

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 2009-0192-PR
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JAMES ANTHONY STAPLES,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053759

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 After invading a home, demanding money, and shooting one of the victims, petitioner James Staples and his brother, Thomas Henry, were charged with two counts of

kidnapping, two counts of aggravated assault, and one count each of attempted armed robbery, attempted aggravated robbery, and first-degree burglary. The state filed various sentence-enhancing allegations. The brothers were tried together, and a jury found Staples guilty of all charges. The trial court sentenced him to concurrent and consecutive prison terms totaling fifty-six years. This court affirmed the convictions and sentences on appeal. *State v. Staples*, No. 2 CA-CR 2006-0204 (memorandum decision filed Sept. 27, 2007). Staples then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P, claiming his trial counsel had been ineffective in numerous respects. The trial court denied relief without an evidentiary hearing, and this petition for review followed.

¶2 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). The evidence presented at trial is more fully set forth in this court's memorandum decision on Staples' appeal. *Staples*, No. 2 CA-CR 2006-0204, ¶¶ 2-3. Briefly, however, three men entered the home of Robert J. and demanded money. *Id.* ¶ 2. One of the men shot Robert twice in the leg. *Id.* The men had also forced Robert's guest, Arturo, and Robert's two children into another room. *Id.* Police found Staples and Henry hiding in the neighborhood, and Arturo identified them as two of the three men who had invaded the home. *Id.* ¶ 3. Both Robert and Arturo identified Staples and Henry at trial. *Id.*

¶3 Staples filed a motion for a continuance of trial on the first day, having just received a compact disc containing one hundred recorded telephone calls purportedly between Robert or Arturo and a jail inmate, Sam Rakeshaw. *Id.* ¶ 4. Attorney Bradley

Roach, the fourth attorney appointed to represent Staples, had received the files for the case three weeks before trial but claimed he had just received the disc, and although he had not listened to the calls, he told the court he expected the conversations would include admissions by the victims that they might not have been able to identify Staples. The trial court denied the motion but requested that the defense investigator listen to the recorded conversation as the trial continued and stated defense counsel would be permitted to present any additional evidence at trial after listening to the conversations. *Id.* ¶ 5. Roach told the court at the end of the second day of trial that he would finish listening to the recordings that night, before resting his case. The next day, when he did rest his case, he did not mention introducing additional evidence. *Id.*

¶4 On appeal, Staples challenged the trial court’s denial of the motion to continue, arguing the conversations would have provided him with valuable evidence with which to impeach Robert. *Id.* ¶ 8. Staples argued that, because Robert had not cooperated with police initially “and because his testimony contained various discrepancies[,] . . . the jury would have heavily weighed Rakeshaw’s influence when considering Robert’s testimony.” *Id.* Staples also challenged the trial court’s denial of his motion for a new trial, in which he had argued the recorded conversations constituted newly discovered evidence. *Id.* ¶¶ 13-14.

¶5 This court found the trial court had not abused its discretion in denying Staples’s motion to continue the trial, that he had not been prejudiced by the trial court’s ruling, and that the court properly had denied Staples’s motion for a new trial. *Id.* ¶ 8. We found the motion to continue had been based on “sheer speculation and vague assertions that

new evidence, if discovered in the [recorded] telephone calls and if relevant and ruled admissible, might be used to impeach Robert.” *Id.* ¶ 9. Because the recordings were known to defense counsel, the prosecutor, and the court during trial, and defense counsel had listened to them before resting, they did not qualify as newly discovered evidence. *Id.* ¶ 14. Additionally, we found the recordings would have provided evidence that was merely impeaching, and Staples had already impeached Robert at trial by pointing out to the jury discrepancies in Robert’s statements and testimony, and effectively suggesting to the jury that Robert was a drug dealer. *Id.* ¶ 16.

¶6 In his petition for review, Staples contends the trial court erred by denying relief on his claims of ineffective assistance of counsel. Staples claims Arturo’s identification of Staples and Henry was highly suspect. First, Staples claims Arturo had told police the assailants were in their twenties, but he then identified Staples, who was nearly fifty. Staples also contends Arturo did not mention to the police there had been a third assailant but had testified there had been three and that the third person had hit him in the head with a pistol. Under the circumstances, including other discrepancies in Arturo’s statements and testimony, Staples contends he was entitled to a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), to determine whether the pretrial identification procedures involving Arturo had been unduly suggestive and had tainted Arturo’s in-court identification of him as one of the assailants. Staples contends counsel was ineffective for failing to request a *Dessureault* hearing. He also contends, as he did in his Rule 32 petition, that trial counsel had been ineffective in failing to file a motion to sever the

brothers' trials or join in the motion to sever that Henry's counsel had filed and the court had denied. He argues he was thereby prejudiced because their defenses were antagonistic in certain respects. And, he contends, he was unable to raise the issue on appeal because he had not filed a motion or joined in Henry's motion below. Finally, he asserts the trial court erred in denying relief on his claim that Roach should have filed a motion to continue the trial as soon as he was appointed. He insists Roach had not been prepared for trial and a continuance would have allowed Roach to evaluate and understand better the significance of the recorded conversations with Rakeshaw.

¶7 On the record before us, we cannot say the trial court abused its discretion in denying Staples's petition for post-conviction relief. The court clearly identified the claims Staples had raised and resolved them correctly in a thorough, well-reasoned minute entry, which we adopt. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶8 We grant Staples's petition for review. But, finding Staples has not sustained his burden of establishing on review that the trial court abused its discretion by denying his petition for post-conviction relief, we deny relief.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge