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20CA0006 Peo v Sayed 11-18-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA0006
Boulder County District Court No. 00CR1250
Honorable Bruce D. Langer, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Hazhar A. Sayed,

Defendant-Appellant.

ORDER AFFIRMED

Division II
Opinion by CHIEF JUDGE BERNARD
Davidson* and Casebolt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced November 18, 2021

Philip J. Weiser, Attorney General, Mariza Frias, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Katherine C. Steefel, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.



¶ 1 Defendant, Hazhar A. Sayed, appeals the postconviction court's order denying his most recent Crim. P. 35(c) motion. We affirm.

I. Background and Procedural History

¶ 2 Defendant, an Iraqi national living in the United States, pled guilty to attempted felony menacing. The original charges, which were dismissed as part of the plea agreement, were based on allegations that defendant had flicked a lit cigarette at the victim, hitting him in the neck. In March 2003, the trial court sentenced defendant to two years of probation. He did not file a direct appeal.

¶ 3 Between July 2004 and August 2013, defendant filed four postconviction motions under Crim. P. 35(c). In each of them, he sought to withdraw his guilty plea on the basis that his plea counsel had not advised him of the immigration consequences of his plea. He withdrew the first motion before the postconviction court ruled on it. The court denied the remaining three — filed in 2007, 2010, and 2013 — as time barred. Defendant appealed two of these orders, and divisions of this court affirmed them. *People v. Sayed*, (Colo. App. No. 08CA0864, Dec. 18, 2008)(not published

pursuant to C.A.R. 35(f); *People v. Sayed*, (Colo. App. No. 10CA2660, Feb. 9, 2012)(not published pursuant to C.A.R. 35(f)).

¶ 4 In December 2019, defendant filed a fifth Crim. P. 35(c) motion, which is the subject of this appeal. He again sought to withdraw his guilty plea based on ineffective assistance of plea counsel. But, this time, he asserted that counsel had provided ineffective assistance by misadvising him about the elements of felony menacing. Counsel, he continued, informed him that “attempted felony menacing [was] a class 6-felony” when it should have been “classified as a class 3-misdemeanor” because it was an attempt to commit the crime of menacing and because defendant had not used “a deadly weapon against anyone.”

¶ 5 Defendant recognized that his motion was untimely, but he asserted that “he should be allowed [the] justifiable excuse or excusable neglect exception” to the time bar “due to ineffective assistance of counsel.” Namely, he claimed that his untimely filing resulted from plea counsel’s “affirmative and erroneous advice, which caused him to neglect to pursue timely collateral relief.”

¶ 6 The postconviction court denied defendant’s motion without a hearing, concluding that it was time barred and that defendant had

not alleged circumstances amounting to justifiable excuse or excusable neglect.

II. Discussion

¶ 7 Defendant's conviction was final in March 2003, when he was sentenced on his guilty plea. *See People v. Hampton*, 857 P.2d 441, 444 (Colo. App. 1992)(where no direct appeal is pursued, a conviction becomes final when defendant's judgment of conviction is entered and sentence is imposed), *aff'd*, 876 P.2d 1236 (Colo. 1994). He had until March 2006 to file a Crim. P. 35(c) motion collaterally attacking his conviction. *See* § 16-5-402(1), C.R.S. 2021 (imposing a three-year time limit for collateral attacks on non-class 1 felony convictions). In other words, he filed the motion that is the subject of this appeal more than thirteen years too late. We therefore conclude that the record supports the trial court's determination that the motion was time barred.

¶ 8 There is an exception to the time bar: Can a defendant establish justifiable excuse or excusable neglect for the untimely filing? *See* § 16-5-402(2)(d). But defendant's allegations of justifiable excuse or excusable neglect in his motion were inadequate, alleging only a conclusory assertion that plea counsel's

“affirmative and erroneous advice” had caused him to neglect to pursue timely collateral relief. As we understand his motion, he claimed that, when he pled guilty, counsel (1) did not advise him that “a cigarette [was] not a deadly weapon”; and (2) did not ensure that “the terms of the plea were met.” Even assuming the truth of these allegations, they do not explain what may have prevented him from pursuing collateral relief until sixteen years after he had pled guilty. *See People v. Wiedemer*, 852 P.2d 424, 441 (Colo. 1993)(In determining the applicability of the justifiable excuse or excusable neglect exception, courts “consider the circumstances existing throughout the entire period from the inception of the conviction in question.”); *People v. Xiong*, 940 P.2d 1119, 1119-20 (Colo. App. 1997)(postconviction court may deny a postconviction motion without a hearing if the defendant fails to allege facts which, if true, would establish justifiable excuse or excusable neglect); *People v. Vigil*, 955 P.2d 589, 591-92 (Colo. App. 1997)(recent discovery of a legal basis for a collateral attack does not constitute justifiable excuse or excusable neglect when the defendant has not otherwise demonstrated some unavoidable hindrance that would cause a reasonably prudent person to neglect to pursue timely collateral

relief). We therefore conclude that the postconviction court did not err when it decided that the justifiable excuse or excusable neglect exception did not apply.

¶ 9 We are not persuaded by defendant's reliance on *People v. Chavez-Torres*, 2019 CO 59, to conclude otherwise. In *Chavez-Torres*, our supreme court was careful to limit the scope of its analysis "to [Crim. P. 35(c)] claims in which a noncitizen defendant alleges justifiable excuse or excusable neglect under subsection (2)(d) based on . . . plea counsel's purported failure to fulfill [a] legal duty to provide proper advice about the immigration consequences of [a] plea." ¶ 24. Although defendant has previously advanced such a claim, he did not do so in the motion that is the subject of this appeal. *Chavez-Torres* is therefore inapposite.

¶ 10 In any event, we agree with the prosecution that defendant's motion was also procedurally barred. As the prosecution notes, postconviction proceedings "are intended to prevent injustices after conviction and sentencing, not to provide perpetual review." *People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996). Consequently, with limited exceptions not alleged in defendant's motion, "[a] court shall deny any claim that could have been presented in an appeal

previously brought or postconviction proceeding previously brought.” Crim. P. 35(c)(3)(VII). Because defendant could have included his most recent ineffective assistance claim in one of his previous Crim. P. 35(c) motions, it is procedurally barred as successive. *See People v. Taylor*, 2018 COA 175, ¶ 20 (Where Crim. P. 35(c)(3)(VII) was in effect throughout the defendant’s case, the defendant “was on notice that he needed to include all of his postconviction claims in [his first] Crim. P. 35(c) motion.”); *see also People v. Vondra*, 240 P.3d 493, 494 (Colo. App. 2010)(appellate court can affirm the denial of postconviction relief on grounds different from those relied on by the postconviction court).

¶ 11 The order is affirmed.

JUDGE DAVIDSON and JUDGE CASEBOLT concur.

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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 18, 2022 CASE NUMBER: 2021SC942
Certiorari to the Court of Appeals, 2020CA6 District Court, Boulder County, 2000CR1250	
Petitioner: Hazhar A. Sayed, v.	Supreme Court Case No: 2021SC942
Respondent: The People of the State of Colorado.	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 18, 2022.

PLAINTIFF'S
EXHIBIT
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