

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT CARL STONE,
Petitioner.

No. 2 CA-CR 2016-0389-PR
Filed January 19, 2017

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201301241
The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Wade C. Tanner, Deputy County Attorney, Florence
Counsel for Respondent

Rosemary Gordon Pánuco, Tucson
Counsel for Petitioner

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Robert Stone seeks review of the trial court’s summary denial of his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 Following a jury trial in 2015, Stone was convicted of two counts of child molestation and sentenced to concurrent, seventeen-year prison terms. On appeal, we affirmed Stone’s convictions and sentences. *State v. Stone*, No. 2 CA-CR 2015-0128, ¶ 7 (Ariz. App. Nov. 5, 2015) (mem. decision). Stone then initiated a post-conviction proceeding asserting a claim of ineffective assistance of trial counsel.

¶3 In his petition for review, Stone argues trial counsel was ineffective by failing to “investigate his medical condition at the time of the offense, which would have provided a complete defense to the charges against him.” He maintains he “was so incapacitated from his failing heart by-pass and [chronic obstructive pulmonary disease] that was exacerbated by the beginnings of pneumonia that he was unable to do the things [the victim] described at trial.”¹ Stone contends medical records from the jail and a medical facility documenting his hospitalization three days after the offenses

¹The offenses consisted of Stone touching the vaginal area of the eight-year-old victim “by sliding his hands down her shorts” two times, and placing his hand “on the victim’s crotch, over her clothing.” *Stone*, No. 2 CA-CR 2015-0128, ¶ 4.

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occurred support his position. He also asserts he had told trial counsel how ill he was on the day of the offenses.

¶4 Stone argues trial counsel should have obtained his medical records and either submitted them to a medical expert for further evaluation or consulted his physician, and maintains counsel's failure to do so was not based on reasonable trial strategy. *See State v. Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d 98, 102 (App. 2013) ("Strategic decisions are 'conscious, reasonably informed decision[s] made by an attorney with an eye to benefiting his client.'"), quoting *Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir. 2001) (alteration in *Denz*). He asserts trial counsel's conduct deprived him of a "substantial defense." Stone also argues he was entitled to an evidentiary hearing and contends the trial court not only failed to explain why it denied his claim, but incorrectly found it untimely and precluded.

¶5 In its ruling denying Stone's petition, the trial court determined "that all matters contained in the Petition for Post-Conviction Relief are precluded as having been previously ruled upon or untimely filed or the Petition lacks sufficient basis in law and fact to warrant further proceedings herein and no useful purpose would be served by further proceedings." Although we agree with Stone that the court incorrectly found that his petition was untimely and that it previously had ruled upon his claim, we nonetheless conclude it did not abuse its discretion by summarily denying his petition on the ground that it lacked merit. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) ("We are obliged to affirm the trial court's ruling if the result was legally correct for any reason."); *see also* Ariz. R. Crim. P. 32.6(c).

¶6 "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." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Notably, Stone did not attach an affidavit from a medical expert to support his conclusion that the medical records from August 11, 2013, somehow establish that he had been incapable of committing the offenses on August 8, 2013. Nor are the medical

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records clear on their face that Stone's medical condition somehow prevented him from committing the offenses of which he was convicted.² Additionally, Stone has not provided any specific detail explaining his otherwise speculative argument. Accordingly, having failed to establish either that counsel's conduct was in any way deficient or that he was prejudiced thereby, the trial court did not abuse its discretion by summarily denying Stone's petition. *See Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d at 68.

¶7 Therefore, we grant review and deny relief.

²In fact, the medical records Stone relies on refer to chest pains that started on August 10, after the offenses had occurred, and describe Stone as suffering from "no acute distress."