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SUPREME COURT OF ARIZONA

ROBERT EARL ROBINSON,) Arizona Supreme Court
Petitioner,) No. M-19-0013
v.)
HON. DANIELLE J. VIOLA, JUDGE OF)
THE SUPERIOR COURT FOR THE STATE)
OF ARIZONA, in and for the)
County of Maricopa,)
Respondent Judge,)
STATE OF ARIZONA; BILL)
MONTGOMERY, MARICOPA COUNTY)
ATTORNEY; DIANA M. MELOCHE,)
DEPUTY MARICOPA COUNTY ATTORNEY,)
Real Parties in Interest.)

)

O R D E R

On May 28, 2019, Petitioner Robinson filed a "Motion for Reconsideration 'Writ Writter' DeMoore T. Gray 'Amicus Brief'" and DeMoore T. Gray filed a "Request to Proceed as Amicus Curiae Before the Courts Pursuant to: 16A A.R.S. Rule of Crim Proc., 31.15." After consideration,

IT IS ORDERED denying the motions.

DATED this 29th day of May, 2019.

/s/

Robert M. Brutinel
Duty Justice

TO:

Robert Earl Robinson, ADOC 317425, Arizona State Prison,
Red Rock Correctional Center
DeMoore T Gray, ADOC 288125, Arizona State Prison,
Red Rock Correctional Center
tel

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

A

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05/08/2018

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

ROBERT EARL ROBINSON (001)

ROBERT EARL ROBINSON
317425 ASPC RED ROCK CORRECTI
1752 E ARICA RD
ELOY AZ 85131

COURT ADMIN-CRIMINAL-PCR

RULE 32 PROCEEDING DISMISSED

Pending before the Court are Defendant's Notice of Post-Conviction Relief and "Memorandum in Support of Delayed Notice of Post-Conviction Relief," both filed on March 20, 2018. This is Defendant's first Rule 32 proceeding.

Defendant entered a plea agreement and pled guilty to second-degree murder, a class 1 dangerous felony. On March 17, 2017, the Court entered judgment and sentenced Defendant to a 15-year term of imprisonment with 1,071 days of presentence incarceration credit. At sentencing Defendant received a form titled "Notice of Rights of Review After Conviction and Procedure." He acknowledged receipt by signing the form.

Under Rule 32.4(a)(2)(C) of the Arizona Rules of Criminal Procedure, the Notice of Post-Conviction Relief must be filed within 90 days of the entry of judgment and sentencing. This date is clearly stated in the "Notice of Rights of Review After Conviction and Procedure" form that Defendant received at sentencing. Because this Court sentenced Defendant on March 17, 2017, the deadline for Defendant's Notice of Post-Conviction Relief was June 15, 2017. His Rule 32 proceeding is thus untimely by more than nine months.

A. Rule 32.1(f) Claim

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Nevertheless, Defendant contends that the untimeliness of this Rule 32 proceeding is without fault on his part and he is entitled to relief under Arizona Rule of Criminal Procedure 32.1(f). (Motion at 2; Notice at 3) He claims that he instructed his attorney to file the Notice of Post-Conviction Relief but the attorney failed to do so. (Motion at 3-4) The Court finds Defendant has failed to provide adequate factual support for this claim. The "Notice of Rights of Review After Conviction and Procedure" form he received at each sentencing clearly states that a Notice of Post-Conviction Relief must be filed within 90 days. Defendant fails to adequately explain why he waited nine months past that deadline to file a Notice of Post-Conviction Relief.

B. Rule 32.1(a) Claims

He also contends that his conviction and sentence were obtained in violation of his constitutional rights and he is entitled to relief under Arizona Rule of Criminal Procedure 32.1(a). Specifically, Defendant claims that he received ineffective assistance from counsel, who allegedly "lied" about Arizona law and provided deficient advice during the plea negotiation stage. (Notice at 2; Petition at 2) By pleading guilty, Defendant waived all non-jurisdictional defects unrelated to the voluntariness of his plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). Moreover, Defendant cannot raise these Rule 32.1(a) claims in an untimely Rule 32 proceeding because the notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a)(2)(A); *see generally State v. Petty*, 225 Ariz. 369, 373, ¶ 11, 238 P.3d 637, 641 (App. 2010) (holding ineffective assistance of counsel claims are "cognizable under Rule 32.1(a)"). The Rule 32.1(a) claims Defendant has asserted were required to be raised in a timely Rule 32 proceeding.

In sum, Defendant fails to state a claim for which relief can be granted in an untimely Rule 32 proceeding. Defendant must assert substantive claims and adequately explain the reasons for their untimely assertion. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet this standard. Although the Court would normally grant the request for appointment of counsel for a first Rule 32 proceeding, appointment is not required when, as here, the Notice of Post-Conviction Relief is "facially non-meritorious." *State v. Harden*, 228 Ariz. 131, 133-34, ¶ 11, 263 P.3d 680, 682-83 (App. 2011).

IT IS THEREFORE ORDERED dismissing Defendant's Notice of Post-Conviction Relief and "Memorandum in Support of Delayed Notice of Post-Conviction Relief" pursuant to Arizona Rule of Criminal Procedure 32.2(b).

IT IS FURTHER ORDERED denying the request for appointment of counsel.

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11/21/2018

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

ROBERT EARL ROBINSON (001)

ROBERT EARL ROBINSON
317425 ASPC RED ROCK
CORRECTIONAL CENTER
1752 E ARICA RD
ELOY AZ 85131

COURT ADMIN-CRIMINAL-PCR
JUDGE VIOLA

RULE 32 PROCEEDING DISMISSED

Pending before the Court are Defendant's Notice of Request for Post-Conviction Relief and "Memorandum in Support of Newly Discovered Evidence" filed on October 22, 2018. This is Defendant's second Rule 32 proceeding.

After a mistrial, Defendant entered into a plea agreement and pled guilty to second-degree murder, a class 1 dangerous felony. On March 17, 2017, the Court entered judgment and sentenced Defendant to a 15-year term of imprisonment. Thereafter, this Court summarily dismissed Defendant's first Rule 32 proceeding in an order filed on May 10, 2018. He did not seek review.

Arizona law allows defendants to file a second notice of request for post-conviction relief for the purpose challenging the effectiveness of post-conviction relief counsel in a first of-right proceeding. *See State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995). The notice challenging counsel's effectiveness must be filed within 30 days. Ariz. R. Crim. P. 32.4(a)(2)(C); *Osterkamp v. Browning*, 226 Ariz. 485, 491, ¶ 21, 250 P.3d 551, 557 (App. 2011). Because this Court dismissed the first Rule 32 proceeding on May 10, 2018, the deadline for this Rule 32 proceeding was June 11, 2018. Accordingly, Defendant's Rule 32 proceeding is

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untimely by more than four months. In any event, Defendant cannot assert a claim against Rule 32 counsel because he was not represented in his first Rule 32 proceeding.

A. Rule 32.1(a) Claim

In his current submission, Defendant contends that his conviction and sentence were obtained in violation of his constitutional rights, thereby entitling him to relief under Ariz. R. Crim. P. 32.1(a). Specifically, Defendant claims that he received ineffective assistance of counsel. (Notice at 2) By pleading guilty, Defendant waived all non-jurisdictional defects unrelated to the voluntariness of his plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). Moreover, Defendant cannot raise this Rule 32.1(a) claim in an untimely Rule 32 proceeding because the notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a)(2)(A); *see State v. Lopez*, 234 Ariz. 513, 514-15, ¶ 5, 323 P.3d 1164, 1165-66 (App. 2014); *see generally State v. Petty*, 225 Ariz. 369, 373, ¶ 11, 238 P.3d 637, 641 (App. 2010) (holding ineffective assistance of counsel claims are “cognizable under Rule 32.1(a)”). Because Defendant raised an ineffective assistance claim in his previous Rule 32 proceeding, relief on that ground is precluded. *See Ariz. R. Crim. P. 32.2(a)(2); State v. Spreitz*, 202 Ariz. 1, 2, ¶ 4, 39 P.3d 525, 526 (2002) (“Our basic rule is that where ineffective assistance of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded.”) (emphasis in original).

B. Rule 32.1(e) Claim

In addition, Defendant contends that newly discovered and material facts exist that entitle him to relief under Ariz. R. Crim. P. 32.1(e). (Notice at 2) Although such claims are not necessarily precluded under Rule 32.2(a), when raised they “must include the specific exception to preclusion and explain the reasons for not raising the claim . . . in a timely manner.” Ariz. R. Crim. P. 32.2(b); *see also Ariz. R. Crim. P. 32.1(e)*. “If the notice does not identify a specific exception or provide reasons why defendant did not raise the claim in a previous petition or in a timely manner, the court may summarily dismiss the notice.” Ariz. R. Crim. P. 32.2(b). Rule 32.1(e) is applied quite restrictively to overturn guilty pleas in part because a person who is “not manifestly guilty of the crime charged” may opt to plead guilty in the face of “a distinct possibility of a finding of guilt” to avoid the more severe sentence that could result from a jury trial. *State v. McFord*, 125 Ariz. 377, 379, 609 P.2d 1077, 1079 (App. 1980):

To be entitled to post-conviction relief based on newly discovered facts, Defendant must show that the facts were discovered after trial although existed before trial; the facts could not have been discovered and produced at trial or on appeal through reasonable diligence; the facts

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agreement is unenforceable and he has been deprived of his due process rights. (*Id.*) By pleading guilty, Defendant waived all non-jurisdictional defects unrelated to the voluntariness of his plea. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). Moreover, Defendant cannot raise these Rule 32.1(a) claims in a successive Rule 32 proceeding because the notice may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.4(a)(2)(A); *see State v. Lopez*, 234 Ariz. 513, 515, ¶ 6, 323 P.3d 1166 (App. 2014). Because Defendant attacked the plea, as well as the alleged ineffective assistance of plea counsel, in his first Rule 32 proceeding (Memorandum filed on March 20, 2018 at 2-3), relief on these grounds is precluded. *See Ariz. R. Crim. P. 32.2(a)(2)*. To the extent that Defendant is raising new claims concerning the plea, relief is still precluded. *See Ariz. R. Crim. P. 32.2(a)(3)*.

Alternatively, Defendant contends that his claims are not precluded because he did not personally waive them. (Notice at 1-2) Under *Stewart v. Smith*, the waiver of certain rights under Ariz. R. Crim. P. 32.2(a)(3) depends upon the nature of the right asserted. 202 Ariz. 446, 46 P.3d 1067 (2002). In some cases, the right is so significant that the Defendant must make a knowing, voluntary, and intelligent waiver of the alleged right. *Id.* at 450, ¶ 12, 46 P.3d at 1071. Nothing in *Stewart*, however, overrides other Rule 32 requirements, including timeliness. *See State v. Lopez*, 234 Ariz. 513, 515, ¶ 8, 323 P.3d 1164, 1166 (App. 2014).

In sum, Defendant fails to state a claim for which relief can be granted in a successive Rule 32 proceeding. Defendant must assert substantive claims and adequately explain the reasons for their untimely assertion. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet this standard.

C. Remaining Requests

In addition, Defendant claims that he has not received the case file from prior counsel and lacks the grand jury transcript. (Notice at 3, 4) He is entitled to receive both. *See Ariz. R. Crim. P. 12.8(c)*. Because Defendant has failed to state a colorable claim for post-conviction relief, the Court declines to order preparation of the transcripts and other items. In any event, Defendant has failed to explain why those other items would support a claim for post-conviction relief.

IT IS THEREFORE ORDERED dismissing Defendant's "Notice of Petition of P.C.R. 16A A.R.S. Rules of Crim. P. 32.2(B)" pursuant to Ariz. R. Crim. P. 32.2(b).

IT IS FURTHER ORDERED that Jamie Allen Jackson must produce Defendant's entire file, including all notes, correspondence, and transcripts in counsel's possession, to Defendant no later than January 30, 2019. Mr. Jackson must file a Notice of Compliance with the foregoing order by that date. The Notice of Compliance must contain an itemized list of what constituted "the file."

SUPERIOR COURT OF ARIZONA
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CLERK OF THE COURT

HONORABLE DANIELLE J. VIOLA
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

ROBERT EARL ROBINSON (001)

ROBERT EARL ROBINSON
317425 ASPC RED ROCK
CORRECTIONAL CENTER
1752 E ARICA RD
ELOY AZ 85131
JAMIE ALLEN JACKSON

COURT ADMIN-CRIMINAL-PCR
JUDGE VIOLA

RULE 32 PROCEEDING DISMISSED

Pending before the Court is Defendant's "Notice of Petition of P.C.R. 16A A.R.S. Rules of Crim. P. 32.2(B)" filed on December 10, 2018. This is Defendant's third Rule 32 proceeding. It is successive.

A. Background

After a mistrial, Defendant entered into a plea agreement and pled guilty to second-degree murder, a class 1 dangerous felony. On March 17, 2017, the Court entered judgment and sentenced Defendant to a 15-year term of imprisonment. This Court summarily dismissed Defendant's previous Rule 32 proceedings. He did not seek review.

B. Rule 32.1(a) Claims

In his current submission, Defendant contends that his conviction and sentence were obtained in violation of his Sixth and Fourteenth Amendment rights, thereby entitling him to relief under Ariz. R. Crim. P. 32.1(a). (Notice at 2) Specifically, Defendant claims that the plea

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IT IS FURTHER ORDERED granting Defendant's request for the grand jury transcript. The Rule 32 Management Unit must mail a redacted copy of the grand jury transcript, eliminating the identifying information, to Defendant.

IT IS FURTHER ORDERED denying the remaining requests.

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are neither solely cumulative nor impeaching; the facts are material; and the facts probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e). To put it another way, an evidentiary hearing is warranted if Defendant alleges facts which, “if true, would *probably* have changed the verdict or sentence.” *State v. Amaral*, 239 Ariz. 217, 220, ¶ 11, 368 P.3d 925, 928 (2016) (emphasis in original). Importantly, “[e]vidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence.” *Saenz*, 197 Ariz. at 490, ¶ 13, 4 P.3d at 1033. Defendant provides an affidavit from Lawrence McElrathbey, stating that Mr. McElrathbey was present on the day of the offense and had heard the victim earlier state that he was going to try to turn Defendant’s gun toward Defendant and intended to rob Defendant. [Aff. at 1]

This Rule 32.1(e) claim is not colorable. As a threshold matter, this witness is not newly discovered. Mr. McElrathbey was disclosed early in the case and was known to the parties, defense counsel, and the Court. Specifically, the State first identified Mr. McElrathbey as a witness on May 28, 2014 in its initial disclosure statement. He was later identified as having been present during the incident as referenced in the State’s Motion for deposition filed October 5, 2016. Further he was listed as a trial witness in the Joint Pre-Trial Statement filed October 18, 2016. Defendant has presented no information to establish that he did anything to interview Mr. McElrathbey or otherwise secure his statement for trial or otherwise even though he was identified as a witness for the State. Moreover, the affidavit submitted was signed on October 16, 2018 and did not exist at trial.

In any case, the affidavit does little to undermine Defendant’s conviction. The submission is largely comprised of statements impeaching the victim and his family members. Mr. McElrathbey concedes that he and the victim were “getting high and drunk” during at least one of the conversations he describes.

In sum, Defendant fails to state a claim for which relief can be granted in an untimely Rule 32 proceeding. Defendant must assert substantive claims and adequately explain the reasons for their untimely assertion. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet this standard.

IT IS THEREFORE ORDERED dismissing Defendant’s Notice of Request for Post-Conviction Relief and “Memorandum in Support of Newly Discovered Evidence” pursuant to Ariz. R. Crim. P. 32.2(b).

IT IS FURTHER ORDERED denying the request to appoint counsel.