

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BILLY BURTON,
Petitioner.

No. 2 CA-CR 2014-0261-PR
Filed September 3, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2009113204001SE
The Honorable Jeanne Garcia, Judge

REVIEW GRANTED; RELIEF DENIED

Billy Burton, San Luis
In Propria Persona

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which
Presiding Judge Miller and Judge Espinosa concurred.

STATE v. BURTON
Decision of the Court

E C K E R S T R O M, Chief Judge:

¶1 Billy Burton petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Burton has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Burton was convicted of burglary, armed robbery, and kidnapping and sentenced to concurrent prison terms of 15.75 years for each count. This court affirmed his convictions and sentences on appeal. *State v. Burton*, No. 1 CA-CR 09-0963 (memorandum decision filed May 24, 2011). Burton filed a notice of post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but had found no "claims for relief to raise in post-conviction relief proceedings."

¶3 Burton then filed a pro se petition raising various claims. He argued the trial court erred by: (1) giving legal advice to a witness; (2) admitting "prejudicial" photographs into evidence; (3) correcting a witness's testimony; (4) allowing trial counsel to waive Burton's presence for discussion of additional jury instructions; (5) permitting a hearing-impaired juror to remain on the panel; and, (6) denying Burton's motion for judgment of acquittal. Burton further claimed his trial counsel had been ineffective: (1) for failing to file an additional motion to remand the case to the grand jury for a new finding of probable cause after the victim altered his story to acknowledge Burton had robbed him after a drug transaction and had not forced his way into the victim's home, as the victim originally told police; (2) by waiving his right to be present during a discussion of jury instructions; (3) by failing to challenge the hearing-impaired juror. Finally, Burton claimed his appellate counsel had been ineffective because he did not provide Burton with his trial transcripts in sufficient time for him to file a "supplemental brief" on appeal, and that his Rule 32 counsel was ineffective for filing a motion of completion rather than a petition for post-conviction relief.

STATE v. BURTON
Decision of the Court

¶4 The trial court summarily dismissed Burton's pro se petition. It determined his claims of error by the trial court were precluded pursuant to Rule 32.2(a)(3) because they could have been raised on appeal. And it rejected the claims of ineffective assistance of trial counsel, concluding Burton had demonstrated neither ineffective assistance nor resulting prejudice. Last, the court denied Burton's claims of ineffective assistance of appellate and Rule 32 counsel, noting Burton had not explained how his filing a supplemental brief on appeal "would have resulted in a different outcome" or how Rule 32 counsel "failed to provide effective assistance."

¶5 On review, Burton first focuses on the trial court's preclusion of several of his claims because they could have been raised on appeal. He asserts that, because his appellate counsel did not timely provide him with transcripts, he could not raise the issues in a supplemental brief; thus, he reasons, his failure to raise those claims on appeal was "not [his] fault." But a criminal appellant is not entitled to hybrid representation. *See State v. Dixon*, 226 Ariz. 545, ¶ 38, 250 P.3d 1174, 1182 (2011). Thus, Burton would not have been able to raise those arguments in a supplemental brief unless he opted to proceed in propria persona. Burton does not assert that he wished to do so, nor does he develop any argument that appellate counsel was ineffective for failing to raise those arguments on appeal. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on review). The trial court did not err in finding precluded Burton's various claims of trial error or in concluding Burton had not raised a colorable claim of ineffective assistance of appellate counsel.

¶6 Burton next complains that his Rule 32 counsel was ineffective because he did not properly review Burton's case. As a non-pleading defendant, however, Burton is not entitled to the effective assistance of Rule 32 counsel; non-pleading defendants "have no constitutional right to counsel in post-conviction proceedings." *State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013).

¶7 Burton also repeats his claims of ineffective assistance of trial counsel. We have reviewed the record and are satisfied the trial

STATE v. BURTON
Decision of the Court

court clearly identified and thoroughly addressed these claims and correctly resolved them in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No purpose would be served by repeating the court's ruling in its entirety, and we therefore adopt it.¹ *See id.*

¶8 For the reasons stated, although review is granted, relief is denied.

¹Burton claims for the first time in his petition for review that trial counsel was ineffective for failing to object to a detective's testimony. We will not address arguments raised for the first time on review. *State v. Ramirez*, 126 Ariz. 464, 467-68, 616 P.2d 924, 927-28 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").