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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STATE OF ARIZONA, Respondent, v. RYAN ROBERT BAKER, Petitioner.	2 CA-CR 2010-0250-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR20072882

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Barton & Storts, P.C.
By Brick P. Storts, III
Tucson
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Following a jury trial, petitioner Ryan Baker was convicted of two counts each of attempted armed robbery and aggravated assault. The trial court sentenced him to concurrent and consecutive prison terms totaling 37.5 years. We affirmed Baker's convictions and sentences on appeal. *State v. Baker*, No. 2 CA-CR 2008-0224 (memorandum decision filed May 15, 2009). Baker then filed a petition for post-

conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The court dismissed the petition without conducting 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 such abuse here.

¶2 On review, Baker challenges the trial court's summary denial of relief on his claim that the state's disclosure, made just before sentencing, of a $1,000 reward its key witness, B., had received from 88-CRIME, was newly discovered evidence that "probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e). He also contends the court abused its discretion in denying his related claim that trial counsel had been ineffective in failing to file a motion to vacate the judgment pursuant to Rule 24.2(a)(2), Ariz. R. Crim. P., based on the same disclosure.

¶3 The following facts are relevant to Baker's claims. At trial, B. testified he had been present when the offenses occurred and identified Baker as the individual who had assaulted the victim. In response to questions from both the prosecutor and defense counsel, B. testified he was not receiving any benefit for his testimony other than the prosecutor's promise to inform the judge and the prosecutor in another matter involving B. that he had testified truthfully in Baker's case. In an affidavit the state submitted with its response to the petition below, a detective assigned to Baker's case attested that at no time before the jury returned its verdict had he discussed with either B. or the prosecutor the possibility of B. receiving a reward for his testimony. The state also submitted with its response a memorandum the detective had written to the executive director of the 88-

CRIME program almost two weeks after the trial had concluded, explaining that B. had been instrumental in convicting Baker and asking that he receive "the highest reward possible."[1]

¶4 At sentencing, defense counsel informed the court that the prosecutor had told her about B.'s reward just the day before sentencing. She then told the court, "I think [the prosecutor] indicated . . . that . . . he believes the award happened after the trial. But that doesn't tell me much. Because did [B.] know he was being considered for a thousand dollars when he testified? I don't know." In turn, the prosecutor explained he had not learned about the reward until two days before sentencing, and that the detective had given the check to B. just that week. Notably, the prosecutor told the court B. knew "nothing" about the reward at the time of trial.

¶5 Based on the record before us, we cannot say the trial court abused its discretion in summarily denying Baker's petition for post-conviction relief. Although Baker acknowledges the detective's sworn statement that he never had discussed the possibility of a reward with B. before B. testified, and had not attempted to secure a reward for B. until after the trial had concluded, Baker nonetheless asserts the court erred by dismissing his claim and that he was entitled, at the very least, to an evidentiary hearing.

[1]According to the detective's memorandum, he initially had been informed after trial that B. would not be eligible for a significant reward because "no initial 88-crime report was taken when B[.] called in and . . . he was referred directly to the police department." The detective asked that an exception be made in light of B.'s contribution at trial.

¶6 A defendant is entitled to an evidentiary hearing only if he raises a colorable claim for relief which is one that, if taken as true, might have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). And, to prevail on a claim of newly discovered evidence, a defendant must show that "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict." Ariz. R. Crim. P. 32.1(e). Combining these rules, to raise a colorable claim of newly discovered evidence, a defendant must "plausibly show" that the facts supporting his claim exist and that they "probably" entitle him to relief. *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995). Similarly, to prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶7 Here, Baker did not submit "[a]ffidavits, records, or other evidence" that supported the allegations in his petition for post-conviction relief.[2] Ariz. R. Crim. P. 32.5. The only evidence before the trial court, at sentencing or since that date, supported the court's finding that the "award was not a condition to [B.] testifying, that he did not

[2]In support of his allegations, Baker submitted only the affidavit of a private investigator who described his experience with the 88-CRIME program and the procedures it generally followed.

find out about the award until after the trial was concluded, and that his testimony had been truthful on [the] issue [of benefits he expected to receive from testifying]." Because Baker has not "plausibly show[n]" any evidence to contradict that finding, *Krum*, 183 Ariz. at 292, 903 P.2d at 600, the court did not abuse its discretion in concluding that "the existence of an award granted after [B.] testified and of which he had no knowledge could not possibly have resulted in a different outcome at trial" and that "[t]here was nothing for defense counsel to pursue once the facts behind the 88-C[RIME] award were determined." These findings foreclose Baker's assertion that he has stated a colorable claim entitling him to an evidentiary hearing. *See id.*

¶8 Because we conclude the trial court did not abuse its discretion by finding Baker failed to state a colorable claim and summarily denying post-conviction relief, we grant the petition for review but deny relief.

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

CONCURRING:

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

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