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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STATE OF ARIZONA, Respondent, v. MARYANNE CHISHOLM, Petitioner.	2 CA-CR 2009-0118-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20013189

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

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E S P I N O S A, Presiding Judge.

¶1 After a jury trial, petitioner Maryanne Chisholm was convicted of one count of illegally conducting an enterprise, three counts of fraudulent schemes and artifices, and

fifty-four counts of sale of unregistered securities. This court affirmed the convictions on appeal but remanded the case for resentencing on most of the counts. *State v. Chisholm*, No. 2 CA-CR 2005-0409 (memorandum decision filed May 22, 2008). After her resentencing, Chisholm filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., raising numerous claims. In this petition for review, she challenges the trial court's denial of the relief requested in the Rule 32 petition, claiming she was at least entitled to an evidentiary hearing on two claims of ineffective assistance of counsel. We will not disturb the trial court's ruling absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Chisholm was first charged in this cause, CR-20013189. The facts giving rise to her multiple convictions in this cause are set forth in our memorandum decision in the appeal. *Chisholm*, No. 2 CA-CR 2005-0409, ¶¶ 2-6. Chisholm had devised a scheme by which she defrauded about a thousand investors through a sham company called Safari Media, Inc. *Id*. ¶ 4. Subsequently, she was charged in CR-20021306 with conspiracy to commit theft, fraud in insolvency, and perjury. After a bench trial, she was convicted of conspiracy and two counts of fraud in insolvency in that cause.[1] In the Rule 32 petition she filed in this case, Chisholm asserted that the prosecutor had told defense counsel he was pursuing CR-20021306 first, hoping to obtain a perjury conviction that he would be able to

[1]Chisholm appealed those convictions, and this court affirmed. *State v. Chisholm*, Nos. 2 CA-CR 2005-0176, 2 CA-CR 2005-0208 (consolidated) (memorandum decision filed Oct. 31, 2007). We also denied relief on review of the trial court's denial of her petition for post-conviction relief. *State v. Chisholm*, No. 2 CA-CR 2008-0356-PR (memorandum decision filed Mar. 24, 2009).

use to impeach her in this cause, effectively preventing her from testifying. In the petition for review, Chisholm asserts the prosecutor also stated at a pretrial and status conference that he intended to prosecute CR-20021306 first. Chisholm contends defense counsel was ineffective because he had not objected to or expressed concern about this strategy until two years later when he filed a motion to dismiss the charges based on prosecutorial misconduct. The trial court had denied that motion because it was untimely. Chisholm argues on review, as she did in the petition below, that this "had a significant chilling effect upon her decision whether to testify."

¶3 To be entitled to relief based on a claim of ineffective assistance of counsel, the defendant must establish both that counsel's performance was deficient, based on prevailing professional norms, and that the defendant was thereby prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). Under this test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the outcome of the case would have been different. *Strickland*, 466 U.S. at 693. A defendant is only entitled to an evidentiary hearing if she has raised a colorable claim for relief. *See State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). A colorable claim is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶4 In a thorough, well-reasoned minute entry, the trial court clearly identified each of Chisholm's claims, applied the appropriate legal standard, and resolved the claims correctly based on the record. Although no purpose would be served by rehashing the court's

order in its entirety here, *see State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993), we summarize the relevant portions of the court's ruling in light of the arguments Chisholm raises on review.

¶5 Characterizing the instant case as complex and CR-20021306 as "less complicated," the trial court found Chisholm had failed to raise a colorable claim that trial counsel had been ineffective in failing to make an early request that the cases be tried chronologically. The court added that, even if it might have been strategically wise for counsel to have done so, Chisholm was not prejudiced by counsel's omission or delay. Although the basis for that conclusion is not entirely clear, it seems to have been based on the fact that, as the court suggested, counsel might not have been able to control or affect the order of the trials because scheduling decisions are not made by defense counsel alone but, rather, are "the collaborative decision[s] of both parties and the Court." Moreover, the court found Chisholm was not denied her right to testify; rather, she chose not to testify in light of the existence of strong impeachment evidence. As the court correctly observed, "[a] defendant's constitutional right to testify is not impaired because the State might impeach her credibility." Even assuming Chisholm had been deterred from testifying because counsel had not insisted the court change the order in which the cases were tried, the court applied the correct test when it found Chisholm had failed to establish a reasonable probability the outcome of the case would have been different had she testified. The court based its conclusion on what it described as "overwhelming evidence of her guilt."

¶6 Chisholm has not persuaded us on review that the trial court applied the wrong test in determining whether she had raised a colorable claim of ineffective assistance of counsel.[2] She relies on *State v. Bowers*, 192 Ariz. 419, 966 P.2d 1023 (App. 1998), as she did below, for the proposition that she was not required to prove there was a reasonable probability the outcome of the trial would have been different had she testified. She contends she was only required to show she was prejudiced by having decided not to testify as a result of counsel's ineffectiveness, much the same as the defendant in *Bowers* was prejudiced by having chosen to waive his trial rights and enter a guilty plea. *See id.* ¶ 7. But the trial court was correct that the prejudice the defendant had to show in *Bowers* was necessarily different, because the alleged deficiency there had occurred in the plea context. *See id.* ¶¶ 5-6. That case simply stands for the proposition that, when a guilty plea has beeen induced by erroneous legal advice, a defendant claiming counsel was ineffective need not show that, had the case proceeded to trial, the defendant would have been acquitted. *See id.* ¶ 19. It does not support Chisholm's contention the standard applicable in *Bowers* applies here.

¶7 The ineffectiveness alleged here must be evaluated in terms of its effect on the trial. As the trial court wrote, Chisholm was like any other defendant who must decide whether to testify in light of impeachment evidence available to the state. Even assuming counsel's performance was deficient and that the state obtained the impeachment evidence as a result of that deficiency, Chisholm has not sustained her burden of establishing that the

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[2]Chisholm raised this same argument in her petition for review of the denial of post-conviction relief in *Chisholm*, No. 2 CA-CR 2008-0356-PR, ¶ 2. We rejected the argument then as well. *Id.* ¶ 3.

outcome would have been different had she testified. We have no basis for second-guessing the trial court or for concluding it abused its discretion in denying Chisholm post-conviction relief without an evidentiary hearing.

¶8 Chisholm also challenges the trial court's rejection of her claim that counsel was ineffective because he did not use a certain computer software program in providing her defense[3] and had been otherwise ill-prepared for trial. The court made thorough findings in connection with this claim and concluded counsel's conduct was neither deficient nor prejudicial. The court noted counsel had "mounted as effective a defense for the Petitioner as the facts would allow." We adopt the court's findings and its conclusions. *See Swoopes*, 216 Ariz. 390, ¶ 47, 166 P.3d at 959. Because Chisholm has not persuaded us that she had raised a colorable claim for relief entitling her to an evidentiary hearing on this ground, we deny relief on this claim as well.

¶9 The petition for review is granted, but for the reasons stated, we deny relief.

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PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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JOHN PELANDER, Judge

[3]We rejected this argument, too, in *Chisholm*, No. 2 CA-CR 2008-0356-PR.