

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.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0174-PR
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
GEORGE HUMBERTO VEGA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042641

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

George Humberto Vega

Florence
In Propria Persona

ESPINOSA, Presiding Judge.

¶1 A jury found petitioner George Humberto Vega guilty of leaving the scene of an accident, two counts of aggravated driving while under the influence of an intoxicant (DUI), three counts of endangerment, and criminal damage. The trial court granted his

motion to vacate the judgments of conviction based on ineffective assistance of counsel. After a second jury trial, he was convicted of these same charges. Vega appealed the convictions and the sentences imposed, and this court affirmed. *State v. Vega*, No. 2 CA-CR 2006-0404 (memorandum decision filed June 26, 2008). Vega subsequently sought relief pursuant to Rule 32, Ariz. R. Crim. P., primarily raising claims of ineffective assistance of counsel. The trial court dismissed his petition, denying relief, and this petition for review challenging that order followed. Absent a clear abuse of the court's discretion to determine whether post-conviction relief is warranted, this court will not disturb its ruling. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Vega has not sustained his burden of establishing the court abused its discretion.

¶2 The facts giving rise to the charges against Vega are set forth in this court's memorandum decision in Vega's appeal. Briefly, the evidence at trial established Vega had been driving and struck the vehicle in front of him while it was stopped at a stop sign. Vega and three others had been in the car; Vega and another male ran from the scene, and two female occupants walked away. A Department of Public Safety (DPS) officer saw the accident, and Vega, who was apprehended shortly thereafter, fit the description of the person the officer had seen getting out of the driver's side of the car. Robert Rosas was the other male occupant. Vega denied he had been driving; Rosas subsequently maintained that he had been driving. Credibility of the witnesses in the context of identification, particularly that of the DPS officer and the female passengers, were key issues at trial.

¶3 On appeal, Vega contended the trial court erred in denying his motion to substitute appointed counsel with retained counsel, precluding admission of Rosas's statements to various individuals and a tape recording of his statements to Vega's counsel, and permitting Rosas to invoke his constitutional privilege against self-incrimination instead of granting him immunity to testify. Vega also raised claims of prosecutorial misconduct and ineffective assistance of counsel, the latter of which this court refused to address on appeal.

¶4 In his petition for post-conviction relief, Vega alleged trial counsel had been ineffective in numerous respects. He claimed counsel failed to adequately investigate the case before trial and obtain discovery favorable to the defense; to examine witnesses effectively; to raise a variety of objections at trial; to request or object to certain jury instructions; to request that Rosas be granted immunity based on *State v. Doody*, 187 Ariz. 363, 930 P.2d 440 (App. 1996), so he could testify at Vega's trial; to craft an adequate defense at trial; and to properly support his request to substitute counsel. Many of these claims of ineffective assistance of counsel were bootstrapped to issues Vega had raised on appeal. Additionally, he contended the trial court had erred by failing to address the motion he had filed in propria persona to substitute counsel and continue the trial. And, Vega asserted summarily that he had not been driving and is clearly innocent and, therefore, entitled to relief pursuant to Rule 32.1(h), Ariz. R. Crim. P., and the Fifth and Fourteenth Amendments to the United States Constitution. The trial court denied relief and dismissed the petition in a thorough, well-reasoned, eight-page minute entry.

¶5 In his petition for review, Vega attempts to reiterate the claims he raised in his Rule 32 petition by asserting generally that trial counsel made “numerous . . . errors . . . while the case was being tried.” In terms of specific instances of ineffectiveness, Vega contends counsel failed to challenge the DPS officer’s testimony, to rely on *Doody* in arguing for the admissibility of Rosas’s various admissions that he had been the one driving the vehicle, and to rely on *State v. LaGrand*, 152 Ariz. 483, 733 P.2d 1066 (1987), when trying to persuade the trial court to admit Rosas’s statements. Vega contends the DPS officer’s credibility could have been effectively challenged if counsel had obtained a copy of the “booking sheet” and “property sheet” relating to the accident and his arrest. And, he essentially asserts his relationship with trial counsel had disintegrated to such a degree that it was no longer possible for her to meaningfully represent him, resulting in a violation of his rights under the Sixth and Fourteenth Amendments. Thus, he asserts, the trial court abused its discretion when it denied his request for a change of counsel and motion to continue the trial.

¶6 To be entitled to post-conviction relief based on the ineffectiveness of counsel, a defendant must establish counsel’s performance fell below prevailing professional norms and the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687-92 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (adopting *Strickland* test in Arizona); *see also State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (defendant must prove both prongs of *Strickland* test). To satisfy the second part of the *Strickland* test, the defendant must show a reasonable probability that, but for counsel’s deficient performance, the outcome of the case would have been different. *See*

Strickland, 466 U.S. at 694. An examination of counsel’s tactical decisions is highly deferential. *Nash*, 143 Ariz. at 398, 694 P.2d at 228. Counsel’s decisions need only have had some reasoned basis and will not be evaluated by a reviewing court “in the harsh light of hindsight.” *State v. Pacheco*, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978).

¶7 In its minute entry denying post-conviction relief, the trial court noted these principles of law that relate to claims of ineffective assistance of counsel. Additionally, the court identified the various instances in which Vega had claimed trial counsel had been ineffective, including those that Vega reasserts on review, and evaluated the claims thoroughly and correctly. When the trial court rules correctly on claims raised in a petition for post-conviction relief “in a fashion that will allow any court in the future to understand the [bases for the court’s] resolution” of those claims, “[n]o useful purpose would be served by . . . rehashing the trial court’s correct ruling” in our decision on review. *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). In all respects but one, we find the court correctly resolved the claims before it; therefore, we adopt the court’s ruling.

¶8 Although the trial court addressed and correctly resolved Vega’s claims on their merits, it repeatedly found precluded the claims of ineffective assistance of counsel that were based on issues Vega had raised on appeal or in his motion to vacate the judgment pursuant to Rule 24.2, Ariz. R. Crim. P. Those claims of ineffective assistance fail, in part, because this court on appeal rejected the underlying issues upon which they were based. Our rejection of the underlying claims effectively establishes counsel’s performance in that

context could not have been prejudicial, even assuming it had been deficient.¹ But a claim of ineffective assistance of counsel is not the same as the claim upon which it rests. With respect to those claims of ineffective assistance of counsel that are based on claims Vega raised on appeal or in a pretrial motion, to the extent he failed to specify a particular failing by counsel, he has constructively reasserted the underlying claims, and they are precluded. Thus, the court did not abuse its discretion in finding such claims precluded. And with respect to any claims of ineffective assistance of counsel that were truly independent of the claims that Vega had raised on appeal, he failed to raise a colorable claim for relief. The court, therefore, did not abuse its discretion in rejecting such claims on their merits.

¶9 We grant Vega’s petition for review, but for the reasons stated, we deny relief.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge

¹The trial court found Vega did not establish counsel’s performance had been deficient. Vega has not persuaded us on review that the trial court abused its discretion in so finding. And, as the court correctly noted, citing *Salazar*, 146 Ariz. at 541, 707 P.2d at 945, a defendant’s failure to satisfy either prong of the *Strickland* test is fatal to a claim of ineffective assistance.