

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

AUG 21 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0236-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MICHAEL ROONEY CORBIN,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCONINO COUNTY

Cause No. CR20090294

Honorable Joseph Lodge, Judge

REVIEW GRANTED; RELIEF DENIED

David Rozema, Coconino County Attorney
By Heather Mosher

Flagstaff
Attorneys for Respondent

H. Allen Gerhardt, Coconino County Public Defender
By H. Allen Gerhardt

Flagstaff
Attorneys for Petitioner

M I L L E R, Judge.

¶1 Petitioner Michael Corbin 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). Corbin has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Corbin was convicted of four counts of attempted sexual exploitation of a minor, all dangerous crimes against children. In March 2010, the trial court imposed a presumptive, ten-year term of imprisonment on the first count and suspended the imposition of sentence on the remaining counts, placing Corbin on lifetime probation. Pursuant to Corbin’s request, the court also made findings pursuant to A.R.S. § 13-603(L), to allow Corbin to petition the Board of Executive Clemency for commutation of his sentence after serving five years. The Board apparently recommended commutation, but the request was denied by the governor.

¶3 In January 2011, Corbin apparently wrote a letter to the trial court, which it treated as a petition for post-conviction relief and denied. Corbin filed other letters with the court, moving for reconsideration of that decision, but, in February 2012, the court denied his motion for reconsideration. Earlier, in December 2011, however, the court appointed counsel, apparently based on a recently filed notice of post-conviction relief. In March 2012, Corbin filed a petition for post-conviction relief, arguing he had received ineffective assistance of counsel based on counsel’s having planned to seek commutation or clemency from the Board of Executive Clemency rather than urging the court to refuse to enter the sentence in his plea agreement. He maintained that, because the prosecutor assigned to his case had indicated personal feelings that the ten-year sentence offered by his office was too long and the trial court also felt the sentence was excessive, counsel

should have urged the court to reject the plea in hopes that the prosecutor would offer a lesser plea instead.

¶4 The trial court granted Corbin a hearing on his petition, at which trial counsel testified about his strategic decision to pursue a clemency proceeding rather than risk the state withdrawing the plea and forcing Corbin to go to trial facing 100 years' imprisonment. The court thereafter denied relief. On review, Corbin repeats the arguments raised below and maintains the trial court abused its discretion in rejecting his claims because the sentencing judge had erred in permitting him to petition the clemency board and counsel was ineffective in seeking that relief rather than urging the court to impose a lesser sentence.

¶5 Although the trial court granted Corbin a hearing on his petition for post-conviction relief, it could properly have denied relief summarily, because Corbin's notice of post-conviction relief was untimely. For that reason, we affirm its decision. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason). As outlined above, the court initially treated Corbin's January 2011 letter, which does not appear in the record before us, as a petition for post-conviction relief and denied the petition, as well as a motion to reconsider its treatment of the letter as a Rule 32 petition. But, the court later suggested that the evidentiary hearing granted was being held as part of an ongoing proceeding. Thus, although the petition filed by counsel arguably could be viewed as a second proceeding, in which any claim of ineffective assistance of counsel would be

precluded, *see* Ariz. R. Crim. P. 32.2(a), (c), it does not appear that is what the court intended here.

¶6 But whether the letter or counsel’s petition is viewed as initiating the current proceeding for post-conviction relief, the record before us does not include a timely notice of post-conviction relief. Corbin was sentenced in March 2010 and the earliest document in the record before us that could be deemed a notice of or petition for post-conviction relief was the letter apparently written to the court in January 2011, clearly outside the ninety days provided by Rule 32. Ariz. R. Crim. P. 32.4(a). In an untimely petition for post-conviction relief, a petitioner may only raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). *Id.* Corbin has not established, or even suggested, that his claims fall under any of those subsections. The court therefore could have denied relief solely on that basis.

¶7 In any event, we cannot say the trial court abused its discretion in concluding Corbin had not received ineffective assistance of counsel. In reviewing a trial court’s ruling after an evidentiary hearing, we defer to that court with respect to its assessment of the witnesses’ credibility and its resolution of any conflicts in the evidence. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). We are mindful that “[t]he trial judge is in the best position to evaluate credibility and accuracy, as well as draw inferences, weigh, and balance” the evidence presented at the evidentiary hearing. *State v. Hoskins*, 199 Ariz. 127, ¶ 97, 14 P.3d 997, 1019 (2000), *quoting State v. Bible*, 175 Ariz. 549, 609, 858 P.2d 1152, 1212 (1993). Thus, “[w]e examine a trial

court's findings of fact after an evidentiary hearing to determine if they are clearly erroneous." *State v. Berryman*, 178 Ariz. 617, 620, 875 P.2d 850, 853 (App. 1994).

¶8 In this case, whatever the merits of counsel's strategy to seek relief before the board of clemency, we cannot say the trial court was clearly erroneous in concluding that counsel's performance was not deficient. As counsel pointed out, in the absence of a plea agreement, Corbin faced a minimum of 100 years' imprisonment. And counsel testified at some length about his strategic decision to pursue clemency rather than risk losing the plea agreement. Corbin's arguments on review amount to a request that we reweigh the evidence before the court; that we will not do. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993) (appellate court reviews evidence at post-conviction-relief hearing favorable to trial court's ruling and defers to trial court in resolving conflicts in evidence). For all these reasons, although we grant the petition for review, relief is denied.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge