

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAVID HENRY SHERMAN,
Petitioner.

No. 2 CA-CR 2013-0494-PR
Filed May 6, 2014

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

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20092773001

The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

David Sherman, North Port, Florida
In Propria Persona

STATE v. SHERMAN
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Petitioner David Sherman seeks review of the trial court’s order denying relief of 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). We find no such abuse here.

¶2 After a jury trial, Sherman was convicted of resisting arrest. In August 2010, the trial court suspended the imposition of sentence and placed Sherman on probation for eighteen months. The state filed a January 2011 petition to revoke probation, and, after Sherman admitted one of the allegations in the petition, the court revoked his probation and sentenced him to six months’ imprisonment. Sherman initiated a Rule 32 proceeding in March 2011, and, after appointed counsel notified the court she “was unable to find any claims for relief to raise” in a Rule 32 petition, Sherman filed a supplemental petition in November 2012.

¶3 In a May 2013 ruling, the trial court found the “myriad of claims” Sherman had raised were precluded, noting that with the exception of his claims of ineffective assistance of counsel, he could have raised the other claims on appeal. *See* Ariz. R. Crim. P. 32.2(a)(1), (3) (preclusion of claim “[r]aisable on direct appeal” or waived on appeal). And, Sherman did not file a direct appeal, nor did he assert or establish that his claim fell under Rule 32.1(f) (failure to file timely appeal without fault by defendant). The court found, however, that Sherman was entitled to an evidentiary hearing on his claims that trial counsel and the attorney who had represented him in the probation revocation proceedings had been ineffective.

STATE v. SHERMAN
Decision of the Court

Following an evidentiary hearing, at which Sherman, his parents, and his prior attorneys testified, the court denied Sherman's claims of ineffective assistance of counsel. This petition for review followed.¹

¶4 On review, Sherman argues he was denied "his right to face his accusers" when one of the detectives was not called to testify; the charges against him constituted a double jeopardy violation; and, the trial court improperly denied his motion for judgment of acquittal, filed pursuant to Rule 20, Ariz. R. Crim. P. To the extent he raised all of these claims in his petition below, they are precluded because he could have raised them in an appeal. *See* Ariz. R. Crim. P. 32.2(a)(1), (3). And, to the extent he may not have raised the first two issues in his petition below, we do not address them in any event. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (court of appeals does not address issues raised for first time in petition for review); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

¶5 Sherman also seems to argue the trial court erred by denying his claims of ineffective assistance of counsel, specifically that trial counsel was ineffective for advising him not to file an appeal and that the attorney who had represented him in the probation revocation proceeding was ineffective for advising him he would remain on probation if he admitted he had violated the conditions of his probation. Stating a colorable claim of ineffective assistance requires showing both that counsel's performance fell

¹Sherman mistakenly entitled his pro se petition for review an "Opening Brief" filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), avowing he had "been unable to find any arguably meritorious issue to raise under his Rule 32" and asking that we review for fundamental error. However, because it is clear he intended to file a petition for review from the trial court's denial of post-conviction relief and in fact raised several issues for our consideration, we treat his pleading as a petition for review.

STATE v. SHERMAN
Decision of the Court

below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

¶6 Here, Sherman fails to explain how the trial court erred by denying his claims of ineffective assistance of counsel or why he should have prevailed on them. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review shall contain reasons relief should be granted). In any event, ample evidence was presented at the evidentiary hearing to support the court's finding that "there was [not] any ineffective assistance of counsel" by either attorney. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993) (appellate court views evidence presented at evidentiary hearing in light most favorable to sustaining court's ruling and resolves all reasonable inferences against defendant).

¶7 In a related argument, Sherman contends the trial court erroneously permitted, over his objection, testimony that exceeded the scope of the evidentiary hearing and left him "ill-prepared" to prove the attorney who had represented him in the probation revocation matter had been ineffective. Although Sherman does not expressly state what his objection was or direct us to the location of that objection in the transcript of the evidentiary hearing, it appears he is complaining about his former attorney's testimony regarding a report that summarized Sherman's performance on probation. However, in the absence of any argument explaining why the admission of such testimony was improper, and in light of the fact that it related to his claim of ineffective assistance of counsel, the very issue that was the subject of the evidentiary hearing, we find no error.

¶8 In his final argument, Sherman asserts that placing him on probation "should raise questions if the application of the statu[t]e [for resisting arrest] is within the legislative intent." To the extent we understand Sherman's argument, we conclude that any claim related to the legality of the statute under which he was convicted is precluded. *See* Ariz. R. Crim. P. 32.2(a)(1), (3).

STATE v. SHERMAN
Decision of the Court

¶9 On the record before us, we agree with the trial court's assessment that Sherman failed to establish a claim of ineffective assistance of counsel and that his other claims were precluded. Accordingly, because we are unable to say the court abused its discretion, we grant the petition for review but deny relief.