IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ALFREDO QUIJADA,
Petitioner.

No. 2 CA-CR 2015-0146-PR
Filed July 15, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20111320001
The Honorable Kathleen Quigley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Harold L. Higgins PC, Tucson
By Harold L. Higgins
Counsel for Petitioner

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly[1] concurred.

H O W A R D, Judge:

¶1 Petitioner Alfredo Quijada was convicted after a jury trial of kidnapping, assault, and two counts of sexual assault. This court affirmed the convictions and sentences on appeal. *State v. Quijada*, No. 2 CA-CR 2012-0157 (memorandum decision filed Mar. 5, 2013). In this petition for review, Quijada challenges the trial court's order denying, without an evidentiary hearing, his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he had raised claims of ineffective assistance of trial counsel and deprivation of counsel. Because Quijada has not sustained his burden of establishing the trial court abused its discretion, we grant review but deny relief. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Some of the facts that gave rise to the charges and convictions are set forth in this court's memorandum decision of Quijada's appeal. *Quijada*, No. 2 CA-CR 2012-0157. Shortly after 3:00 a.m., Quijada approached the victim, who had been waiting for a friend to pick her up at an intersection in Tucson. Quijada forced her to go with him to an abandoned building where he sexually assaulted her. Semen containing Quijada's DNA[2] was found on the victim's body. The victim told police and testified at trial that, after Quijada had intercourse with her, what appeared to be a condom

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

[2]Deoxyribonucleic acid.

fell to the ground; Quijada picked it up and ran from the scene. Police found a condom wrapper at the place the victim told them Quijada had taken her. The state introduced the wrapper at trial without objection and the state relied on it to corroborate the victim's version of the events and refute Quijada's claim that the sexual acts, which he asserted had been consensual, took place in a different location.

¶3 Neither the state nor trial counsel had the condom wrapper tested for DNA material. In this post-conviction proceeding, however, Quijada's retained counsel,[3] filed a motion seeking the release and testing of the wrapper. The trial court denied the motion, finding that, irrespective whether Quijada's "prints" or those of another, unidentified person could have been "found on the wrapper . . . [, he] ha[d] made no showing that this would provide any basis to support a ground for post-conviction relief," citing, inter alia, *State v. Saenz*, 197 Ariz. 487, 489, 4 P.3d 1030, 1032 (App. 2000).

¶4 In its ruling on the Rule 32 petition, the trial court found Quijada had not sustained his burden of establishing counsel's performance had been deficient and prejudicial. Observing that courts are required to give counsel "wide latitude in making tactical decisions" and acknowledging there is, generally, a strong presumption that an attorney made such tactical decisions during the course of the representation, the court found Quijada's counsel "likely" had made the reasonable tactical decision not to have the wrapper tested. The court further found that had the wrapper been tested and contained Quijada's DNA or fingerprints, the result could have bolstered the state's case. But, the court reasoned, "given the trash and debris" in the area where the wrapper had been found, the DNA material on the victim's body identified as belonging to Quijada, and Quijada's defense of consent, even if his DNA or fingerprints were not found on the wrapper, or DNA or fingerprints identified another person, the evidence "would not have been

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[3] Retained counsel substituted for appointed counsel, who found no issues to raise in the post-conviction proceeding.

dispositive of innocence nor would it have provided evidence that would be useful for impeachment of the victim."

¶5 In his petition for review, Quijada contends the trial court erred in denying his request to test the wrapper and rejecting the related claim of ineffective assistance of counsel. He argues the court deprived him of "potentially exculpatory evidence," thereby violating his due process rights, and rules of disclosure under Rule 15.1, Ariz. R. Crim. P. He contends the court's reasoning is "flawed" and that its order reflects "the court's complete lack of understanding of defendant's argument."

¶6 The trial court's rulings reflect it did, in fact, understand Quijada's argument but rejected it. The court saw no purpose in having the wrapper tested because it found that, regardless of the results of any testing, the outcome would have been no different.[4] *See Canion v. Cole*, 210 Ariz. 598, ¶¶ 10, 18, 115 P.3d 1261, 1263-64 (2005) (in Rule 32 proceeding, defendant entitled to discovery if he establishes good cause or identifies colorable claim for relief); *see also State v. Cornell*, 179 Ariz. 314, 320-21, 878 P.2d 1352, 1358-59 (1994) (trial court has discretion to determine whether discovery expenditures necessary).

¶7 For the reasons the trial court stated in its ruling, the wrapper, if tested, at best could have had no DNA or fingerprints identifying Quijada or could have identified another individual; in either case, the test results would not have exculpated Quijada. And, the impeachment value of that evidence to the defense would have been minimal, particularly in light of evidence such as the testimony of various witnesses, including the victim's friend who was talking to the victim when Quijada approached her and spoke

[4]There was no disclosure violation because Rule 15.1, Ariz. R. Crim. P., applies to the state's discovery and disclosure obligations at the pretrial and trial stages. *Canion v. Cole*, 210 Ariz. 598, ¶9, 115 P.3d 1261, 1262-63 (2005). Not only does the trial record suggest the state disclosed the wrapper, but Quijada's Rule 32 counsel does not dispute that trial counsel knew of its existence.

to her again after the assault. Such evidence supported the victim's version of the events and thereby refuted Quijada's claim that she had agreed to have sex with him for money but he refused to pay her afterwards.

¶8 Test results would not establish, as Quijada argued below and on review, that the sexual activity had occurred in a different location because the condom wrapper could have been left there by someone other than Quijada. And even if such evidence suggested the acts occurred elsewhere, that alone did not refute the victim's claim that Quijada had assaulted her. Therefore, the trial court did not err in refusing Quijada's request to have the wrapper tested.

¶9 For the same reasons, Quijada's related claim of ineffective assistance of counsel also must fail. The potential test results would not have exculpated Quijada. And, during closing argument defense counsel briefly referred to the state's failure to test the wrapper in an apparent attempt to use this fact in favor of Quijada, reinforcing the trial court's finding that Quijada's attorney made a tactical decision not to test the wrapper. The court did not abuse its discretion in finding counsel likely had made a tactical decision not to have the wrapper tested and risk providing impeachment evidence against defendant. *See State v. Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d 98, 102 (App. 2013) ("[A]lthough counsel has a duty to engage in adequate investigation of possible defenses, counsel may opt not to pursue a particular investigative path based on his or her reasoned conclusion that it would not yield useful information or is otherwise unnecessary in light of counsel's chosen trial strategy.").

¶10 Additionally, although Quijada attached to his Rule 32 petition affidavits and other documentation supporting his contention that law enforcement officers had not conducted a thorough investigation, he did not provide support, such as an affidavit from an attorney, to establish the prevailing professional norms for the circumstances and to show how counsel's performance had fallen below that standard. *See 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"); *see also* 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."). Nor has Quijada persuaded this court that the trial court abused its discretion by finding any deficiency in counsel's performance was not prejudicial, in light of the evidence presented.

¶11 In his petition for review, Quijada also challenges the trial court's rejection of his claims that trial counsel was ineffective in failing to effectively cross-examine the state's witnesses about the discrepancies in the victim's versions of the incident. The court rejected this claim, in part, because Quijada had not provided the court with relevant portions of the trial transcript supporting the claim, concluding that it therefore had "no way to determine how thoroughly the issues were pursued."

¶12 Although such transcripts arguably should have been part of the presumptive record before the trial court, *see* Ariz. R. Crim. P. 32.3, 32.4(d), apparently they were not. This court may, however, take judicial notice of such records, and we have done so here in reviewing the trial court's ruling. *See In re Sabino R.*, 198 Ariz. 424, ¶ 4, 10 P.3d 1211, 1212 (App. 2000); *see also* Ariz. R. Evid. 201. Based on the transcripts and the record that is before us, Quijada has not persuaded this court the trial court abused its discretion.

¶13 First, although Quijada cited to portions of the transcript in his petition's statement of facts, in the section in which he argued counsel's performance had been deficient, he did not cite to the record and show how the cross-examinations that were conducted were deficient. Second, although Quijada attached supporting exhibits to his petition showing the discrepancies he claimed should have been brought out on cross-examination, he did not sustain his burden of establishing on review that the trial court abused its discretion. The court assumed as accurate Quijada's assertion that counsel had failed to point out these discrepancies, and concluded nevertheless that, even had counsel done so, the outcome of the case would not have been different. And as before,

nothing in the affidavits or other documentation Quijada attached to the Rule 32 petition established counsel's performance in this regard fell below prevailing professional norms.

¶14 Finally, Quijada argues on review that trial counsel was ineffective because he had failed to fully inform him about the use of a law student to assist in the case pursuant to Rule 38(d), Ariz. R. Sup. Ct., and failed to properly supervise the law student to ensure that Quijada was effectively represented, and that he was therefore deprived of counsel. These issues were adequately addressed and correctly resolved by the trial court in its ruling, which we therefore adopt, and we find no reason to restate that ruling here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).[5]

¶15 We grant this petition for review but deny relief for the reasons stated herein.

[5]At the beginning of trial, attorney Walter Palser introduced the student who was assisting pursuant to Rule 38(d), Ariz. R. Sup. Ct. The trial transcript supports the state's recollection, which the trial court noted in its ruling, that before Quijada took the stand, Palser informed the court the law student would be conducting the examination.