

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

FILED BY CLERK

SEP 11 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0168-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
VINCENT WAYNE FRANCISCUS)	the Supreme Court
MCCOY,)	
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101040001

Honorable Danelle B. Liwski, Judge

REVIEW GRANTED; RELIEF DENIED

Lori J. Lefferts, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Petitioner

HOWARD, Chief Judge.

¶1 Petitioner Vincent McCoy seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App.

2007). As to the claims raised in his petition, McCoy has not sustained his burden of establishing such abuse.

¶2 Pursuant to a plea agreement, McCoy was convicted of aggravated assault. In November 2010, the trial court imposed an enhanced, “slightly aggravated” term of fifteen years’ imprisonment. At the sentencing, the victim spoke briefly about her injury, stating that a scar on her forehead would be permanent. The victim had also submitted to the county attorney a restitution affidavit stating she had incurred \$5,646.90 in medical expenses. That report was sent to defense counsel before sentencing. When restitution was discussed at sentencing, the prosecutor stated that the victim had “medical bills” totaling “about \$6,209,” but was uncertain as to whether an affidavit supporting that amount had been provided to defense counsel or the court. The court indicated it intended to order restitution “subject to a properly executed affidavit,” and if it was “not presented” McCoy could “ask [it] to vacate the order.” McCoy agreed, and the court ordered restitution to the victim in the amount of \$6,209.00.

¶3 In June 2012, McCoy initiated a proceeding for post-conviction relief, arguing in his petition that the trial court “should treat [his] notice of post-conviction relief as timely because it was filed [late] . . . through no fault of his own” and that the restitution order should be vacated “because no restitution affidavit was filed as the Court directed and the[r]e was no evidence supporting the restitution award.” The court concluded McCoy’s notice had been “untimely through no fault of his own” and treated it as timely. It denied McCoy’s request to vacate the award of restitution, but it reduced the amount of restitution to reflect the amount included in the victim’s affidavit.

¶4 On review, McCoy repeats his claim that the restitution order should be vacated and argues the trial court abused its discretion in ruling otherwise. He maintains he “has a right to challenge the sufficiency of evidence for the restitution award” under Rule 32.1(c). But, McCoy’s plea agreement provides that “[t]he victims’ restitution claim form shall be accepted as conclusive proof of the victims’ economic loss.” Thus, McCoy waived his right to a judicial determination of the amount of restitution—the victim’s affidavit was conclusive. However, because the state failed to produce an affidavit supporting the greater amount asserted at the sentencing hearing and originally granted by the court, the court properly corrected the amount to conform to the amount provided in the victim’s affidavit. The court’s ruling correctly and thoroughly addresses this issue, and we therefore adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (no purpose served by restating court’s correct ruling in its entirety).

¶5 McCoy also points out that the trial court did not address his claim of ineffective assistance of counsel. He maintains counsel was ineffective in failing to object when the state failed to file an affidavit within the time provided by the court. In his petition for post-conviction relief, this claim was made in the alternative, arguing that if the court concluded the restitution claim was precluded based on counsel’s having waived it by failing to object, counsel was ineffective. But the court did not conclude the claim had been waived by counsel’s failure to object. And, even had counsel objected, the lower amount provided in the existing affidavit would still have been properly ordered, based on McCoy’s plea agreement that left the amount of the restitution to be

determined by the court. Thus, McCoy has failed to establish that any other relief would have been appropriate in the context of a claim of ineffective assistance of counsel, even were it successful. Therefore, although we grant the petition for review, relief is denied.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Michael Miller

MICHAEL MILLER, Judge