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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THE STATE OF ARIZONA, Respondent, v. CRAIG ALLEN BAY, Petitioner.	2 CA-CR 2010-0228-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20050565

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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H O W A R D, Chief Judge.

¶1 Petitioner Craig Bay seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. In 2006, a jury found Bay guilty of two counts of sexual assault and one count each of kidnapping

and aggravated assault, all committed in 1987. The jury also found the kidnapping and aggravated assault counts were dangerous-nature offenses. After finding Bay had three prior felony convictions, the court sentenced him to enhanced and aggravated prison terms, some consecutive and some concurrent, totaling forty-two years. On appeal, we affirmed Bay's convictions and two of his sentences. *State v. Bay*, No. 2 CA-CR 2006-0135, ¶ 12 (memorandum decision filed July 12, 2007). Finding the court's pronouncements at sentencing insufficient to support the other two sentences imposed, we remanded the case for resentencing. *Id.*

¶2 Bay then filed a notice of post-conviction relief alleging trial counsel had been ineffective in failing to challenge the state's evidence of genetic testing, performed in 2004, that had linked him to these crimes committed seventeen years earlier. As detailed in the trial court's order setting this matter for an evidentiary hearing, the evidence established that in 1987, H. had been working alone in a furniture store when she was sexually assaulted at knifepoint by a man she had known by the name Alan Downing. Police transported H. to a hospital, where a sexual assault examination was conducted and evidence was taken. Although H. had been able to tell police officers where Downing lived, they had been unable to locate him and issued a warrant for his arrest.

¶3 In December 2004, a Tucson Police Department criminalist analyzed evidence taken during H.'s sexual assault examination for deoxyribonucleic acid (DNA) evidence and submitted results of that analysis to a national database known as the

Combined DNA Index System (CODIS). He discovered that the DNA from the sperm collected in 1987 matched Bay's DNA, which had been obtained and submitted to CODIS after Bay had been convicted of a similar sexual assault in Oregon in 1990. Defense counsel did not cross-examine the state's witnesses who testified about the DNA investigation and did not call an expert witness in rebuttal.

¶4 Finding "no information in the record from which the Court c[ould] determine whether counsel's choices [to forego challenging DNA evidence] were tactical" decisions, the trial court scheduled an evidentiary hearing. *See State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985) (disagreements about trial strategy will not support ineffective assistance claim if challenged conduct had reasoned basis). At that hearing, Bay's trial counsel testified that he had not sought to impeach the state's DNA evidence because he had not presented a defense of misidentification. He explained that H. and Bay had been "quite familiar with each other and she knew him quite well," H. had positively identified him, and there were three different tests linking his DNA to physical evidence of the offense. Counsel said he had focused instead on limiting Bay's exposure at trial by suggesting "he really didn't kidnap [H.] and he didn't really use a knife on her." He told the court he believed challenging the DNA identification evidence, in support of a misidentification defense, would have impaired his credibility with the jury. After the hearing, the trial court denied relief, finding that counsel's conduct at trial had been based on a legitimate tactical decision and that Bay

had failed to establish either deficient performance by counsel or prejudice. This petition for review followed.

¶5 "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). Moreover, when that court's ruling is based on findings of fact after an evidentiary hearing, we accept those findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). Thus, we will uphold the court's factual determinations if they are based on substantial evidence. *Id.*

¶6 To establish his claim of ineffective assistance of trial counsel, Bay is required to show counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984). To demonstrate the requisite prejudice, he must show there is a "reasonable probability that, but for counsel's unprofessional errors," the result of his trial "would have been different." *Id.* at 694. A petitioner's failure to establish either part of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶7 On review, Bay argues the trial court erred in finding counsel had a reasoned basis for deciding to forego cross-examination of the state's DNA experts and presentation of a defense expert to rebut their testimony. Relying on *Davis v. Alaska*, 415 U.S. 308, 315, 318 (1974), he also suggests, for the first time on review, that he need not establish prejudice to prevail on his ineffective assistance claim because counsel's failure

to cross-examine the state's expert witnesses implicated his right to confront witnesses against him under the Sixth Amendment to the United States Constitution. Finally, he argues that, even if prejudice is required, he has established a reasonable probability that he would not have been found guilty if counsel had attempted to impeach the state's DNA evidence and questioned the victim's identification of Bay, in light of changes in his appearance.

¶8 "'[T]he power to decide questions of trial strategy and tactics,' including what witnesses to call at trial, 'rests with counsel.'" *Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954, *quoting State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). Such tactical decisions "will not normally support a claim of ineffective assistance of counsel," *Gerlaugh*, 144 Ariz. at 462, 698 P.2d at 707, because we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" that "'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955); *see also State v. Shurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993). To overcome this presumption, a petitioner must show that counsel's decisions were not tactical in nature, but the result of "ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Thus, disagreements about trial strategy will not support an ineffective assistance claim if the challenged conduct has some reasoned basis. *Gerlaugh*, 144 Ariz. at 455, 698 P.2d at 700.

¶9 According to Bay, trial counsel's decision to refrain from challenging the state's DNA evidence at trial "reveals . . . counsel's ineptitude and lack of preparation." He asserts counsel had failed to subject the DNA evidence "to even the most basic level of meaningful adversarial testing" before determining that a misidentification defense would not be successful. But trial counsel testified that he had investigated this evidence by reviewing disclosures and conducting interviews, and also that he had some experience with "cold case" evidence. We reject Bay's implicit suggestion that counsel was required to retain an expert witness before determining his defense strategy, even though counsel testified that independent testing "to confirm a confirmatory finding" by national and state agencies was "not a viable issue." *See State v. Sammons*, 156 Ariz. 51, 56, 749 P.2d 1372, 1377 (1988) (calling expert witness matter of trial strategy; counsel not ineffective for omission unless no reasoned basis for decision).

¶10 Nor is there any merit to Bay's argument that it would have been permissible for counsel to present evidence to support alternative defense theories and, therefore, he was ineffective for not doing so. According to counsel's testimony, he had concluded pursuing an alternative theory of misidentification would diminish his credibility and Bay's best defense. Substantial evidence thus supported the trial court's findings that counsel had a reasoned basis for his conduct at trial and performed in accordance with prevailing professional norms.

¶11 Finding no error in the trial court's determination that Bay failed to establish deficient performance by counsel, we need not consider Bay's arguments

regarding prejudice. *See Salazar*, 146 Ariz. at 541, 707 P.2d at 945. We note, however, that petitioner has not attempted to show that the state's DNA evidence was faulty or subject to meaningful challenge. For the foregoing reasons, we grant review but deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge