State v. Schultz

2009 | Cited 0 times | Court of Appeals of Arizona | July 21, 2009

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of the Supreme Court

¶1 Following a jury trial, Kevin Schultz was convicted of twenty-two counts of sexual conduct with a minor and one count of furnishing obscene materials to a minor. The trial court sentenced him to a combination of presumptive and aggravated prison terms totaling 300.5 years. This court affirmed his convictions and sentences on appeal. State v. Schultz, No. 2 CA-CR 2006-0437 (memorandum decision filed Oct. 31, 2007). The trial court summarily denied Schultz's subsequent petition for post-conviction relief that he filed pursuant to Rule 32, Ariz. R. Crim. P., and this petition for review followed.

¶2 As he did below, Schultz contends he received ineffective assistance from his trial and appellate counsel. "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel, Defendant must present a colorable claim (1) that counsel's representation was unreasonable or deficient under the circumstances and (2) that he was prejudiced by counsel's deficient performance." State v. Fillmore, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); see also Strickland v. Washington, 466 U.S. 668, 687 (1984); Ariz. R. Crim. P. 32.6(c), 32.8. We will affirm a trial court's summary denial of relief if a defendant fails to colorably assert either of these two points. See State v. Salazar, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). A colorable claim of post-conviction relief is "one that, if the allegations are true, might have changed the outcome" of the proceeding. State v. Runningeagle, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶3 First, Schultz contends his appellate counsel was ineffective because she "never ordered or reviewed" transcripts of "jury voir dire, opening and closing arguments, and final jury instructions." He claims that, had she done so, she would have discovered that several venire persons had made statements that tainted the jury and that the prosecutor had committed misconduct during opening statement and closing argument. Although Schultz admits trial counsel had not objected during voir dire or asked for a new jury panel, he contends appellate counsel "could have argued for such a

remedy under a fundamental error standard." And he contends his appellate claim of prosecutorial misconduct, which counsel had based solely on an incident during Schultz's testimony, would have been stronger had counsel also argued the prosecutor had acted improperly during opening statement and closing argument.

¶4 In its ruling denying Schultz's petition for relief, the trial court stated:

[T]he failure of appellate counsel to order transcripts does not support a conclusion that the verdict in Mr. Schultz['s] case would have been any different. The record reflects that any juror who could not be fair and impartial was excused by the Court. There is no evidence that the entire panel had somehow been corrupted. Furthermore, nothing in either counsel's opening or closing arguments would [warrant] a mistrial.

The court also stated that "any allegation[] that the prosecutor in this case engaged in any type of misconduct . . . ha[d] already been addressed by the Court of Appeals."

¶5 Schultz contends the "trial court missed the point by ruling" that prospective jurors' comments had not changed the verdict and asserts the court's ruling "condones laziness on the part of the appellate counsel." He also contends "[t]he trial court's ruling that the matter [of prosecutorial misconduct] had been handled by the Court of Appeals [was] misguided" and maintains "[t]he [relevant] issue was whether the appellate counsel should have reviewed the entire record to complete the appeal, not whether the Court of Appeals ruled on an incomplete record." But Schultz had the burden of showing both deficient performance and resulting prejudice. See Strickland, 466 U.S. at 687. Even assuming appellate counsel performed deficiently by failing to review transcripts of voir dire, the record supports the trial court's determination that the comments made by potential jurors did not taint the jury or otherwise affect its verdict. Thus, no error, fundamental or otherwise, occurred during voir dire, and any appellate claim of error would have failed.[1]

¶6 Likewise, Schultz did not show prejudice resulting from counsel's alleged failure to review transcripts of opening statements and closing arguments. "As a general rule, '[a]ppellate counsel is not ineffective for selecting some issues and rejecting others.'" State v. Bennett, 213 Ariz. 562, ¶ 22, 146 P.3d 63, 68 (2006), quoting State v. Herrera, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (alteration in Bennett). However, even if we assumed that at least some of the prosecutor's comments in opening statement and closing argument were improper and that counsel should have included them in Schultz's claim of prosecutorial misconduct, the record does not support a conclusion that misconduct so permeated the trial as to have deprived Schultz of due process. See State v. Hughes, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998) ("To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Thus, the trial court did not abuse its discretion by denying relief on Schultz's claim of ineffective assistance of appellate counsel. See State v. Watton, 164 Ariz. 323, 325,

793 P.2d 80, 82 (1990).

¶7 Nor did the trial court abuse its discretion by summarily denying relief on Schultz's claims of ineffective assistance of trial counsel. Schultz claimed trial counsel had failed adequately to explain to him the terms of a plea offer, had been ill prepared for trial, and had failed to object to the trial venue. But Schultz submitted nothing to contradict his original trial counsel's affidavit, submitted by the state in response to the petition below, stating she had explained the only plea offer the state had made to Schultz in detail, including the ramifications of proceeding to trial. Schultz does not contest the court's finding that his second counsel, who had represented him during the trial, had been retained after all plea negotiations had concluded. In addition, Schultz showed no prejudice resulting from trial counsel's failure to object to venue. The court's ruling suggests it would have denied any such motion, and Schultz has provided no authority to this court showing venue was improper. Finally, Schultz did not show that trial counsel had been unprepared or that counsel's alleged unpreparedness had caused him prejudice.

¶8 Accordingly, although we accept review of Schultz's petition, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

J. WILLIAM BRAMMER, JR., Judge

1. Fundamental error is error that goes "'to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" State v. Henderson, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), quoting State v. Hunter, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." Id. ¶ 20. And, he "must first prove error." Id. ¶ 23.