

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

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0163-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
KENNETH T. DRAYTON II,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR93-06-00263

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Kenneth T. Drayton II

Florence
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Petitioner, Kenneth Drayton II, seeks review of the trial court’s order denying his fourth petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. In that petition, he argued his trial attorney had rendered ineffective assistance of counsel by

failing to adequately explain the potential prison sentence he could receive if he rejected the state's offered plea agreement. We will not disturb the trial court's ruling absent a clear abuse of its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶2 In 1995 a jury found Drayton guilty of four counts of armed robbery, three counts of kidnapping, two counts of sexual assault, three counts of aggravated assault, one count of burglary of a nonresidential structure, and one count of theft by control. He was sentenced to ninety-one years in prison. This court consolidated his direct appeal and first petition for post-conviction relief and affirmed his convictions, modified his three sentences for kidnapping, and denied post-conviction relief. *State v. Drayton*, Nos. 2 CA-CR 94-008, 2 CA-CR 95-0515-PR (consolidated) (memorandum decision filed June 11, 1996).

¶3 Drayton filed a second petition for post-conviction relief in 1998, arguing the trial court had erred in imposing consecutive sentences for some of his offenses under A.R.S. § 13-116, which precludes consecutive sentencing for acts punishable under multiple statutes. The trial court summarily dismissed the petition, finding it was untimely, two of the issues argued were precluded, and the claims were meritless. This court granted review but denied relief. *State v. Drayton*, No. 2 CA-CR 98-0446-PR (memorandum decision filed June 30, 1999).

¶4 In 2004, Drayton, represented by counsel, filed a third petition for post-conviction relief, again arguing his sentences were illegal for various reasons relating to the

trial court's consideration of aggravating and mitigating factors, statements made by the court during sentencing, and a subsequent change in the law. The trial court summarily denied relief, finding all of the issues raised were precluded because they had either been raised or could have been raised in his prior appeal and petitions for post-conviction relief. It does not appear that Drayton filed a petition for review of that ruling.

¶5 Drayton filed his fourth petition for post-conviction relief in 2007. In it, relying on *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), he contended for the first time that his trial counsel had rendered ineffective assistance by leading him to believe that, if convicted after trial, he would not receive a substantially longer prison sentence than the thirty-year sentence called for in the plea agreement offered by the state. He claimed he would have accepted the plea agreement had he known he could be sentenced to more than ninety years in prison. Drayton argued this claim was not precluded because *Donald* represented a significant change in the law that affected his case. *See* Ariz. R. Crim. P. 32.1(g), 32.2(b) (claims under Rule 32.1(g) not subject to preclusion).

¶6 The trial court summarily denied relief, finding the claim of ineffective assistance of counsel precluded because *Donald* did not represent a significant change in the law and because either Drayton or his counsel could have raised this claim before Division One's decision in *Donald*. Specifically, the court noted "the principles upon which the *Donald* court answered the question had been in existence for many years before [Drayton] committed the crimes for which he was convicted and sentenced."

¶7 On review, Drayton contends the trial court did not enter findings of fact as required by Rule 32.8, Ariz. R. Crim. P., and it erred in finding he had not presented a colorable claim of ineffective assistance of counsel. Preliminarily, we note that Rule 32.8 applies only to rulings made after evidentiary hearings on petitions for post-conviction relief. Under Rules 32.2(b) and 32.6(c), a trial court may summarily dismiss precluded, unsubstantiated, and meritless petitions without making specific findings of fact. Furthermore, Drayton has not persuaded us that the trial court abused its discretion in denying relief.

¶8 Even assuming, without deciding, that *Donald* was a significant change in the law and retroactively applied to Drayton’s case, Drayton’s claim is precluded. Drayton was represented by counsel in his third petition for post-conviction relief, filed several years after *Donald* was decided in 2000. Because counsel did not raise this issue in Drayton’s third petition, the claim is now precluded. *See* Ariz. R. Crim. P. 32.2(a)(3) (claims raisable in prior collateral proceeding precluded); Ariz. R. Crim. P. 32.2(b) (untimely claims based on significant change in law require “meritorious reasons . . . indicating why . . . claim was not stated in . . . previous petition).

¶9 Drayton has not demonstrated the trial court abused its discretion in summarily dismissing his fourth petition for post-conviction relief. Thus, although we grant Drayton’s petition for review, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge