

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
MAR 19 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0361-PR
)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
VICTOR M. PARRA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200600738

Honorable Stephen M. Desens, Judge

REVIEW GRANTED; RELIEF DENIED

Edward G. Rheinheimer, Cochise County Attorney
By David R. Pardee

Bisbee
Attorneys for Respondent

Harriette P. Levitt

Tucson
Attorney for Petitioner

BRAMMER, Judge.

¶1 A jury found petitioner Victor Parra guilty of possession of a narcotic drug for sale and possession of marijuana for sale. The trial court sentenced him to concurrent prison terms, the longer of which was 15.75 years. We affirmed his convictions and sentences on appeal. *State v. Parra*, 2 CA-CR 2007-0305 (memorandum decision filed Oct. 28, 2008). Parra filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing his trial counsel had been ineffective because he had waived Parra’s right to be present at trial, thereby denying Parra “his constitutional right to confront the witnesses against him.” The court summarily dismissed Parra’s petition and, without comment, denied Parra’s subsequent “motion for reconsideration.”¹ This petition for review followed. We will not disturb a trial court’s ruling on a petition for post-conviction relief absent an abuse of its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶2 On review, Parra asserts his trial counsel was ineffective “in failing to object to trial proceeding in [Parra’s] absence.”² He additionally contends he was entitled to an evidentiary hearing on his claim. “A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is[,] a claim which, if defendant’s allegations are true, might have changed the outcome.” *Id.* at 328, 793 P.2d at 85. To establish a colorable claim of

¹More accurately, a motion for rehearing. *See* Ariz. R. Crim. P. 32.9(a).

²To the extent Parra argues the trial court was required to conduct a hearing to determine whether Parra’s waiver of his right to be present was knowing, voluntary, and intelligent, we rejected that argument in Parra’s direct appeal. *See Parra*, 2 CA-CR 2007-0305, ¶¶ 10-14. He is therefore precluded from raising it in a Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2). Any claim that Parra’s absence was involuntary was raisable on direct appeal and therefore is precluded pursuant to Rule 32.2(a)(1).

ineffective assistance of counsel, a defendant must show that counsel's performance fell below prevailing professional norms and that this deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient showing on either part of the *Strickland* test, the claim fails. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). "A defendant establishes prejudice if [h]e can show a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Bennett*, 213 Ariz. 562, ¶ 25, 146 P.3d 63, 69 (2006), quoting *Strickland*, 466 U.S. at 694.

¶3 In rejecting Parra's ineffective assistance claim, the trial court found he and his counsel had made a strategic decision that Parra should not appear at trial because his "physical appearance at that time was of such a nature and condition that it would not make a favorable impression upon the jury and could not be conducive to the presumption of innocence." See *State v. Webb*, 164 Ariz. 348, 351, 793 P.2d 105, 108 (App. 1990) ("Actions of defense counsel which appear to be trial tactics will not support an allegation of ineffective assistance of counsel."). Parra does not directly address the court's finding, instead asserting, as we understand his argument, that trial counsel was ineffective for waiving Parra's presence at trial because Parra was not competent to agree to that waiver, being in the throes of drug withdrawal. He primarily relies on an affidavit by his trial counsel

that Parra attached to his motion for reconsideration.³ In that affidavit, Parra’s counsel stated that, due to Parra’s drug withdrawal, counsel had concerns about Parra’s ability to enter “a knowing and intelligent waiver” of his right to be present at trial.

¶4 But Parra should have appended the affidavit to his petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.5 (“Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it.”). A motion for rehearing is not the proper vehicle for presenting new evidence to the court. *See* Ariz. R. Crim. P. 32.9(a) (motion for rehearing must “set[] forth in detail the grounds wherein it is believed the court erred” in denying petition for post-conviction relief); *cf. Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, n.2, 156 P.3d 1157, 1162 n.2 (App. 2007) (court may not consider new evidence presented in motion for reconsideration).

¶5 Although Parra asserted he did not receive the affidavit until after the court had denied his petition, that does not justify its late submission—nothing in the record suggests he could not have obtained the affidavit before filing his petition for post-conviction relief, had he exercised due diligence. *Cf.* Ariz. R. Crim. P. 32.1(e), 32.6(d) (“After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.”). Finally, Parra did not file timely his motion for rehearing, having filed it over a month after the trial court had dismissed his petition for post-conviction

³Although Parra suggests his petition for post-conviction relief could establish that his absence from trial was not voluntary, there is nothing in that petition nor in the record supporting that assertion.

relief. *See* Ariz. R. Crim. P. 32.9(a) (motion for rehearing to be filed within fifteen days of ruling); *see also State v. Pope*, 130 Ariz. 253, 254-56, 635 P.2d 846, 847-49 (1981) (Rule 32 time limits not jurisdictional, but party must demonstrate valid reason for noncompliance).

¶6 Nor does the affidavit establish a colorable claim of ineffective assistance of counsel. Taken at face value, the affidavit suggests counsel may have disregarded his own concerns about Parra’s competence to waive his right to be present at trial because Parra’s “obvious condition” would have negatively affected the jury and the court had refused to continue the trial. Given those facts, counsel was faced with a difficult strategic choice. *See Webb*, 164 Ariz. at 351, 793 P.2d at 108. Thus, we cannot say counsel’s conduct necessarily fell below prevailing professional standards, *see Strickland*, 466 U.S. at 687, and Parra has provided no extrinsic evidence or citation of authority suggesting that it did.⁴

¶7 Accordingly, we conclude, for all the reasons stated, that the trial court did not abuse its discretion in denying Parra’s motion for rehearing. *Cf. State v. Flores*, 218 Ariz. 407, n.14, 188 P.3d 706, 715 n.14 (App. 2008) (we uphold trial court’s ruling if correct for any reason); *Watton*, 164 Ariz. at 325, 793 P.2d at 82. Moreover, Parra identifies nothing in the record suggesting his absence from trial was other than a strategic decision. *See Webb*,

⁴Although Parra suggested in passing in his motion for rehearing that trial counsel should have filed a request for an examination pursuant to Rule 11, Ariz. R. Crim. P., nothing in the record suggests counsel’s failure to do so in these circumstances fell below prevailing professional norms or that such a motion would have been granted. *See Strickland*, 466 U.S. at 687. And Parra does not make this argument in his petition for review. We therefore do not address it further. *See generally* Ariz. R. Crim. P. 32.9(c).

164 Ariz. at 351, 793 P.2d at 108 (strong presumption counsel’s actions made for tactical reasons). Thus, we cannot say the court abused its discretion in summarily dismissing Parra’s petition for post-conviction relief. *See Watton*, 164 Ariz. at 325, 793 P.2d at 82.

¶8 Although we grant the petition for review, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge