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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ALEX JOSEPH PEDRIN, Petitioner.	)	2 CA-CR 2010-0199-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20022147

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

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

Alex J. Pedrin
Buckeye
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Alex Pedrin was convicted after a 2003 jury trial of five counts of aggravated assault, two counts of first-degree burglary, and one count each of conspiracy, kidnapping, armed robbery, aggravated robbery, fleeing from a law enforcement vehicle, possession of a deadly weapon by a prohibited possessor, theft, and attempted first-degree murder. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 110.5 years. On appeal, we reversed Pedrin's conviction and sentence for theft, but affirmed his remaining convictions and sentences. *State v. Pedrin*, No. 2 CA-CR 2007-0087 (memorandum decision filed Aug. 28, 2008). In 2009, Pedrin filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and counsel was appointed to represent him. Unable to identify any colorable post-conviction claim, counsel filed a notice of review pursuant to Rule 32.4(c)(2). After the court allowed Pedrin to file a pro se petition, he asserted various claims of ineffective assistance of trial counsel. The trial court denied relief without an evidentiary hearing and this petition for review followed. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 Stating a colorable claim of ineffective assistance of counsel requires showing both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 669 (1984); *State v. Nash*, 143 Ariz. 392, 397,

694 P.2d 222, 227 (1985); *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004).

¶3 Pedrin first argues the trial court abused its discretion by denying relief on his claim that trial counsel was ineffective in failing to obtain tapes and transcripts of television news reports about his attempted escape from police custody on the seventh day of trial. He maintains counsel should have used this evidence as grounds for removing two jurors who had learned about this incident. As the court correctly noted, we addressed the abuse of discretion claim on appeal and concluded that even if the trial court had erred in refusing to dismiss those two jurors, Pedrin did not suffer prejudice as a result. To the extent Pedrin essentially has reframed the same issue in the context of deficient performance by counsel, the claim of ineffective assistance of counsel necessarily fails based on our rejection of that underlying claim. Inability to show prejudice is fatal to a claim of ineffective assistance of counsel. *State v. Salazar*, 173 Ariz. 399, 414, 844 P.2d 566, 581 (1992) ("If no prejudice is shown, the court need not inquire into counsel's performance.").

¶4 To the extent the trial court found this claim precluded because it had "substantially" been raised on appeal, the court was mistaken, given that Pedrin was precluded from challenging counsel's performance on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance of counsel claims may only be raised in post-conviction proceedings). But that error was of no consequence, given that the court correctly found "counsel was not ineffective in the manner he raised

the issue [at] trial, and that even if counsel was ineffective, [Pedrin] has not been prejudiced."

¶5 In addition, we reject Pedrin's assertion that the trial court failed to rule on his claim of newly discovered evidence and denied him the right to present such evidence at an evidentiary hearing. In his petition for review, Pedrin asserts he "had recently been made aware that witnesses existed that would testify at an evidentiary hearing that newscasts shown on September 17, 2003 stated [his] criminal history, imprisonments, and [alleged] affiliations with the Mexican Mafia," claiming this information constitutes newly discovered evidence under Rule 32.1(e), Ariz. R. Crim. P.

¶6 However, Pedrin did not present this as a claim of newly discovered evidence in his petition below; rather, he raised it solely as one of ineffective assistance of counsel. This court will not consider on review any issue on which the trial court has not first had an opportunity to rule. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). In addition, even if Pedrin had asserted this as a claim of newly discovered evidence below, he has utterly failed to show how it satisfies the elements set forth in Rule 32.1(e).[1] In fact, as we noted on appeal, "any additional information showing Pedrin's propensity for flight was merely cumulative" to the evidence established at trial that he had fled from police officers, thereby defeating any claim of

[1]To constitute newly discovered evidence justifying relief under Rule 32.1(e), Ariz. R. Crim. P., the defendant must show the evidence was discovered after trial; the defendant must have exercised due diligence in discovering the evidence; the evidence must not be simply cumulative or impeaching, unless the impeaching evidence substantially undermines critical testimony at trial that probably would have changed the verdict or sentence.

newly discovered evidence under Rule 32.1(e). *Pedrin*, No. 2 CA-CR 2007-0087, ¶ 13. Moreover, a trial court is required to conduct an evidentiary hearing only when a colorable claim has been presented, which is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). No such claim was presented here.

¶7 Pedrin also argues the trial court abused its discretion by permitting the state to file an untimely response to his petition below. The court granted the state's motion for leave to file a late response to the petition for post-conviction relief for good cause, finding the state had shown "good cause and extraordinary circumstances" for the late filing. A trial court not only has the discretion to extend the time for filing motions, *State v. Perez*, 141 Ariz. 459, 462, 687 P.2d 1214, 1217 (1984), but it also may consider late filings. *State v. Vincent*, 147 Ariz. 6, 8, 708 P.2d 97, 99 (App. 1985). Absent an abuse of discretion, which we do not find, we will not interfere with the court's decision.

¶8 Pedrin next reasserts his claim below that trial counsel had been ineffective by conceding guilt on two counts in closing argument, specifically, fleeing from a law enforcement vehicle and possession of a deadly weapon by a prohibited possessor. He also reasserts his contention that counsel should have moved to sever the prohibited possessor count from the rest of the case because it required proof of a prior conviction, information that he contends should not have been presented to the jury. Relying on *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985), the trial court concluded "defense counsel's [closing] argument was tactical, had a rational basis, and was not ineffective assistance." As we noted in our memorandum decision on appeal, the

evidence at trial showed "Pedrin had attempted to flee from officers before he was apprehended, leading them on a high-speed chase through downtown Tucson while shooting at them from the windows of his vehicle." *Pedrin*, No. 2 CA-CR 2007-0087, ¶ 13. Accordingly, we find the court correctly concluded trial counsel's decision to concede these points in closing argument was tactical, had a rational basis in the record, and did not constitute ineffective assistance. *See State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984) (power to decide questions of trial strategy and tactics rests with trial counsel).

¶9 Regarding the severance claim, the trial court concluded

> the issue of severance of [the prohibited possessor count] is precluded as raisable on direct appeal and waived. Moreover, this Court concludes in light of the overwhelming evidence of guilt and sentence imposed, that petitioner suffered no prejudice for inclusion of the prohibited possessor count even if it was error not to sever it.

To the extent Pedrin is arguing he was prejudiced by trial counsel's failure to move to sever the prohibited possessor count, we agree with the court that he suffered no prejudice by counsel's conduct, and thus find he did not establish a colorable claim of ineffective assistance of counsel in this regard. However, to the extent the court's ruling suggests Pedrin's claim of ineffective assistance of counsel was "precluded as raisable on direct appeal and waived," the court is incorrect. Again, Pedrin could not have challenged counsel's performance on direct appeal. *See Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d at 527. We nonetheless conclude the court correctly denied relief. *See Perez*, 141 Ariz.

at 464, 687 P.2d at 1219 (appellate court will affirm trial court "if the result was legally correct for any reason").

¶10 Because we conclude the trial court did not abuse its discretion by denying Pedrin's petition for post-conviction relief, we grant the petition for review but deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge