



Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

April 11, 2022

RE: STATE OF ARIZONA v ROBERT CARRASCO GAMEZ
Arizona Supreme Court No. CR-21-0375-PR
Court of Appeals, Division Two No. 2 CA-CR 21-0076
Pima County Superior Court No. CR20021207-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 11, 2022, in regard to the above-referenced cause:

ORDERED: Petition for Review Pursuant to Ariz. R. Crim. P Rule 31.19(A) and 32.9(g) = DENIED.

Tracie K. Lindeman, Clerk

TO:

Linley Wilson
Myles A Braccio
Robert Carrasco Gamez, ADOC 131401, Arizona State Prison,
Florence - Eyman Complex-SMU #1 Unit
Itza C French
nm

CC: [redacted]

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT CARRASCO GAMEZ,
Petitioner.

No. 2 CA-CR 2021-0076-PR
Filed November 5, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20021207001
The Honorable Renee T. Bennett, Judge

REVIEW GRANTED; RELIEF DENIED

Robert Carrasco Gamez, Florence
In Propria Persona

STATE v. GAMEZ
Decision of the Court

Gamez's are waived when a defendant attempts to raise them in a successive proceeding.¹ Ariz. R. Crim. P. 32.2(a)(3). But, the rule exempts from preclusion claims raising "a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." *Id.* Even if Gamez's claims implicated such rights, however, he has not explained why any of his claims could not have been raised in the eighteen years since his convictions. Rule 32.2(b) provides for summary dismissal when "the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner." Thus, the trial court did not err in summarily dismissing Gamez's most-recent notice of post-conviction relief.

¶5 We grant review but deny relief.

¹Gamez appears to have abandoned his claim of newly discovered evidence.

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. RENEE T BENNETT

CASE NO. CR20021207

DATE: July 12, 2021

STATE OF ARIZONA

Plaintiff,

vs.

ROBERT CARRASCO GAMEZ

Defendant.

ORDER

SUMMARY DISMISSAL OF NOTICE OF POST-CONVICTION RELIEF

Pending before the Court is the defendant's Notice of Post-Conviction Relief filed on June 28, 2021. After a jury trial, Robert C. Gamez was convicted of Kidnapping (2 Counts), Armed Robbery (3 Counts), Aggravated Assault with a Dangerous Weapon/Deadly Instrument (8 Counts), Theft of Means of Transportation (3 Counts) and Criminal Damage (2 Counts). On June 13, 2003, he was sentenced to a total of 45 years in prison.

Appellate counsel found no arguable issues. However, the Court of Appeals determined the trial court found aggravating factors in violation of *Blakely v. Washington*¹, vacated the sentence and remanded the case for resentencing. At the resentencing hearing, the trial court imposed the same sentence.

//

¹ 542 U.S. 296 (2004)

Karla Montoya

Judicial Administrative Assistant

Post-Conviction Relief (PCR) Counsel found no issues to pursue. The defendant subsequently filed a *proper* Petition for Post-Conviction Relief, claiming his counsel was ineffective. On October 24, 2008, the court found no colorable claim and dismissed the Petition for Post-Conviction Relief.

The defendant filed two subsequent requests for post-conviction relief, one relating to restitution payments being withdrawn from his prisoner wages and another addressing a seizure of his mail or materials by the Federal Bureau of Investigation (FBI) in 2017. Both were dismissed for failing to state a claim cognizable under Arizona Rule of Criminal Procedure 32.

In his current PCR notice, Gamez claims trial, appellate and PCR counsel were ineffective in challenging an illegal search and seizure, visibility of his shackles, failing to sever the case from his co-defendant, failure to withdraw for a conflict of interest, failure to investigate alibi witnesses and prosecutorial misconduct. He also claims newly discovered material facts.

The newly discovered material facts claim is expressly based upon cell phone records which prove illegal search and seizure. However, Gamez also describes a declaration signed by his co-defendant² that summarized the co-defendant's cooperation with authorities. Gamez claims the co-defendant received pretrial release and a lighter sentence in exchange for testifying against him.

Gamez asserts the notice was not timely filed because he didn't have access to his legal files for eighteen months because said files were seized by the FBI in 2017.

² Although Gamez had no co-defendant in CR20021207, CR20020931-002 involving Marin Soto was consolidated for trial. Soto was convicted of Aggravated Assault on a Police Officer and sentenced to the presumptive term of 10.5 years in the DoC.

CLAIMS THAT ARE TIME BARRED**CLAIMS UNDER RULE 32.1(a)**

A petitioner must file a notice for a claim under Rule 32.1(a), conviction obtained or sentence imposed in violation of the United States or Arizona Constitutions, no later than ninety (90) days after the oral pronouncement of sentence or no later than thirty (30) days after the issuance of the mandate in the direct appeal, whichever is later. Ariz. R. Crim. P. 32.4(b)(3)(A). The court must excuse an untimely notice if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault. Ariz. R. Crim. P. 32.4(b)(3)(A).

Gamez's claims for ineffective assistance of counsel are grounded in Rule 32.1(a), relief based on conviction obtained or sentence imposed in violation of the United States or Arizona Constitutions. *State v. Petty*, 225 Ariz. 369, 373, ¶ 11 (App. 2010).

In this case, the appellate mandate issued on June 10, 2005. Gamez's initial Petition for Post-Conviction Relief was dismissed on October 24, 2008. An alleged seizure of Gamez's legal files in 2017 does not justify his failure to file these claims in a timely manner.

THE COURT FINDS these claims were not timely filed.

THE COURT FURTHER FINDS Gamez failed to adequately explain why his failure to timely file was not his fault. Thus, his untimely filing of these claims is not excused.

CLAIMS UNDER RULE 32.1(e)

Claims under Rule 32.1(b) through (h) must be filed within a reasonable time after discovering the basis for the claim. Ariz. R. Crim. P., Rule 32.4(b)(3)(B). Gamez's claims of newly discovered material facts fall within Rule 32.1(e).

Gamez expressly asserts the newly discovered material facts are cell phone records which prove an illegal search and seizure. He provides no facts from which the Court could conclude he filed these claims within a reasonable time after discovering the basis for the claim. It has been over 17 years since the jury trial was conducted, and presumably, the relevant cell phone records were created.

Gamez implicitly claims newly discovered material facts regarding his co-defendant testifying against Gamez in exchange for pretrial release and a reduced sentence in his case. Gamez states he was possession in 2017 of a declaration summarizing his co-defendant's cooperation agreement. He further asserts the declaration was no longer in his legal file when it was returned to him eighteen months later.

The facts provided do not justify Gamez's delay in filing this notice. He purportedly discovered the alleged basis for a claim in 2017 or prior thereto. Even if Gamez had good reason to delay filing until his legal records were allegedly returned in 2018 or 2019, he failed to file within a reasonable time.

THE COURT FINDS the petitioner has failed to demonstrate his newly discovered material facts claims were filed within a reasonable time after discovering the basis thereof.

Karla Montoya

Judicial Administrative Assistant

For these reasons,

THE COURT FINDS Gamez's claims are untimely and subject to summary dismissal.

CLAIMS THAT ARE PRECLUDED

A defendant is precluded from relief under Rule 32.1(a) if the claim: (1) is still raiseable on direct appeal or in a post-trial motion; (2) was finally adjudicated on the merits in an appeal or in any previous collateral proceedings; or (3) was waived at trial, on appeal, or in any previous collateral proceedings, except when the claim raises a constitutional right that can only be waived knowingly, voluntarily and personally by the defendant. Ariz. R. Crim. P. Rule 32.2(a).

Gamez asserted a claim of ineffective assistance of trial defense counsel in his first Notice of Post-Conviction Relief. The court found no colorable claim. He failed to raise ineffective assistance of appellate or PCR counsel, or prosecutorial misconduct, in any of his three prior notices and/or petitions.

THE COURT FINDS these claims do not involve a right of sufficient constitutional magnitude so as to require personal waiver by the defendant.

THE COURT FINDS the petitioner's ineffective assistance of trial, appellate and PCR counsel are precluded.

Claims under Rule 32.1(b) through (h) are exempt from preclusion. Ariz. R. Crim. P. Rule 32.2(b). However, in a successive or untimely notice, the defendant must provide sufficient reasons why he did not raise the claim in a previous notice or petition. *Id.*

In his PCR Petition filed on April 13, 2018, in the context of requesting relief from the alleged seizure of his legal files by the FBI in 2017, Gamez stated he had been working on a claim for post-conviction relief based on Soto's cooperation with authorities. However, he does not assert an independent claim on that basis.

Gamez's claim of newly discovered material facts are not precluded. However,

As described above in addressing timeliness,

THE COURT FINDS the defendant failed to provide a sufficient reason why he did not raise the claim in a previous notice or petition.

For these reasons, summary dismissal is appropriate.

NEWLY DISCOVERED MATERIAL FACT

Even if Gamez's claim of newly discovered material facts was not subject to summary dismissal for being untimely and precluded, it would fail based on failure to present a colorable claim.

A defendant is entitled to an evidentiary hearing regarding a claim of newly discovered evidence if he or she presents a "colorable claim." *State v. Amaral*, 239 Ariz. 217, 219 ¶9, 368 P.3d 925, 927 (2016), citing, *State v. Bilke*, 162 Ariz. 51, 52, 781 P.2d 28, 29 (1989).

There are five requirements for presenting a colorable claim of newly discovered evidence:

- (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
- (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
- (3) the evidence must not simply be cumulative or impeaching;
- (4) the evidence must be relevant to the case;
- (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Id.

The court in *Amaral* clarified the standard for entitlement to a Rule 32 evidentiary hearing. *Id.* at 219-220 ¶10 and 11. The relevant inquiry for determining whether the petitioner is entitled to an evidentiary hearing is whether he has alleged facts, which, if true, would probably have changed the verdict or sentence. *Id.* at 220 ¶11. If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal. *Id.*, citing Ariz. R. Crim. P. 32.6(c).

As noted on appeal, Gamez's convictions were fully supported by his own testimony, fingerprints and DNA at the crime scenes, as well as the testimony of the owners of two of the vehicles he stole.

THE COURT FINDS neither the cell phone records nor Soto's alleged cooperation with authorities would probably have changed the verdicts or sentence.

Karla Montoya

Judicial Administrative Assistant

CONCLUSION

THE COURT FINDS summary dismissal based on this Notice of Post-Conviction relief is appropriate. Ariz.R.Crim.P. Rule 32.6(d)(1).

Accordingly, **IT IS ORDERED** the Notice of Post-Conviction Relief is summarily **DISMISSED**.

Renee T. Bennett 1sl
HON. RENEE T. BENNETT
(ID: cb930cf8-b82f-42fb-9066-76eed0327f54)

cc: Hon. Renee T Bennett
Ashley C Enderle, Esq.
Robert Carrasco Gamez

Karla Montoya
Judicial Administrative Assistant