IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LEANDRO ANDY MARTINEZ,
Petitioner.

No. 2 CA-CR 2017-0220-PR
Filed September 8, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2010006085001DT
The Honorable Peter C. Reinstein, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton, Deputy County Attorney, Phoenix
Counsel for Respondent

The Hopkins Law Office, P.C., Tucson
By Cedric Martin Hopkins
Counsel for Petitioner

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

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

¶2 After a jury trial, Martinez was convicted of second-degree murder, two counts of attempted second-degree murder, and three counts of aggravated assault. Martinez's convictions stemmed from the shooting of a convenience store owner and his employee; the owner was killed and the employee wounded. A witness identified Martinez as the shooter, and Martinez's DNA[2] was found on a beer bottle the shooter dropped before firing. The trial court sentenced Martinez to concurrent and consecutive prison terms totaling thirty-four years. We affirmed his convictions and sentences on appeal. *State v. Martinez*, No. 1 CA-CR 12-0310 (Ariz. App. Feb. 4, 2014) (mem. decision).

¶3 Martinez sought post-conviction relief, arguing his trial counsel had been ineffective in failing to interview and call witnesses he claimed would have testified in support of an alibi defense. In his

[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.

accompanying affidavit, Martinez avowed he had given trial counsel "several names of potential witnesses" who would have "placed [him] at a house away from where the shooting took place when the shooting took place." He claimed trial counsel did not interview those witnesses despite his urging.

¶4 Martinez further stated in his affidavit that he and his girlfriend had gone to the convenience store before the shooting to purchase beer and encountered a man who asked him for money; he claimed to have given the man money and "[i]n exchange . . . [had] g[i]v[en] the man empty beer bottles from the car" to place in the trash. He stated he then went to a nearby house he frequently visited and "greeted several people [he] knew." He claimed he and others heard gunshots fifteen to twenty minutes after he arrived at the house. Finally, Martinez avowed that "Estevan Orozco was one of the individuals at the house when the gunshots were heard."

¶5 Martinez also included with his petition the report of an investigator describing a recent interview with Orozco. According to that report, Orozco stated Martinez had arrived at the house with his sister and brother-in-law before any gunfire was heard. Orozco provided the investigator a list comprised mostly of the first names of people who had been at the house around the time of the gunfire.

¶6 Martinez additionally requested that the trial court order witnesses to submit to interviews, claiming "[a] good faith effort has been made to obtain the witnesses' statements, to no avail." The court denied the motion "without prejudice," allowing Martinez to "file a supplemental request specifying the steps taken to obtain witness statements, and when those steps were taken." In his supplement, Martinez asserted he had located three possible witnesses, two of whom were incarcerated. He claimed he had "attempted to set up calls" with the incarcerated witnesses "to no avail" and that those witnesses had "not responded to letters requesting they provide statements." Martinez further stated an individual at the residence of the third witness had indicated the witness "is not willing to give a statement." He asked the court to order those witnesses "to submit to interviews."

¶7 Without addressing Martinez's supplemental motion, the trial court summarily denied his petition for post-conviction relief. The court concluded he had not presented a colorable claim and found his "alibi claim is beyond speculation." It further observed that Martinez did "not attach[] any affidavit other than his own to the Petition" and waived his alibi defense because he "failed to testify at trial regarding" that defense. Martinez filed a motion for rehearing asking the court to consider his supplemental motion seeking to compel witness interviews. The court denied the motion for rehearing, and this petition for review followed.

¶8 On review, Martinez asserts the trial court erred by denying his request to compel witness interviews and that he is entitled to a new trial due to the ineffective assistance of trial counsel or, at minimum, to an evidentiary hearing on that claim.

¶9 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).

¶10 Martinez repeats his argument that his trial counsel was ineffective for failing to interview potential witnesses who would have supported an alibi defense. Citing *State v. Tapia*, 151 Ariz. 62,

725 P.2d 1096 (1986), he claims "the failure of trial counsel to interview witnesses who would have provided beneficial testimony . . . constitutes deficient performance." But *Tapia* does not stand for the proposition that trial counsel necessarily falls below prevailing professional norms by failing to interview all potential witnesses. There, the defendant relied on an expert who opined that competent counsel would have conducted the interviews. *Id.* at 64, 725 P.2d at 1098. Martinez has offered no such evidence here.

¶11 Nor is it apparent from the record that any competent attorney would have sought out the alibi witnesses. First, it is not clear from Martinez's affidavit that he gave or could have given counsel meaningful information about the potential witnesses. He avows that he gave counsel "several names" but does not indicate whether he gave counsel any other information with which counsel might have located those witnesses. Notably, Martinez does not avow that he gave his counsel the address of the house or Orozco's name, or even that he described his alleged alibi to trial counsel.

¶12 Even were we to assume, however, that Martinez told counsel his version of events, we cannot say that would have compelled any competent attorney to seek out and interview additional witnesses. *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."). Trial counsel could have concluded a jury would not accept an alibi defense absent Martinez's testimony or some other explanation of the DNA evidence placing him at the scene. And counsel readily could have decided that Martinez's explanation of how his DNA came to be on the beer bottle held by the shooter was incredible, and that its lack of believability would have tainted both Martinez's claimed alibi and the testimony of any witness supporting that claim, and thus tainted Martinez's defense as a whole. In sum, counsel reasonably could have concluded that investigating Martinez's alleged alibi was unlikely to yield useful evidence. Consequently, absent contrary evidence demonstrating counsel's lack of investigation was the result of "ineptitude, inexperience or lack of preparation" rather than a tactical decision,

State v. Goswick, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984), Martinez has not established that counsel fell below prevailing professional norms.

¶13 Having failed to make a colorable claim that counsel fell below prevailing professional norms, we need not address Martinez's claim of prejudice.[3] *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) ("In deciding an ineffectiveness claim, this court need not approach the inquiry in a specific order or address both prongs of the inquiry if the defendant makes an insufficient showing on one."). Nor need we address his claim that the trial court erred in denying his motions to compel witness interviews, as those interviews would be relevant only to an analysis of prejudice.

¶14 Although we grant review, relief is denied.

[3]We note, however, that to the extent the trial court disregarded the investigator's report because it was not an affidavit, Rule 32.5, Ariz. R. Crim. P., permits a defendant to attach evidence other than affidavits to support a post-conviction claim. Additionally, the court's observation that Martinez "waiv[ed]" his alibi defense by failing to testify does not support its decision to reject it. First, an alibi defense is not an affirmative defense and the defendant does not bear the burden of proof; thus, an alibi defense does not require a defendant's testimony. *See State v. Rodriguez*, 192 Ariz. 58, ¶¶ 25-26, 961 P.2d 1006, 1011 (1998). And, in any event, the court's reasoning ignores the crux of Martinez's argument that his trial counsel failed to adequately develop and present an alibi defense—rendering any waiver irrelevant. However, because we may uphold the court's ruling for any reason supported by the record, we nonetheless deny relief. *See State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013).