Rec 10·7·22 Appendix C

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: October 4, 2022
Certiorari to the Court of Appeals, 2019CA1284 District Court, Arapahoe County, 1996CR589	
Petitioner: Christopher Ashley Shetskie, **v.**	Supreme Court Case No: 2022SC331
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, OCTOBER 4, 2022.

Appendix A

19CA1284 Peo v Shetskie 02-10-2022

COLORADO COURT OF APPEALS

DATE FILED: February 10, 2022

Court of Appeals No. 19CA1284
Arapahoe County District Court No. 96CR589
Honorable Ben L. Leutwyler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Christopher Ashley Shetskie,

Defendant-Appellant.

ORDER AFFIRMED IN PART, REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by CHIEF JUDGE ROMÁN
Berger and Yun, JJ., concur

Prior Opinion Announced December 2, 2021, WITHDRAWN
Petition for Rehearing GRANTED

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 10, 2022

Philip J. Weiser, Attorney General, Brian M. Lanni, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Christopher Ashley Shetskie, Pro Se

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¶ 1 Defendant, Christopher Ashley Shetskie, appearing pro se, appeals the postconviction court's order denying his Crim. P. 35(c) motion for postconviction relief. We affirm in part, reverse in part, and remand for further proceedings.

I. Background

¶ 2 In 1996, the People charged defendant with first degree murder (after deliberation), first degree murder (felony murder), first degree burglary, aggravated robbery, attempted first degree sexual assault, second degree kidnapping, second degree assault, aggravated first degree motor vehicle theft, third degree sexual assault, attempted second degree assault, and a violent crime penalty enhancer for the murder of K.M. and the assault of her sister, A.M.

¶ 3 The parties reached a plea disposition in which defendant agreed to plead guilty to first degree felony murder, second degree kidnapping, a violent crime penalty enhancer, and second degree burglary. Defendant also agreed to plead guilty to first degree murder (after deliberation) in a separate Park County case. In exchange, the prosecution agreed to dismiss the remaining charges in this case. The trial court sentenced defendant in January 1997;

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according to the parties' stipulation, defendant received a sentence of life without parole for first degree murder.

¶ 4 In January 2019, defendant filed a pro se Crim. P. 35(c) motion. The postconviction court summarily denied defendant's motion in a written order. Defendant now appeals.

II. Analysis

¶ 5 Defendant contends the postconviction court erred when it summarily denied his claims that (1) the felony murder statute is unconstitutional on its face; (2) his trial attorneys were ineffective; and (3) the determination of the Department of Corrections (DOC) to classify defendant as a sex offender was erroneous. We agree with defendant that an evidentiary hearing is warranted on one of his claims of ineffective assistance of counsel. Otherwise, we affirm.

A. Untimeliness

¶ 6 Before turning to the merits of defendant's claims, we first consider the untimeliness of his Crim. P. 35(c) motion — an issue that the trial court did not consider but that we may address because the untimeliness of some of the issues is clear from the motion and the record. *See* § 16-5-402(1.5), C.R.S. 2021; *People v.*

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Knoeppchen, 2019 COA 34, ¶ 32, *overruled on other grounds by People v. Weeks*, 2021 CO 75.

¶ 7 Defendant filed his Crim. P. 35(c) motion more than nineteen years after his convictions became final and did not assert any justifiable excuse or excusable neglect for the late filing. Therefore, the motion was timely only as to his conviction for first degree felony murder, a class 1 felony, but not as to his other convictions for second degree kidnapping and second degree burglary. *See* § 16-5-402(1) (establishing no time limit for collateral attacks as to class 1 felonies, a limit of three years as to all other felonies, and a limit of eighteen months as to misdemeanors); *see also People v. Genrich*, 2019 COA 132M, ¶ 36 (limiting review of a Crim. P. 35(c) motion filed over three years after the defendant's convictions to his class 1 felony convictions and deeming it untimely as to his other convictions); *People v. Stovall*, 2012 COA 7M, ¶¶ 36-37 (concluding that the extended time for filing collateral attacks as to class 1 felonies applies only to those specific charges, and not to other convictions arising out of the same criminal episode).

¶ 8 Accordingly, we consider defendant's claims only as they relate to his conviction for first degree felony murder.

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B. Constitutionality of the Felony Murder Statute

¶ 9 Defendant contends that the felony murder statute is unconstitutional on its face because it does not require proof of intent to cause the death of another. As the People point out, however, the Colorado Supreme Court has rejected virtually identical arguments. *People v. Morgan*, 637 P.2d 338, 345 (Colo. 1981); *Early v. People*, 142 Colo. 462, 473-75, 352 P.2d 112, 118-19 (1960); *see also People v. Jones*, 990 P.2d 1098, 1103 (Colo. App. 1999). Though defendant asserts in his reply brief that those decisions should be re-examined, we must follow decisions of the supreme court. *People v. Gladney*, 250 P.3d 762, 768 n.3 (Colo. App. 2010); *People v. Smith*, 183 P.3d 726, 729 (Colo. App. 2008).

C. Ineffective Assistance of Counsel

¶ 10 Defendant next argues that his trial attorneys were ineffective for (1) advising him to plead guilty in a separate Park County case; (2) advising him to take a plea agreement in this case that conferred no benefit upon him; (3) incorrectly advising him that, if he went to trial, the prosecution would not have to establish a mental state for the killing of K.M.; (4) failing to advise him of a viable defense; and

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(5) ignoring his instructions to file a notice of appeal. We consider each contention in turn.

1. Standard of Review and Applicable Law

¶ 11 We review the postconviction court's summary denial of a Rule 35(c) motion de novo. *People v. Luong*, 2016 COA 13M, ¶ 7.

¶ 12 In a Crim. P. 35(c) proceeding, the conviction is presumed valid and the defendant bears the burden of proving his entitlement to postconviction relief. *Dunlap v. People*, 173 P.3d 1054, 1061 (Colo. 2007).

¶ 13 To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Davis v. People*, 871 P.2d 769, 772 (Colo. 1994) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

¶ 14 A defendant must do more than allege ineffective assistance in vague or conclusory terms. *People v. Osorio*, 170 P.3d 796, 799 (Colo. App. 2007). To obtain a hearing on his motion, the defendant must allege specific facts that would demonstrate (1) his counsel's representation fell below an objective standard of reasonableness; and (2) a reasonable probability that, but for counsel's

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unprofessional errors, the result of the proceeding would have been different. *People v. Mills*, 163 P.3d 1129, 1133 (Colo. 2007).

¶ 15 Counsel's performance is deficient when the representation falls below "an objective standard of reasonableness." *Dunlap*, 173 P.3d at 1063. A strong presumption exists that counsel provided adequate assistance and exercised reasonable professional judgment with regard to significant decisions. *People v. Hickey*, 914 P.2d 377, 379 (Colo. App. 1995). Thus, the defendant must overcome a strong presumption that counsel's challenged action may have been sound strategy. *People v. Trujillo*, 169 P.3d 235, 238 (Colo. App. 2007) (citing *Strickland*, 466 U.S. at 689). To overcome this presumption, the defendant must establish that his counsel made one or more errors that were so flagrant that they more likely resulted from neglect or ignorance rather than from informed professional deliberation. *Strickland*, 466 U.S. at 690.

¶ 16 "In the context of a guilty plea, the prejudice prong requires the defendant to 'show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *People v. Sifuentes*, 2017 COA 48M, ¶ 20, *as modified on denial of reh'g* (June 15, 2017)

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(quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "'Reasonable probability' means a probability sufficient to undermine confidence in the outcome and is a standard 'somewhat lower' than a preponderance of the evidence." *Id.* (quoting *Strickland*, 466 U.S. at 694).

¶ 17 "Because a defendant must show both deficient performance and prejudice, a court may resolve the claim solely on the basis that the defendant has failed in either regard." *People v. Karpierz*, 165 P.3d 753, 759 (Colo. App. 2006).

¶ 18 A postconviction court may deny a Rule 35(c) motion without a hearing only where the motion, files, and record in the case clearly establish that the allegations presented in the motion lack merit and do not warrant postconviction relief. *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003). In other words, the postconviction court must hold a hearing unless the defendant's allegations are bare and conclusory in nature; the allegations, even if true, do not warrant postconviction relief; the allegations raise only an issue of law; or the record directly refutes the defendant's allegations. *People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005).

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2. Discussion

a. Park County Plea Deal

¶ 19 At the outset, we reject defendant's allegations of ineffective assistance of counsel pertaining to the separate Park County case. Defendant is required to bring any claims regarding his plea in that case to the court that sentenced him. Crim. P. 35(c)(3) ("One who is aggrieved and claiming either a right to be released or to have a judgment of conviction set aside . . . may file a motion *in the court which imposed the sentence* . . . .") (emphasis added); *see Duran v. Price*, 868 P.2d 375, 378 (Colo. 1994) ("Crim. P. 35(c) motions . . . must be filed in the court rendering the sentence because that court maintains the records relating to the conviction and sentence.").

b. Arapahoe County Plea Deal

i. Plea Deal Conferred A Benefit

¶ 20 Defendant argues the postconviction court erred by summarily denying his claim that his attorneys were ineffective because they advised him to take a plea deal that conferred no benefit upon him. Again, we disagree. At the time defendant pled guilty, his plea (1) dismissed several other felony charges and (2) spared him the

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possibility of receiving the death penalty for felony murder. *See* § 18-3-102(1)(b), C.R.S. 1996; § 16-11-103(1)(a), C.R.S. 1996. Accordingly, defendant fails to plead facts that would entitle him to postconviction relief. *See Osorio*, 170 P.3d at 800 (affirming summary denial of an ineffective assistance of counsel claim that was belied by the record).

ii. Counsel Properly Advised Defendant Regarding Felony Murder Mental State

¶ 21 We reject defendant's second assertion that his attorneys were ineffective for advising him that the prosecution would not have been required to prove a culpable mental state with respect to the killing of K.M. As we have established, the supreme court and divisions of this court have consistently held that "[t]he only culpable mental state for felony murder is the intent to commit the underlying felony." *People v. Roark*, 643 P.2d 756, 773 (Colo. 1982); *see supra* Part II.A. Thus, counsel's advice was accurate, and defendant again fails to plead facts that would entitle him to postconviction relief.

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iii. Counsel Failed to Inform Defendant of Viable Defenses

¶ 22 Defendant next argues that the postconviction court erred by summarily denying his claim that his attorneys were ineffective for advising him that he had no viable defense to felony murder and that, but for this advice, he would not have taken a plea deal. We disagree.

¶ 23 Defendant's argument relies on facts argued in his postconviction motion — namely, that he restrained the victims, ransacked their home, and left. Then, when defendant went back to the home to look for his cigarettes, K.M. had escaped her restraints, she stabbed defendant in the back, and he "ended up killing her." Thus, defendant argues that he could have advanced a defense at trial that he did not kill K.M. in the course of, in furtherance of, or during his immediate flight from his commission of the felony offenses he was charged with as a predicate for felony murder — burglary, kidnapping, robbery, or sexual assault. Rather, defendant argues that his commission of those felonies ended when he left the victims' home the first time and that he killed K.M. while trespassing, which is not a predicate offense for felony murder.

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¶ 24 The postconviction court rejected defendant's claim because "the facts which support [d]efendant's theory also comport with the elements necessary to prove felony murder, [so] defense counsel were not ineffective in failing to assert [d]efendant's theory of the case." In this context, however, we ask "not whether the defendant likely would have been acquitted at trial but whether counsel's conduct affected the outcome of the plea process." *Sifuentes*, ¶ 20 (citing *People v. Corson*, 2016 CO 33, ¶ 35).

¶ 25 The record nevertheless supports the postconviction court's ultimate conclusion that defendant is not entitled to a hearing on this claim. *People v. Gutierrez-Vite*, 2014 COA 159, ¶ 11 ("We may affirm a trial court's ruling on grounds different than those employed by the court, so long as the record supports them."). There is no indication from defendant's Rule 35(c) motion or the record in this case that defendant ever presented this new version of events to his counsel or the court when he pled guilty or in the twenty years since. Further, defendant repeatedly admitted guilt with respect to each element of felony murder and affirmed he understood (1) the nature and elements of the offense; (2) that he was pleading guilty; and (3) that there were "sufficient facts in this

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case which could be presented at trial and which would result in a strong likelihood of conviction in this charge." Defendant then reaffirmed in a 1997 motion to reconsider his sentence that he agreed with his guilty plea. While defendant disputed several factual allegations in that motion, he did not allege any of the facts he now cites in support of his Rule 35(c) motion.

¶ 26 Because defendant's new factual claims are belied by his repeated admissions and assurances in the record, defendant does not assert sufficient facts to support his claim that counsel knew of this version of events, much less that they failed to act on it during the plea process. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Accordingly, we reject defendant's ineffective assistance of counsel claim in this regard.

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iv. Counsel Disregarded Defendant's Request to File an Appeal

¶ 27 We agree with defendant's assertion that the postconviction court erred by summarily denying his claim that defense counsel was ineffective for ignoring his requests to file a notice of appeal.

¶ 28 "[T]he United States Supreme Court has said that 'a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.'" *People v. Hunt*, 2016 COA 93, ¶ 41 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000)). While the trial court accurately concluded that, "[g]enerally, a guilty plea precludes review of issues that arose prior to the plea," *Neuhaus v. People*, 2012 CO 65, ¶ 8, defendant may raise issues on direct appeal that arose after the entry of his guilty plea. Thus, because defendant has again alleged facts that, if proved true, could warrant relief, we remand for an evidentiary hearing to provide defendant an opportunity to prove his allegation that his attorneys "disregarded

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[his] specific instructions" to file a direct appeal.[1] *See Hunt*, ¶¶ 44-45.

D. Sex Offender Classification

¶ 29 Finally, defendant argues that the postconviction court erred by summarily denying his claims that the DOC's decision to classify him as a sex offender in 2002 (1) violated the terms of his plea agreement and (2) was erroneous. We disagree.

1. The DOC's Classification Did Not Violate the Terms of Defendant's Plea Agreement

¶ 30 Defendant first asserts that the DOC's decision to classify him as a sex offender was erroneous because the parties stipulated that, as a term of his plea agreement, no charge would relate to any sexual offense, and the court made such a record at defendant's providency hearing. We disagree because, at the time of defendant's classification, the DOC had authority to classify

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[1] We note that counsel's failure to file an appeal is not per se ineffective. Defendant still must establish at a hearing that (1) counsel failed to consult or deficiently consulted with defendant regarding an appeal; and (2) the deficient performance was prejudicial because "there is a reasonable probability that, but for counsel's deficient failure to consult with [defendant] about an appeal, [defendant] would have timely appealed." *Roe v. Flores-Ortega*, 528 U.S. 470, 478-84 (2000).

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defendant as a sex offender regardless of any stipulation or judicial record. § 16-22-103(2)(d), C.R.S. 2002.

¶ 31 In 2002, the General Assembly enacted the Colorado Sex Offender Registration Act (the Act). Ch. 297, sec. 1, 2002 Colo. Sess. Laws 1157. As pertinent here, at the time the DOC classified defendant as a sex offender in 2002, the Act expressly authorized the DOC to determine whether the underlying factual basis for defendant's crimes did or did not include unlawful sexual behavior, regardless of whether there had been a stipulation or judicial finding otherwise. § 16-22-103(2)(d); *see Vondra v. Colo. Dep't of Corr.*, 226 P.3d 1165, 1168 (Colo. App. 2009) (Section 16-22-103(2)(d) "did not bind the DOC to any stipulations by the district attorney or any findings by the district court with regard to whether the offense of which the person is convicted includes an underlying factual basis involving unlawful sexual behavior.").

¶ 32 While defendant is correct that the current version of section 16-22-103(2)(d), C.R.S. 2021 — which the General Assembly amended in 2008 — *does* provide that a stipulation or judicial finding is binding upon the DOC, that amendment does not retroactively apply to DOC classifications that preceded it. *Vondra*,

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226 P.3d at 1168-69. Accordingly, the DOC's classification did not violate the terms of defendant's plea.

2. The Postconviction Court Lacked Jurisdiction to Address the Remainder of Defendant's Claims

¶ 33 Defendant also argued in his Crim. P. 35(c) motion that the DOC's classification (1) "directly contradicted the court's factual findings"; (2) was "contrary to the effective dates" set forth within the Act; and (3) violated the subsequently amended version of the act.

¶ 34 However, just as the postconviction court did, we reject defendant's claims because they are not cognizable under Crim. P. 35(c). *See People v. Jones*, 222 P.3d 377, 380 (Colo. App. 2009) (defendant's challenge to his classification as a sex offender must be brought as a civil action against the DOC and not under Crim. P. 35(c)); *Vondra*, 226 P.3d at 1167 ("The DOC's classification of an inmate as a sex offender is a quasi-judicial action subject to review under C.R.C.P. 106(a)(4).").

III. Conclusion

¶ 35 The order is affirmed in part, reversed in part, and remanded to the postconviction court for further proceedings.

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JUDGE BERGER and JUDGE YUN concur.

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