillo relies on the investigator's summary of that interview in arguing his attorney should have called Francisco as a witness at trial.

689 P.2d 153, 158 (1984), and "[d]isagreements as to trial strategy . . . will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis," *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984). *See also Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.").

¶9 The trial court did not abuse its discretion in denying relief without benefit of an evidentiary hearing. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68 (to obtain evidentiary hearing on ineffective-assistance claim, "a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant"); *see also Strickland*, 466 U.S. at 700 (noting, in that case, "state courts properly concluded . . . ineffectiveness claim was meritless without holding an evidentiary hearing"); *cf. 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").

¶10 The trial court clearly identified, addressed, and correctly resolved Trujillo's claim in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Accordingly, no purpose would be served by repeating the court's analysis in full here; instead, we adopt it. *See id.* We grant review and, because the trial court did not abuse its discretion in summarily dismissing Trujillo's claim, we deny relief.