FILED BY CLERK
JUNE 15 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. NOEL ALEJANDRO ALCAREZ-GUERRERO, Petitioner.	2 CA-CR 2009-0010-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200500144

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Joy Bertrand
Scottsdale
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Following a jury trial, Noel Alcarez-Guerrero was convicted of first-degree murder, kidnapping, and three counts of aggravated assault. The trial court sentenced him

to a combination of consecutive and concurrent prison terms for the offenses, including a term of natural life for the murder. This court affirmed his convictions and sentences on appeal. *State v. Alcarez-Guerrero*, No. 2 CA-CR 2006-0115 (memorandum decision filed Aug. 16, 2007). In this petition for review, Alcarez-Guerrero challenges the trial court's summary denial of post-conviction relief on his claims of ineffective assistance of trial counsel. We review the denial of relief under Rule 32, Ariz. R. Crim. P., for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel, Defendant must present a colorable claim (1) that counsel's representation was unreasonable or deficient under the circumstances and (2) that he was prejudiced by counsel's deficient performance." *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984); Ariz. R. Crim. P. 32.6, 32.8. We will uphold a trial court's summary denial of relief if a defendant fails to present a colorable claim on either of these two points. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). A colorable claim of post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceeding. *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶3 As he did below, Alcarez-Guerrero contends his trial counsel performed ineffectively by failing to move to change the venue of his trial based on pretrial publicity

the case had received. The same judge who had presided over the trial ruled on the petition for post-conviction relief. He determined that counsel's failure to file such a motion had neither constituted deficient performance nor prejudiced the defense, noting that he would have denied a motion to change venue had one been filed.

¶4 Failure to file what would have been a futile motion does not constitute ineffective assistance of counsel. *See State v. Noleen*, 142 Ariz. 101, 106, 688 P.2d 993, 998 (1984) (failure to challenge voluntariness of defendant's statements not ineffective assistance because challenge "would have been futile"). Whether to grant or deny a motion for change of venue is within the discretion of the trial court. *State v. Davolt*, 207 Ariz. 191, ¶ 44, 84 P.3d 456, 470-71 (App. 2004). A defendant is only entitled to a change of venue based on pretrial publicity if proceeding in the original venue would be "'fundamentally unfair.'" *Id.* ¶ 45, *quoting State v. Atwood*, 171 Ariz. 576, 630, 832 P.2d 593, 647 (1992). Prejudice from pretrial publicity may be actual or presumed, but prejudice will not be presumed absent a showing that the publicity was "so extensively pervasive and prejudicial" it created a "'carnival-like atmosphere'" in which the court could not "'give credibility to the jurors' attestations, during voir dire, that they could decide [the case] fairly.'" *Id.* ¶ 46, *quoting Atwood*, 171 Ariz. at 631, 832 P.2d at 648, and *State v. Nordstrom*, 200 Ariz. 229, ¶ 15, 25 P.3d 717, 727 (2001). To show actual prejudice, a defendant "must show that 'the jurors have formed preconceived notions concerning the defendant's guilt and that they cannot

leave those notions aside.'" *Id*. ¶ 49, *quoting State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984).

¶5 Alcarez-Guerrero cites nothing in the record suggesting the jurors who decided his case had been actually prejudiced by pretrial publicity. Rather, he contends that "[t]he trial court abused its discretion in failing to disregard the results of *voir dire* in its inquiry." But the trial court did not abuse its discretion by finding pretrial publicity in this case had not been presumptively prejudicial. The overwhelming majority of the news articles Alcarez-Guerrero cited as a basis for his claim were published months before his trial and contained primarily factual information about the crimes, arrests, and pretrial proceedings. *See Davolt*, 207 Ariz. 191, ¶ 46, 84 P.3d at 471 ("We have refused to presume prejudice when the publicity was 'primarily factual and non-inflammatory or if the publicity did not occur close in time to the trial.'"), *quoting Nordstrom*, 200 Ariz. 429, ¶ 15, 25 P.3d at 727. Although newspaper and online coverage of the trial of one of Alcarez-Guerrero's codefendants occurred close in time to Alcarez-Guerrero's trial and included reports that the codefendant had implicated Alcarez-Guerrero in the murder, the court did not abuse its discretion in determining implicitly that these articles, and the pretrial publicity as a whole, had not satisfied the "high" and "rarely met" standard required for presumed prejudice. *Id.* Thus, the court did not abuse its discretion by concluding that trial counsel had neither performed deficiently nor prejudiced the defendant by failing to move for a change of venue for the trial.

¶6 Next, Alcarez-Guerrero contends that counsel performed deficiently by "fail[ing] to present any mitigation evidence" at sentencing. Specifically, he contends counsel failed to properly investigate mitigating issues, failed to present for inclusion in the presentence report a letter that had been written by Alcarez-Guerrero's family and contained over one hundred "supporting" signatures, and failed to inform family members that the time for the sentencing hearing had been changed or otherwise facilitate their speaking at the sentencing hearing. He claims his family members' statements "could have humanized [him]" and provided the basis for a life sentence with the possibility of parole.

¶7 Initially, we note the trial judge stated at sentencing that he had considered Alcarez-Guerrero's expression of remorse and other mitigating factors that had been submitted. But, even assuming as true that counsel had neither investigated nor presented mitigating circumstances, the trial court did not abuse its discretion by finding no prejudice from counsel's inaction. As the court noted in its ruling, Alcarez-Guerrero did "not submit[] any indication of what mitigating evidence an investigator might have discovered" or what statements his family could have made that would have persuaded the court to impose a different sentence. The letter Alcarez-Guerrero attached to his petition did not contain any mitigating information but merely expressed disagreement with the verdict. And, to the extent Alcarez-Guerrero contends his family could have told the court the effect methamphetamine use had had on him, the court had noted at sentencing that, although it had not

> hear[d] any evidence or really any argument that would explain how the use of methamphetamine in this murder, kidnaping and assault would explain or excuse to any extent the defendant's actions, . . . even if [it] consider[ed] the use of methamphetamine as well as remorse as mitigating circumstances, [it did] not believe that they would be sufficient to outweigh the aggravating circumstances in this case.

Consequently, the court did not abuse its discretion in determining Alcarez-Guerrero had failed to present a colorable claim on this issue as well.

¶8 Although we accept review of Alcarez-Guerrero's petition, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge