

Appendices

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Appendix A

Order of the Superior Court of Arizona, Maricopa County

Clerk of the Superior Court
*** Electronically Filed ***
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SUPERIOR COURT OF ARIZONA MARICOPA COUNTY

CR2015-111701-002 DT
CR2015-141119-002 DT

01/13/2022

HONORABLE SUZANNE E. COHEN

CLERK OF THE COURT
Y. Zych
Deputy

STATE OF ARIZONA
v.
RAKEEM BARBER (002)

ROBERT A. WALSH

KATIA MEHU
COURT ADMIN-CRIMINAL-PCR
JUDGE SUZANNE COHEN

PCR DISMISSED

The Court has reviewed the Defendant's Petition for Post-Conviction Relief filed 11/22/2021, the Response and Reply. This is the Defendant's first Rule 32 proceeding following the Division One, Arizona Court of Appeals mandate 3/31/20 in 1CA-CR 17-0622 and 1 CA-CR 18-0482 consolidated.

Notably, Defendant filed a joint Rule 32 petition for CR 2015-111701-002 and CR 2015-141119-002. The 1701 matter went to trial, the defendant was convicted, and the conviction was upheld on appeal. In the 1119 matter, the defendant reached a plea deal with the state. Therefore Rule 33 would be the applicable rule for the 1119 matter.

Defendant makes no argument for post-conviction relief in the 1119 matter, therefore the PCR in that matter is dismissed.

1117 matter

Defendant and 2 codefendants (Newell and Petty) were convicted after a jury trial for Burglary in the Second Degree. The facts as outlined in the pleadings are that Defendant rented a Dodge Charger several days before the burglary. 3 men were seen by neighbors on the street on March 11, 2015. The 3 men were seen acting suspiciously, then jump the victim's wall into his yard and then after a bit, were seen leaving carrying items. The police were called. Police

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secured the charger, the three men fled. The defendant's handprint was located on the charger along with paperwork showing he had rented the dodge.

The three men were arrested later that evening. Defendant and Petty were seen leaving Newell's apartment. They were stopped. The key fob to the Charger was found on Petty as well as the victim's stolen watch. \$630 was found on the defendant. One of the neighbors identified defendant from a photo line up approximately 2 months later.

The three codefendants were tried together after Newell filed a motion to sever, which was denied. Defendant testified denying any involvement. Newell and Petty did not testify, although told police they were at the scene but not involved.

Defendant appealed and his conviction was upheld.

Defendant raises 5 issues in his Petition:

1. Sixth Amendment right to a fair trial was violated because of a joint trial with codefendants.
2. The defendant 5th amendment rights were infringed upon because of the joint trial.
3. The trial courts admission of photographic lineups violated his due process rights.
4. There was ineffective assistance by trial counsel for counsel's failure to seek a severance of the trial or contest eyewitness identification.
5. There was ineffective assistance by appellate counsel for counsel's failure to litigate restitution related claims on direct appeal.

CLAIMS 1-3

"[T]o prevent endless or nearly endless reviews of the same case in the same trial court," *Stewart v. Smith*, 202 Ariz. 446, 450 ¶ 11, 46 P.3d 1067, 1071 (2002), Rule 32.2(a) precludes collateral relief on a ground that either was or could have been raised on direct appeal or in a previous PCR proceeding." *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009)

Except for arguing that the presentation of evidence improperly suggested Defendant invoked his right to remain silent, Defendant did not raise issues 1-3 on appeal. The state argues that Pursuant to ARCP 32.2(a)(3) defendant is precluded from raising these issues.

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Defendant argues that the defendant's Constitutional rights were violated. However, 32.2 (a)(3) is clear, remedy is precluded on issues waived on appeal except a violation of a "constitutional right that can only be waived knowingly, voluntarily and personally by the defendant."

Defendant took the stand voluntarily, waiving his 5th Amendment right. There is no requirement that defendant must personally waive a severance issue or the admissibility of photographic line ups, nor does defendant provide law to support that argument.

State has proved by preponderance of the evidence that claims 1-3 are precluded. (Rule 32.9 (a)(2)).

CLAIMS 4-5

A colorable Sixth Amendment claim is grounded in *Strickland v. Washington*, 466 U.S. 668 (1984): The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a Defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

To establish ineffective assistance of counsel, the Defendant must show that counsel's performance was deficient, and that the Defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. at 687 (1984).

Deficient performance is established when "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In determining deficiency, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the Defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. This presumption of reasonableness means that not only does the court "give the attorneys the benefit of the doubt," it must also "affirmatively entertain the range of possible 'reasons [defense] counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 1407 (2011).

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To establish prejudice, the Defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. Under this standard, the court asks “whether it is ‘reasonably likely’ the result would have been different.” Harrington v. Richter, 562 U.S. 86, 112 (2011) (quoting Strickland, 466 U.S. at 696). That is, only when “[t]he likelihood of a different result [is] substantial, not just conceivable,” has the Defendant met Strickland’s demand that defense errors were “so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable.” Id. at 104 (quoting Strickland, 466 U.S. at 687).

Notably, “[m]atters of trial strategy and tactics are committed to defense counsel’s judgment” and generally cannot serve as the basis for an IAC claim. State v. Bigger, 251 Ariz. 402, 492 P.3d 1020, 1026 (2021)

CLAIM 4; Trial Phase; Counsel’s failure to move for severance or challenge eyewitness ID.

Co-defendant Newell moved for severance. It was denied. Defendant has presented no evidence to support that counsel’s decision move for a severance was anything other than a trial tactic especially in light of the denial of the motion to sever by the co-defendant.

Defendant was part of a 6-person photo array. There was nothing unduly suggestive in the photo array. Even if the court found it to be unduly suggestive the Neil v. Biggers, 409 U.S. 188 (1972) factors would have allowed the court to look at the totality of the circumstances. Defendant has not shown that contesting the identification procedure instead of attacking the identification at trial was objectively unreasonable or that doing so would have resulted in a different result.

CLAIM 5 Appellate counsel not litigating the Restitution appeal

Defendant was sentenced on 9/15/17. A restitution hearing was held on 10/24/17 and the matter was taken under advisement. Judge Rea ruled on 11/21/17 and ordered restitution. Defendant separately appealed the restitution order. The Court of Appeals consolidated the restitution order into the trial appeal. Appellate counsel did not address the restitution order in the briefs.

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A strong presumption exists that appellate counsel provided effective assistance. (Cite omitted) Appellate counsel is responsible for reviewing the record and selecting the most promising issues to raise in an appeal. (Cite Omitted). Generally, “[a]ppellate counsel is not ineffective for selecting some issues and rejecting others.” ... Nevertheless, if counsel ignores issues that are stronger than those selected for the appeal, a defendant can overcome the presumption of effective assistance of counsel. (Cite Omitted). *State v. Macias*, 249 Ariz. 335, 340–41, 469 P.3d 472, 477–78 (Ct. App. 2020).

Here, Defendant makes no showing that a restitution appeal was stronger than those issue selected, that appellate counsel acted other than reasonably or that if appealed that it would have been reasonably likely that any restitution order would have been different.

The court finds that defendant has failed to show a colorable claim for post- conviction relief.

IT IS ORDERED summarily dismissing his petition for post-conviction relief.

Appendix B

Arizona Court of Appeals, Division 1 Memorandum Decision

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE ARIZONA COURT OF APPEALS DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

RAKEEM BARBER, *Petitioner*.

No. 1 CA-CR 22-0176 PRPC
FILED 12-15-2022

Petition for Review from the Superior Court in Maricopa County
Nos. CR2015-111701-002, CR2015-141119-002
The Honorable Suzanne E. Cohen, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Robert A. Walsh
Counsel for Respondent

Law Office of Katia Mehu, Phoenix
By Katia Mehu
Counsel for Petitioner

STATE v. BARBER
Decision of the Court

MEMORANDUM DECISION

Presiding Judge David D. Weinzwieg, Judge Randall M. Howe, and Judge D. Steven Williams delivered the decision of the court.

PER CURIUM:

¶1 Petitioner Rakeem Barber seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is petitioner's first petition.

¶2 Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19, 278 P.3d 1276, 1280 (2012). It is petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. *See State v. Poblete*, 227 Ariz. 537, ¶ 1, 260 P.3d 1102, 1103 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, the petition for review, the state's response, as well as petitioner's reply. The petitioner has failed to show an abuse of discretion.

¶4 For the foregoing reasons, this court grants review but denies relief.



AMY M. WOOD • Clerk of the Court

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Appendix C

Arizona Supreme Court Order Denying Review



Supreme Court STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
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TRACIE K. LINDEMAN
Clerk of the Court

August 25, 2023

RE: STATE OF ARIZONA v RAKEEM BARBER

Arizona Supreme Court No. CR-23-0002-PR

Court of Appeals, Division One No. 1 CA-CR 22-0176 PRPC

Maricopa County Superior Court No. CR2015-111701-002

Maricopa County Superior Court No. CR2015-141119-002

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 25, 2023, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

TO:

Alice Jones

Robert A Walsh

Katia Mehu

Amy M Wood

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