FILED BY CLERK
AUG 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JASON JARED BECK, Petitioner.	2 CA-CR 2008-0303-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR-60232

Honorable John E. Davis, Judge

REVIEW GRANTED; RELIEF DENIED

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

Creighton Cornell, P.C.
By Creighton Cornell
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, petitioner Jason Beck was convicted of kidnapping and felony murder and was sentenced to a term of natural life in prison. We affirmed his convictions and sentences on appeal. *State v. Beck*, No. 2 CA-CR 99-0373 (memorandum decision filed Sept. 25, 2001). On review, our supreme court found sentencing error, vacated our decision, and remanded Beck's case for resentencing. *State v. Viramontes*, 204 Ariz. 360, ¶ 15, 64 P.3d 188, 190 (2003). According to Beck, he was then resentenced to twenty-five years' imprisonment on August 1, 2003.[1]

¶2 Shortly after his resentencing, Beck filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. On the same day he filed his Rule 32 notice, he also filed a "motion to stay/continue briefing deadline." In the motion, he stated it was "unclear how much of the defense file has been preserved or is available," and he requested additional time to file his Rule 32 petition in order to "determine how much disclosure was made to trial counsel, determine if additional disclosure is in the possession of the Pima County Attorney, . . . re-create the entire record of investigation . . . , [and] interview or depose trial counsel as well as other witnesses." Beck then pursued discovery through multiple motions for disclosure, a deposition request, and subpoenas for documents before ultimately filing a petition for post-conviction relief nearly two years later.

¶3 The following summary of trial evidence is relevant to Beck's request for Rule 32 relief from his conviction. On the day David N. was murdered, Beck and codefendant

[1]The record before us contains no evidence of Beck's resentencing on remand.

Kevin Craig had been in the apartment of Aimee M. and Matt K. According to Matt's testimony, Craig had been looking for David and had told Matt, "[W]e want to get him," claiming that David had tried to steal a stereo belonging to Beck. At 9:00 p.m., Beck, Craig, and David were out together in a vehicle belonging to Craig's mother. Later that night, Beck and Craig returned to Aimee and Matt's apartment and went into the bathroom. Matt testified he followed the two men and saw Craig washing blood off his hands and arms. Matt said Craig had then told him, "[W]e killed David," and Beck had laughed and smiled. Aimee testified she had also seen both men go toward the bathroom and had heard Beck say something about "getting rid of some clothes." The following day, David's body was discovered in the desert near Tucson. He had been bound and stabbed to death.

¶4 Pima County Sheriff's Deputy James Gamber testified that, as he was transporting Beck to the Pima County Adult Detention Center on the night of his arrest, Beck asked him the hypothetical question, "[W]hat would happen to a person . . . who wanted someone to be beaten up" when the victim was killed by another person involved in the assault. At trial, Joshua W. testified he had been housed in a cell adjacent to Beck's before the trial and Beck had admitted stabbing David on the night of the murder. The jury found Beck not guilty on charges of premeditated murder and conspiracy to commit murder. It found him guilty of kidnapping and felony murder but found the state had failed to prove the dangerous nature of those crimes beyond a reasonable doubt.

¶5 In his petition below, Beck argued the state had engaged in prosecutorial misconduct in failing to disclose evidence Beck could have used to impeach the credibility of Aimee and Matt and had thereby violated his rights to due process and a fair trial guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. He appears also to have claimed, without developing any argument, that the state had engaged in prosecutorial misconduct, and improper "burden-shifting" had occurred, when the prosecutor commented at trial that Beck had failed to subpoena witnesses to establish an alibi he had provided to the police. In addition, Beck alleged his trial counsel had been ineffective (1) in failing to obtain and use the impeachment evidence the state had failed to disclose; (2) in failing to investigate adequately or cross-examine Joshua W.; (3) in failing to call witnesses who would have contradicted the state's evidence or attested to Beck's characteristic reticence and reputation for peacefulness; (4) in failing to urge the jury to consider finding Beck guilty of unlawful imprisonment, a lesser-included offense of kidnapping, and acquitting him of the greater charge;[2] (5) in failing to argue the kidnapping was "completed" before David N. was killed and that the murder was therefore not in furtherance of the kidnapping, precluding a conviction for felony murder under A.R.S. § 13-1105(A)(2); and (6) in failing to object or move for a mistrial when the state commented that Beck had failed to subpoena witnesses to support an alibi defense.

---

[2]Unlike kidnapping, unlawful imprisonment, *see* A.R.S. § 13-1303, is not one of the predicate felonies that will support a conviction under Arizona's felony murder statute. *See* § 13-1105(A)(2).

¶6 The trial court found Beck had stated a colorable claim of ineffective assistance of trial counsel and scheduled an evidentiary hearing. After multiple hearings over the course of another year, the court denied relief. As the court summarized:

> The central thesis advanced in the petition was that the prosecutor caused *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] material to be withheld and petitioner's trial counsel was ineffective for not exposing this misconduct, [not] obtaining the withheld material[,] and [not] impeaching the state's witnesses with it.[3] The petitioner was granted extensive discovery and ample court time to purs[u]e his claim of prosecutorial misconduct. However, even after lengthy and detailed discovery the petitioner was unable to substantiate his theories regarding prosecutorial misconduct and the evidentiary [hearing] focused on his colorable claim of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] ineffective assistance at trial.
>
> Although the evidentiary hearing was about a *Strickland* claim[,] petitioner was permitted to examine the witnesses about the matters that allegedly constituted withheld impeachment material. None of petitioner's wide ranging theories of prosecutorial misconduct were borne out or even supported by the record made at the evidentiary hearing. The witnesses rebutted this central thesis of the petition even though petitioner was permitted to examine [the witnesses] in areas that would have been collateral before the jury. The record did not support a colorable claim other than for ineffective assistance by trial counsel.

The court further found that Beck had failed to establish either the deficient performance or the prejudice required to prevail on a claim of ineffective assistance of counsel. *See*

---

[3]*See Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.").

Strickland, 466 U.S. at 687; *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Noting that the jury's verdicts were entirely consistent with the hypothetical question Beck had posed to Gamber, the court wrote:

> The Petitioner must prove both prongs of [the *Strickland*] test. Even with the full benefit of hindsight [counsel]'s performance was not proven to be deficient. The record here does not support a finding that either *Strickland* prong was proven. . . . [Counsel] provided effective assistance of counsel to the petitioner. The petitioner was not prejudiced by [counsel]'s strategy or by his tactical decisions during the trial.

(Citation omitted.) This petition for review followed the court's ruling.

¶7 On review, Beck essentially restates the claims he raised below.[4] He contends the trial court erred in relying on evidence other than the testimony of Aimee, Matt, and Joshua in concluding that Beck had not been prejudiced by either the alleged *Brady* violations or the alleged ineffective assistance of counsel.[5] He also disputes the court's conclusions and, without citation, argues the court improperly "conduct[ed] a 'sufficiency of the evidence analysis'" in finding no prejudice. And, he contends the court violated due

---

[4]To the extent he alleges prosecutorial misconduct based on arguments made by the state at trial, his claims are waived and precluded by his failure to have raised them at trial and on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3).

[5]Beck also maintains the trial court improperly cited his statements before sentencing as evidence that he was not prejudiced. We agree evidence of posttrial statements would be irrelevant in considering whether the result of the trial would have been different absent alleged errors. Although the court referred to those statements as "consistent with" evidence at trial, it clearly relied on evidence presented at trial in finding no prejudice, as Beck acknowledges in his petition.

process by denying him "full evidentiary development of [his] prosecutorial misconduct claims" and consequently seeks additional discovery through this proceeding.

¶8 We will not disturb a trial court's denial of post-conviction relief unless the court has abused its discretion. *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). We find no abuse of discretion here.

¶9 We do not agree with Beck that the trial court's analysis was limited to whether the evidence was merely sufficient to support his convictions. Although the court's order did not state what standard it applied to the evidence of prejudice presented at the Rule 32 hearings, "'[t]rial judges are presumed to know the law and to apply it in making their decisions.'" *Id.* at 328, 916 P.2d 1044, *quoting Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). To determine whether a conviction must be reversed because either *Brady* violations or incompetent performance by counsel prejudiced the defense, the inquiry is the same: whether there is a reasonable probability that, but for the alleged violations or errors, the result of the proceeding would have been different. *See State v. Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d 63, 69 (2006) (establishing prejudice for claim of ineffective assistance of counsel requires demonstration of "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'"), *quoting Strickland*, 466 U.S. at 694; *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996) ("[Exculpatory e]vidence is material only if there is a reasonable probability that disclosure of the evidence to the defense would

have changed the outcome of the proceeding."). The court's findings are consistent with this required analysis.[6] Furthermore, because the court has implicitly found Beck's allegations of disclosure violations, even if true, are immaterial in any event, we cannot agree with Beck that limiting further discovery on these issues has violated or would violate his due process rights.

¶10 Because the trial court, after exhaustive evidentiary hearings, has clearly identified, thoroughly analyzed, and correctly resolved Beck's claims, we need not repeat its analysis here. We therefore adopt the court's order. *See generally State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Although we grant the petition for review, we deny relief.

_____
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
J. WILLIAM BRAMMER, JR., Judge

_____
GARYE L. VÁSQUEZ, Judge

[6]Beck cites no authority for his suggestion that the trial court's analysis is flawed because the state had not emphasized Gamber's testimony during argument at trial, and we reject any such limitation on a court's assessment of prejudice.