FILED BY CLERK
MAY 20 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. PAUL DAVID RICHARDSON, Petitioner.	2 CA-CR 2009-0026-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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. CR-20043827

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

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H O W A R D, Presiding Judge.

¶1 Following a jury trial, petitioner Paul Richardson was convicted of two counts of aggravated assault with a deadly weapon, two counts of aggravated assault causing temporary but substantial disfigurement, and third-degree burglary. The trial court imposed a combination of concurrent and consecutive, presumptive prison terms totaling 17.5 years. We affirmed Richardson's convictions and sentences on appeal. *State v. Richardson*, No. 2 CA-CR 2005-0318 (memorandum decision filed May 25, 2006). Richardson then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming trial counsel was ineffective. The trial court summarily denied relief, 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 abuse here.

¶2 Richardson claims trial counsel's failure to object to an improper jury interrogatory permitted the jury to find aggravating factors based on a lower quantum of evidence than the relevant statute required. To state a colorable 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 caused prejudice 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).

¶3 Richardson is correct that the interrogatory submitted to the jury relied on the current, rather than the former, version of the sentencing statute that was in effect when he committed the underlying offenses. Former A.R.S. § 13-702(C)(9) provided that a court may

consider as an aggravating factor the "physical, emotional ***and*** financial harm" caused to the victim. (Emphasis added.) *See* 2005 Ariz. Sess. Laws, ch. 20, § 1. The current statute uses the word ***or*** instead of ***and***.[1] The prosecutor had stated at the close of trial that he intended to have the jury consider two aggravating factors for sentencing purposes: the physical, emotional ***and*** financial harm to the victims and that Richardson had committed the offenses for pecuniary gain. However, the aggravating factors that were submitted to the jury in the form of an interrogatory on the verdict form asked if the defendant had caused the victims to suffer "physical, emotional ***or*** financial harm." (Emphasis added.) At sentencing, the trial court adopted the jury's findings that both aggravating factors had been proven beyond a reasonable doubt, and found, "I have to acknowledge the finding of the jury with regard to the aggravating circumstances that they found, the physical, emotional ***and*** financial harm to the victim[s] . . . and also the pecuniary value . . . ." (Emphasis added.) The court found two mitigating factors and then imposed presumptive terms on all counts.

¶4 Richardson argues that, but for counsel's failure to object to the improperly worded jury interrogatory, it is "probable" he would have received shorter sentences. He contends that, although there was evidence both victims had suffered physical harm, there was minimal evidence that only one victim had suffered emotional harm and that the other had suffered financial harm, suggesting the jury would not have been able to answer a properly worded interrogatory in the affirmative. He reasons that if the court had not

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[1]This provision is now in A.R.S. § 13-701(D)(9). *See* 2008 Ariz. Sess. Laws, ch. 301, § 23.

considered the improper aggravating factors, it would not have had any aggravating factors to weigh against the mitigating circumstances, and he would have received reduced sentences.

¶5 On appeal, Richardson presented the same underlying claim he now asserts, arguing that he was sentenced based on an aggravating factor that did not appear in the applicable sentencing statute. *Richardson*, No. 2 CA-CR 2005-0318, ¶ 10. We rejected this argument as follows:

> Because Richardson does not contest the jury's finding concerning the motive of pecuniary gain, the judge was allowed to consider at sentencing any other valid aggravating factor based on reasonable evidence. *See State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). Under the version of the statute in effect a[t] the time Richardson committed the offenses, the trial court was permitted to consider: "[a]ny other factor that the court deems appropriate to the ends of justice." Former A.R.S. § 13-702(C)(21); *see* 2004 Ariz. Sess. Laws, ch. 174, § 1. Therefore, even if the interrogatory did not track the precise language of former § 13-702(C)(9), the court could consider the evidence of any of the three factors under former § 13-702(C)(21) . . . .
>
> Richardson admits the victims suffered physical injury and does not argue that the jury finding on this issue was erroneous or improper. Although Richardson argues that no evidence was presented to the jury concerning emotional harm, A. testified at trial that she has "nightmares every night" because she "feel[s] like it's just going to happen again." And the victims sent a letter to the trial court that discussed, in part, their emotional suffering. Therefore, no fundamental error occurred.

Richardson, No. 2 CA-CR 2005-0318, ¶¶ 11-12.

¶6 In its ruling dismissing Richardson's petition, the trial court relied on our memorandum decision and concluded that Richardson "was not prejudiced assuming that

counsel was ineffective." We interpret the court's ruling to mean that, even assuming counsel's conduct had been deficient, Richardson was not prejudiced by that deficient performance, and his ineffective assistance claim necessarily fails. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) ("[f]ailure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim"). We agree.

¶7 In addition, despite our having found on appeal that *Martinez* is controlling, Richardson nonetheless argues the trial court incorrectly relied on that case and, by inference, on our reasoning on appeal. We find any distinctions between *Martinez* and this case immaterial and nonetheless find it applicable, as we previously ruled. We note, moreover, that the same judge who presided at trial ruled on Richardson's post-conviction petition. Having had the opportunity to reconsider his sentencing decision in the post-conviction context, the judge nonetheless ratified the sentence he had imposed. *See State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989).

¶8 For all of these reasons, we conclude the trial court properly dismissed Richardson's petition for post-conviction relief. Accordingly, although we grant the petition for review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge