

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JACOB BRANDON FIMBRES,
Petitioner.

No. 2 CA-CR 2015-0377-PR
Filed February 16, 2016

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NOT FOR PUBLICATION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. CR20132360001

The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Harriette P. Levitt, Tucson

By Harriette P. Levitt

Counsel for Petitioner

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

ESPINOSA, Judge:

¶1 Jacob Fimbres petitions for review of the trial court's order summarily denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

Background

¶2 After a jury trial, Fimbres was convicted of second-degree trafficking in stolen property. The trial court sentenced him to an enhanced, partially mitigated, four-year prison term. This court affirmed his conviction and sentence on appeal. *State v. Fimbres*, No. 2 CA-CR 2014-0083 (memorandum decision filed Feb. 6, 2015).

¶3 Fimbres filed a notice of and petition for post-conviction relief in which he alleged trial counsel had been ineffective in failing to present evidence (1) of the fair market value of a used television and game system Fimbres purchased for \$450 from a private party and (2) that the purchase, made from the back of a car behind a fast-food restaurant, nonetheless occurred in a public area. The trial court summarily denied relief in a detailed order, finding Fimbres had failed to state a colorable claim that would entitle him to an evidentiary hearing. This petition for review followed.

Discussion

¶4 On review, Fimbres challenges the trial court's conclusion that he failed to state a colorable claim and asks that we remand the case for an evidentiary hearing. We review a court's

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summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶5 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *Id.* Fimbres argues he “was not required to establish these two elements by a preponderance of the evidence” through his petition and was entitled to an evidentiary hearing because “the [factual] allegations [about trial counsel’s performance], if true, *might* have changed the outcome.” He suggests an evidentiary hearing would have afforded him the opportunity to subpoena trial counsel, and the trial court could “have determined” from counsel’s testimony “whether [he] had made a strategic decision not to present the evidence in question” or whether his performance had been both deficient and prejudicial.

¶6 Fimbres appears to misunderstand the requirements for a colorable claim of ineffective assistance of counsel, particularly with respect to the required showing “that counsel’s performance fell below objectively reasonable standards.” *Id.* Courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Accordingly, although a defendant is not required to establish proof by a preponderance through his petition alone, in order to state a colorable claim, he “must raise some factors that demonstrate that the attorney’s representation fell below the prevailing objective standards”; a request for “a hearing so that trial counsel can fully explain why the decision was made . . . is insufficient to raise a colorable claim.” *State v. Borbon*, 146 Ariz. 392, 399-400, 706 P.2d 718, 725-26 (1985); *see also State v. Santanna*, 153 Ariz. 147, 150, 735 P.2d 757, 760 (1987) (“[p]roof of ineffectiveness must be to a demonstrable reality rather than a matter of speculation”; courts required to give effect to presumption of competence absent contrary evidence in “unsupplemented record”). Thus, to state a colorable claim, “[t]he petitioner must offer some demonstration that the attorney’s representation fell below that of the prevailing objective

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standards . . . [and] some evidence of a reasonable probability that, but for counsel's unprofessional errors, the outcome of the [proceeding] would have been different." *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999).

¶7 Referring to an affidavit filed by his Rule 32 counsel below, Fimbres cites her "avow[a]l . . . that trial counsel . . . had previously admitted that he rendered ineffective assistance of counsel," but "became uncommunicative" when he was "asked to sign an affidavit." We cannot say the trial court abused its discretion in finding the affidavit "mere[] hearsay" and insufficient to substantiate a colorable claim. Cf. *State v. Krum*, 183 Ariz. 288, 292-93, 295, 903 P.2d 596, 600-01, 603 (1995) (characterizing as hearsay third-party affidavits submitted in support of post-conviction claim of victim's recantation; upholding trial court's summary denial). Moreover, Rule 32 counsel's affidavit, even had it been considered competent evidence, was insufficient to evince any "admi[ssion]" by trial counsel that he had performed deficiently. According to the affidavit, Fimbres's trial attorney told her "he should have obtained readily available evidence that the transaction occurred in a public place" and he had "never thought of" presenting evidence of the fair market value of the stolen property, although, "upon reflection[,] it would have been a good idea to do so."¹ Neither statement, even if accepted as true, constitutes a showing that counsel's conduct was unreasonable "under prevailing professional norms." *Strickland*, 466 U.S. at 688. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight," *id.* at 689—including a trial lawyer's assessment, in hindsight, of what he might have done differently.

¹Counsel had instead suggested during closing argument that the state had failed to present evidence of the current value of the used property and so had not established that the \$450 Fimbres paid for the items was a "price substantially below its fair market value," as required to support an inference that Fimbres was aware the property had been stolen.

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¶8 Similarly, we find no abuse of discretion in the trial court's determination that Fimbres's allegation of prejudice "is also unsubstantiated and speculative," as detailed in the trial court's thorough ruling. *See State v. Amaral*, No. CR-15-0090-PR, ¶¶ 10-11, 2016 WL 423761 (Ariz. Feb. 4, 2016) (clarifying that colorable claim requires more than showing of facts that "might" have changed outcome).

¶9 Because the trial court clearly identified, addressed, and correctly resolved Fimbres's claim, no purpose would be served by repeating that analysis here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

Disposition

¶10 For the foregoing reasons, as well as those identified in the trial court's ruling, although we grant review, relief is denied.