IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

MICKEY WAHL,
Petitioner.

No. 2 CA-CR 2017-0136-PR
Filed July 28, 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NOT FOR PUBLICATION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 Cochise County
No. CR201200609
The Honorable John F. Kelliher Jr., Judge

REVIEW GRANTED; RELIEF DENIED

Mickey Wayne Wahl, San Luis
In Propria Persona

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Mickey Wahl seeks review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d 847, 848 (2015). Wahl has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Wahl was convicted of manslaughter and sentenced to a 10.5-year prison term. His conviction stemmed from an altercation with the victim through the window of Wahl's moving truck, in the course of which the victim fell and was killed when the truck ran over his head. We affirmed his conviction and sentence on appeal. *State v. Wahl*, No. 2 CA-CR 2014-0138 (Ariz. App. Oct. 30, 2015).

¶3 Wahl sought post-conviction relief, arguing his trial counsel had been ineffective because he failed to have swabs taken from the truck's rear tire analyzed for blood or DNA.[2] He included results from post-trial testing concluding the swabs were "negative for blood and . . . did not produce a DNA profile." Wahl claimed this evidence would have allowed counsel to "attack . . . alleged eye witness testimony that [he] drove over the victim's head. Any forensic medical examiner would testify that under the circumstances

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[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 our supreme court.

[2]Deoxyribonucleic acid.

one would expect to find both blood and DNA evidence." The trial court summarily denied relief, and this petition for review followed.

¶4 On review, Wahl repeats his claim and asserts he was entitled to an evidentiary hearing. A defendant is entitled to a hearing only if he presents a colorable claim for relief, that is, "he has alleged facts which, if true, would probably have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11, 368 P.3d 925, 927-28 (2016) (emphasis omitted). "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); *accord State v. Kolmann*, 239 Ariz. 157, ¶ 9, 367 P.3d 61, 64 (2016); *see also Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). We presume counsel's decisions "'fall[] 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*, 466 U.S. at 689. Therefore, "disagreements about trial strategy will not support an ineffective assistance claim if 'the challenged conduct has some reasoned basis,' even if the tactics counsel adopts are unsuccessful." *Id.*, *quoting State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985) (citation omitted).

¶5 Wahl has not established that trial counsel had any reason to suspect testing the swabs from the tire would yield useful exculpatory evidence. As the state noted below, the night before law enforcement officers came to seize Wahl's truck at his home, it had been raining and snowing. Wahl's driveway was "muddy and full of large water puddles" and it appeared the truck "had been driven through some of those puddles recently." Given those facts, counsel reasonably could conclude the jury would not find it remarkable that there was no blood on the tires of Wahl's truck, and thus that there was no reason to have the swabs tested for blood or DNA. *See Denz*, 232 Ariz. 441, ¶ 11, 306 P.3d at 102 ("[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."). Moreover, Wahl has provided no evidence to support his assertion

that "[a]ny forensic medical examiner" would testify blood or DNA would have been present if Wahl had run over the victim. We agree with the trial court that Wahl has not made a colorable claim of ineffective assistance of counsel.

¶6 We grant review but deny relief.