

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 11, 2023 CASE NUMBER: 2023SC255
Certiorari to the Court of Appeals, 2021CA1202 District Court, Broomfield County, 2005CR70	
Petitioner: Hazhar A. Sayed, v. Respondent: The People of the State of Colorado.	Supreme Court Case No: 2023SC255
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, SEPTEMBER 11, 2023.



21CA1202 Peo v Sayed 03-16-2023

COLORADO COURT OF APPEALS

DATE FILED: March 16, 2023
CASE NUMBER: 2021CA1202

Court of Appeals No. 21CA1202
City and County of Broomfield District Court No. 05CR70
Honorable Robert W. Kiesnowski, Jr., Judge
Honorable Donald S. Quick, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Hazhar A. Sayed,

Defendant-Appellant.

ORDERS AFFIRMED

Division I
Opinion by JUDGE LUM
Dailey and Johnson, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 16, 2023

Philip J. Weiser, Attorney General, Josiah Beamish, Assistant Attorney
General, Denver, Colorado, for Plaintiff-Appellee

Ruchi Kapoor, Alternative Defense Counsel, Denver, Colorado, for Defendant-
Appellant



¶ 1 Defendant, Hazhar A. Sayed, appeals the trial court's orders denying his most recent postconviction motion. We affirm.

I. Background

¶ 2 In 2006, a jury found Sayed guilty of sexual assault, and the trial court sentenced him to twenty-four years to life in prison. A division of this court affirmed the sentence and the order designating Sayed a sexually violent predator. *See People v. Sayed*, (Colo. App. No. 06CA2267, Apr. 26, 2007) (not published pursuant to C.A.R. 35(f)) (*Sayed I*). The mandate issued in August 2007.

¶ 3 In 2008, Sayed filed a pro se Crim. P. 35(b) motion for reconsideration of sentence. In 2013, he filed a supplemental motion for sentence reconsideration. It does not appear that the court resolved either motion.

¶ 4 Also in 2008, Sayed filed a pro se Crim. P. 35(c) motion for postconviction relief, in which he generally asserted ineffective assistance of trial counsel claims. After his first appointed postconviction counsel failed to take any action, Sayed was appointed a second postconviction counsel, who did not supplement his pro se motion and, instead, filed a motion for a new trial based on newly discovered evidence. The postconviction court

denied both the pro se Crim. P. 35(c) motion and counsel's motion for new trial. A division of this court affirmed the orders. See *People v. Sayed*, (Colo. App. No. 13CA2044, Oct. 8, 2015) (not published pursuant to C.A.R. 35(f)) (*Sayed II*). The mandate issued in April 2016.

¶ 5 In 2017, Sayed filed a pro se petition for DNA testing to prove his actual innocence. The postconviction court denied the motion, and a division of this court affirmed the order. See *People v. Sayed*, (Colo. App. No. 18CA0988, Sept. 5, 2019) (not published pursuant to C.A.R. 35(e)) (*Sayed III*).

¶ 6 While *Sayed III* was pending, Sayed filed two other pro se motions: a motion to correct an illegal sentence and a Crim. P. 35(b) motion. The postconviction court construed the Crim. P. 35(b) motion as substantively asserting an illegal sentence claim and denied both motions in separate orders. Sayed then separately appealed each order, but both appeals were dismissed without prejudice because the postconviction court entered the orders without jurisdiction while the case was pending on appeal concerning *Sayed III*. The record does not reflect that Sayed took any action to relitigate these motions after *Sayed III* was resolved

and the mandate had issued, returning jurisdiction to the postconviction court.

¶ 7 In 2020, Sayed filed the underlying “Motion to Permit Postconviction Claims to be Heard on Their Merits,” in which he alleged that postconviction counsel was ineffective for failing to assert ineffective assistance claims, or to supplement his pro se claims, relating to his earlier counsels’ performance at trial, on direct appeal, and with regard to Crim. P. 35(b) relief.

¶ 8 In a written order, the postconviction court first found that Sayed’s allegations that counsel failed to timely file a Crim. P. 35(b) motion, if true, may constitute deficient performance and may have resulted in prejudice to him. The court thus ordered that issue to be set for a hearing. The postconviction court next found that Sayed’s other claims were untimely but that postconviction counsels’ deficient performance was sufficient to constitute excusable neglect to permit its consideration of those claims. The court then summarily denied the claims as not warranting relief.

¶ 9 After a hearing, the postconviction court issued a written order denying Sayed’s request for a reduction of his sentence. Sayed now appeals.

II. Legal Authority and Standard of Review

¶ 10 A Crim. P. 35(c) motion must be filed within three years of a defendant's conviction for an offense other than a class 1 felony. § 16-5-402(1), C.R.S. 2022; Crim. P. 35(c)(3)(I). Where, as here, a defendant has filed a direct appeal, "the meaning of the word 'conviction' in section 16-5-402(1) refers to a conviction after a defendant's appeal has been exhausted." *People v. Hampton*, 876 P.2d 1236, 1240 (Colo. 1994); *see also People v. Alexander*, 129 P.3d 1051, 1056 (Colo. App. 2005). But, among other things, a postconviction claim shall be excluded from the three-year time limitation where a trial court finds that the "failure to seek relief within the applicable time period was the result of circumstances amounting to justifiable excuse or excusable neglect." § 16-5-402(2)(d).

¶ 11 Importantly, "[i]f an appellate court can determine on the face of the motion, files, and record in a case that a collateral attack is outside the [three-year time period], the . . . court may deny relief on that basis, regardless of whether the issue of timeliness was raised in the trial court." § 16-5-402(1.5).

¶ 12 Defendants have a limited statutory right to the appointment of postconviction counsel and the right to effective assistance of such counsel during postconviction proceedings. *Silva v. People*, 156 P.3d 1164, 1168 (Colo. 2007); *People v. Clouse*, 74 P.3d 336, 341 (Colo. App. 2002). A claim that postconviction counsel provided ineffective assistance is cognizable under Crim. P. 35(c) and must be timely asserted. *Clouse*, 74 P.3d at 341.

¶ 13 It has been recognized that ineffective assistance of postconviction counsel claims cannot be asserted until the conclusion of a postconviction proceeding and that section 16-5-402(1) does not allow additional time beyond its three-year time period for the completion of such a proceeding. *Clouse*, 74 P.3d at 341. Thus, “[b]ecause in many instances postconviction proceedings will consume and even exceed the limitation period as measured from the date of conviction, . . . timeliness of ineffective postconviction counsel claims must ordinarily be assessed under the rubric of justifiable excuse or excusable neglect.” *Id.*

¶ 14 “The defendant must allege facts that, if true, would establish justifiable excuse or excusable neglect in order to entitle [them] to a hearing on the applicability of this exception to the time bar.” *Close*

v. People, 180 P.3d 1015, 1019 (Colo. 2008). We review de novo “[w]hether the facts alleged, if true, would constitute justifiable excuse or excusable neglect pursuant to section 16-5-402(2)(d).” *People v. Chavez-Torres*, 2019 CO 59, ¶ 11.

III. Analysis

¶ 15 First, Sayed argues that the postconviction court erred by failing to hear evidence and argument, and to rule, on his claim of ineffective assistance of counsel regarding his application for Crim. P. 35(b) relief and by proceeding straight to a hearing on the issue of sentence reconsideration. Although the wording of the 2020 order is not definitive, it appears that the parties and the postconviction court treated the order as finding that counsel was ineffective in that respect. Nevertheless, even if the court erroneously failed to rule on Sayed’s claim, we deem such omission harmless because Sayed received the relief he sought from counsels’ asserted ineffective assistance — the court’s consideration of his Crim. P. 35(b) request for a reduced sentence. *See People v. Hartkemeyer*, 843 P.2d 92, 92 (Colo. App. 1992) (a trial court errs when it fails to make findings or conclusions of law in denying a

Crim. P. 35(c) motion but reversal is not required if the error was harmless).

¶ 16 We next conclude that the postconviction court did not err by denying the remainder of Sayed's claims, albeit on timeliness grounds. *See People v. Garcia*, 2012 COA 79, ¶ 62 ("We may affirm the trial court's judgment on any ground that is supported by the record."); *see also* § 16-5-402(1.5).

¶ 17 The record and Sayed's motion clearly demonstrate that, upon the issuance of the mandate from *Sayed II* in April 2016, Sayed knew or should have known that his postconviction counsel failed to sufficiently challenge the effectiveness of prior counsels' performance at trial and on direct appeal. Indeed, the record contains multiple filings dating back to 2007 in which Sayed alerted the court to his dissatisfaction with counsel in these matters.

¶ 18 In April 2016, a Crim. P. 35(c) claim of ineffective assistance of postconviction counsel, as well as claims of ineffective assistance of trial and direct appeal counsel, would have been untimely because more than three years had elapsed since the August 2007 issuance of the mandate from *Sayed I*. *See* § 16-5-402(1); *Hampton*, 876 P.2d at 1240. Thus, such claims could only be considered if they

fell within the justifiable excuse or excusable neglect exception to the time bar. *See Clouse*, 74 P.3d at 341.

¶ 19 Even assuming that Sayed had grounds for establishing justifiable excuse or excusable neglect through April 2016, *see id.*, he did not allege any facts that, if true, would demonstrate why his failure to assert the ineffective postconviction counsel claims until nearly four years later was the result of justifiable excuse or excusable neglect. *See id.* (The defendant failed to establish justifiable excuse or excusable neglect where “he proffered no reason . . . why he could not have presented his . . . allegations of ineffective postconviction counsel any earlier.”); *see also People v. Wiedemer*, 852 P.2d 424, 441 (Colo. 1993) (In determining whether a defendant established the justifiable excuse or excusable neglect exception, “it [is] appropriate to consider the circumstances existing throughout the entire period from the inception of the conviction in question” and “the extent to which a defendant having reason to question the constitutionality of a conviction investigates its validity and takes advantage of avenues of relief that are available to him.”). Indeed, after April 2016, Sayed continued to challenge his conviction and sentence by filing motions for DNA testing and to

correct his illegal sentence, as well as pursuing relief in federal court.

¶ 20 It appears that Sayed argued, and the postconviction court determined, that his ineffective postconviction counsel claims were, by themselves, sufficient to constitute excusable neglect. While ineffective assistance of counsel can constitute justifiable excuse or excusable neglect, *see Close*, 180 P.3d at 1019; *People v. Valdez*, 178 P.3d 1269, 1278 (Colo. App. 2007), a defendant must allege facts that, if true, would demonstrate that counsel's ineffective assistance *caused* the failure to timely file a postconviction motion. *See Chavez-Torres*, ¶¶ 6, 19-29 (plea counsel's deficient immigration advice may constitute ineffective assistance, which could establish justifiable excuse or excusable neglect to avoid the application of the time bar to the defendant's untimely claim); *Valdez*, 178 P.3d at 1279-80, 1282-83 (counsel's inaction on the defendant's postconviction motion constituted ineffective assistance, which established justifiable excuse or excusable neglect to avoid the application of the time bar to his untimely filed claims); *People v. Chang*, 179 P.3d 240, 242 (Colo. App. 2007) (counsel's inaction on the defendant's postconviction motion may constitute ineffective

assistance, which could establish justifiable excuse or excusable neglect to avoid the application of the time bar to his untimely filed claims).

¶ 21 If every ineffective assistance of postconviction counsel claim is deemed to constitute justifiable excuse or excusable neglect, then such claims will always be exempt from the timeliness requirements, regardless of the length of the delay in filing the claims. This scenario has been rejected. *See Clouse*, 74 P.3d at 341 (“Because . . . a defendant’s right to raise claims of ineffective postconviction counsel could lead to postconviction proceedings ad infinitum and be subject to misuse as a mechanism for avoiding the requirements of [section] 16-5-402, claims of ineffective postconviction counsel must themselves be timely asserted and pleaded with reasonable specificity.”) (citations omitted).

¶ 22 Here, because Sayed did not allege that postconviction counsels’ deficient performance through 2016 somehow caused his failure to thereafter assert the ineffective assistance claims until his 2020 motion, we conclude that he did not establish justifiable excuse or excusable neglect on that basis.

¶ 23 Therefore, we conclude that Sayed's motion was required to have been denied as untimely filed. *See* § 16-5-402(1.5).

IV. Disposition

¶ 24 The orders are affirmed.

JUDGE DAILEY and JUDGE JOHNSON concur.

**Additional material
from this filing is
available in the
Clerk's Office.**