

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LUIS ANTONIO CABALLERO,
Petitioner.

No. 2 CA-CR 2014-0311-PR
Filed February 25, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
Nos. CR20080785001; CR20080904001; CR20084119001; CR20091306001
The Honorable D. Douglas Metcalf, Judge

REVIEW GRANTED; RELIEF DENIED

Luis A. Caballero, Tucson
In Propria Persona

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MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 Petitioner Luis Caballero seeks review of the trial court's orders denying his first and second petitions 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). For the reasons set forth below, we find no such abuse here.

¶2 Pursuant to a plea agreement related to four different cases, Caballero pled guilty in 2009 to possession of a narcotic drug, possession of a narcotic drug for sale, and three counts of aggravated assault. The trial court sentenced Caballero to concurrent and consecutive prison terms totaling 26.75 years. Appointed counsel filed a Rule 32 petition in September 2013, asserting trial counsel had been ineffective by telling Caballero he "would receive 15 years in prison"¹ and by failing to file a motion pursuant to Rule 26.5, Ariz. R. Crim. P., or to hire a mitigation specialist, thereby rendering the plea involuntary. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance was prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

¹In the affidavit attached to Caballero's Rule 32 petition, he attested trial counsel had "promised that [he] would only receive a sentence between 10 and 15 years."

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¶3 Following an evidentiary hearing held in February 2014, during which Caballero and trial counsel testified, the trial court found counsel had been effective and concluded the plea was valid. The court determined Caballero’s “evidentiary-hearing testimony about [counsel’s] alleged representations isn’t credible,” noting Caballero had twice told the court at the change-of-plea hearing that no one had “guaranteed him a specific sentence” and had acknowledged he understood he might be sentenced to life in prison. In contrast, the court found credible trial counsel’s testimony that he had not told Caballero what sentence he would receive, nor had he promised to file a Rule 26.5 motion or to hire a mitigation specialist. Moreover, the court concluded Caballero did not establish a reasonable probability that his sentence would have been different even if counsel had filed additional motions or hired a mitigation specialist.

¶4 In May 2014, approximately three months after the trial court denied Caballero’s first Rule 32 petition, he filed a successive petition in propria persona, asserting Rule 32 counsel had been ineffective for failing to challenge trial counsel’s conduct for the specific reasons Rule 32 counsel had in fact raised in the first Rule 32 petition. In July 2014, while the second petition was pending, Rule 32 counsel filed a request to enlarge time to file a petition for review from the denial of the first Rule 32 petition five months earlier.² On August 5, 2014, Rule 32 counsel simultaneously filed (1) a notice of erratum, informing the court he had “mistakenly filed a Request to Enlarge Time to File Petition for Review” and asking the court to “withdraw and strike that motion,” and (2) a motion to withdraw in light of Caballero having filed a successive, pro se Rule 32 petition.

²In that pleading, counsel acknowledged “[t]he failure to . . . file the petition for review [timely] in this case was an error attributable only to counsel . . . and [Caballero] should not be prejudiced by this error.”

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¶5 In an order dated August 8, 2014, and filed on August 12, 2014, the trial court granted Rule 32 counsel's motion to withdraw. Caballero, however, filed an objection to that motion and a response to the notice of erratum in pleadings dated August 7 and 8, 2014, and filed on August 15, 2014, asking that Rule 32 counsel either be ordered to file a petition for review from the February 2014 denial of his first Rule 32 petition or that new counsel be appointed. In the meantime, the court dismissed Caballero's second Rule 32 petition on August 19, 2014, and denied his objection to Rule 32 counsel's motion to withdraw on September 9, 2014, noting Rule 32 counsel "no longer represents [Caballero] and the Court will not compel him to act on [Caballero's] behalf." The court also denied Caballero's request to appoint new counsel to file a petition for review from the denial of his first Rule 32 petition, informing him he "must direct his request" to the court of appeals.³

¶6 Caballero filed this petition for review in August 2014, challenging the February and August 2014 rulings dismissing his first and second Rule 32 petitions. In a November 2014 order, this court informed Caballero that because his petition for review was untimely as to the February 2014 ruling, we would consider only the August 2014 ruling.⁴ *See* Ariz. R. Crim. P. 32.9(c) (petition for review must be filed within thirty days after court's final decision on petition for post-conviction relief).

¶7 Accordingly, because the trial court's February 2014 ruling denying Caballero's first Rule 32 petition based on ineffective assistance of trial counsel became final when he failed to timely file a petition for review, we do not address it. *See* Ariz. R. Crim. P. 32.9(c).⁵ Similarly, we do not address Caballero's assertions that

³Caballero then filed a motion in the trial court asking the court of appeals to appoint counsel.

⁴We directed Caballero to notify this court if he disagreed with our ruling. Caballero filed a response which did not alter our decision.

⁵Although we do not consider the untimely petition for review from the February 2014 ruling, Caballero is not precluded

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Rule 32 counsel was ineffective by failing to preserve claims for federal review and by perpetrating a fraud on the court because these claims were not raised in his second petition, the dismissal of which is the only matter before us. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review limited to “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). For the same reason, we do not consider Caballero’s request that we “exercise [our] inherent Power and direct [Rule 32] counsel to file a Petition for Review, and refer counsel to the State Bar for disciplinary proceedings,” as this was not raised or requested in Caballero’s second Rule 32 petition. *See Ramirez*, 126 Ariz. at 468, 616 P.2d at 928.

¶8 Therefore, the sole issue before us is Caballero’s claim that Rule 32 counsel was ineffective for failing to challenge trial counsel’s purported representation that Caballero’s sentence would not exceed fifteen years, a fact Caballero claims induced him to plead guilty. In its ruling dismissing the second Rule 32 petition, the trial court correctly found Rule 32 counsel was not ineffective for failing to raise arguments “he did, in fact, raise” in the first Rule 32 petition, nor could Caballero “show . . . prejudice where the arguments he wished [Rule 32] counsel . . . raise[d] *were* raised and considered by the Court.” Put simply, Rule 32 counsel was not ineffective for having done exactly what Caballero asserts he should have done.

¶9 Therefore, although the petition for review is granted, we deny relief.

from asking the trial court to permit him to file a delayed petition for review from that ruling. *See State v. Pope*, 130 Ariz. 253, 255, 635 P.2d 846, 848 (1981) (trial court may, “after being presented with proper evidence, allow a late filing” if it finds that petitioner had presented valid reason justifying untimely filing under Rule 32.9); *see also* Ariz. R. Crim. P. 32.9(c) (“Motions for extensions of time to file petitions [for review] . . . shall be filed in and ruled upon by the trial court.”).