

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANTHONY JAMES MERRICK,
Petitioner.

No. 2 CA-CR 2015-0385-PR
Filed November 19, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2010007643001DT
The Honorable Patricia Ann Starr, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Arthur Hazelton, Deputy County Attorney, Phoenix
Counsel for Respondent

Anthony Merrick, San Luis
In Propria Persona

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 Anthony Merrick 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 that order unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Merrick has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Merrick was convicted of two counts of conspiracy to commit witness tampering and one count each of conspiracy to commit perjury and obstructing a criminal investigation or prosecution. The trial court sentenced him to concurrent prison terms, the longest of which was twelve years. On appeal, appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Merrick filed a supplemental brief raising sixteen issues. We rejected those arguments and affirmed his convictions and sentences. *State v. Merrick*, No. 1 CA-CR 11-0834 (memorandum decision filed Oct. 30, 2012).

¶3 Merrick sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and found no claims to raise in post-conviction proceedings. Merrick then filed a pro se petition for post-conviction relief in which he argued: (1) his appellate counsel had been ineffective for failing to raise the sixteen issues Merrick raised in his brief on appeal, for failing to assist him in proceeding pro se by providing "materials, such as paper and pencil to write with," and by failing to aid him in filing a motion for reconsideration; (2) prison officials had interfered with his appeal by refusing to accept for mailing his motion for

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reconsideration; (3) amendments affecting A.R.S. § 13-4062 constituted a significant change in the law applicable to his case; (4) there was newly discovered evidence relevant to his convictions; (5) the state had committed misconduct by presenting false evidence; (6) his constitutional right to testify at trial had been violated because he chose not to testify based on prior convictions that were later vacated on appeal. While his petition was pending, Merrick filed a motion seeking to amend it by adding a claim that his sentences were improper because the jury did not find aggravating factors used to increase his sentences. The trial court rejected Merrick's request to add a claim and summarily denied relief.

¶4 On review, Merrick repeats his claims. Most of them, however, are presented in a cursory fashion without a developed argument or citation to relevant authority. This constitutes waiver of those claims. *See State v. Stefanovic*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013). And, to the extent Merrick attempts to incorporate arguments by reference, that procedure is not permitted. *See State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991).

¶5 In any event, Merrick has not demonstrated he is entitled to relief. Even if he were correct that appellate counsel should have raised various arguments or assisted him in filing a motion for reconsideration, he has not demonstrated resulting prejudice. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (to state colorable claim of ineffective assistance, defendant must show counsel's performance fell below reasonable standards, resulting in prejudice to defendant). The claims he refers to were all raised and rejected on appeal. And he has not proposed any reason a motion for reconsideration would have been granted. Thus, his additional claim that the state improperly interfered with his filing of a motion for reconsideration on appeal necessarily fails.¹

¹Merrick cites numerous cases in support of his claim that he need not show prejudice resulting from counsel's alleged failure to provide adequate assistance on appeal or as a result of the state's purported interference with his efforts to file a motion for reconsideration on appeal. But the law is clear he must show

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¶6 Merrick also suggests there is newly discovered evidence, including evidence of prosecutorial misconduct, relevant to his case. But he has not provided this evidence or even provided any documentation supporting his claim such evidence exists.

¶7 Merrick additionally contends the trial court erred in rejecting his motion to amend his petition to add a claim related to his sentencing. A court may permit a defendant to amend a petition “upon a showing of good cause.” Ariz. R. Crim. P. 32.6(d). But, although Merrick asserts he presented “evidence . . . establishing good cause,” he does not identify that evidence nor explain how it shows good cause.² Thus, he has not established the court erred in refusing him permission to amend his petition for post-conviction relief. Moreover, even if the court had allowed him to amend his petition, the claim he has identified clearly is precluded because it could have been raised on appeal. Ariz. R. Crim. P. 32.2(a)(3).

prejudice resulting from counsel’s unreasonable failure to file a brief on the merits. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Moreover, Merrick cites no authority suggesting the filing of a motion for reconsideration constitutes a critical stage of his appellate proceeding such that we would presume prejudice if counsel or the state interfered with filing such a motion. *See Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (prejudice presumed only if defendant denied assistance of counsel altogether at critical stage of proceeding); *State v. Conner*, 163 Ariz. 97, 104, 786 P.2d 948, 955 (1990) (critical stage is one where substantial rights may be affected); *see also* Ariz. R. Crim. P. 31.18(a) (“The filing of a motion for reconsideration in the Court of Appeals is not a prerequisite to the filing of a petition for review.”).

²Merrick suggests the trial court should have granted his motion to amend because it granted the state a second extension of time to file its response without the state showing extraordinary circumstances as required by Rule 32.6(a). Even assuming the court erred by allowing the state a second extension, any such error was unrelated to Merrick’s request to amend his petition.

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¶8

Although we grant review, we deny relief.