

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
SEP 26 2007
COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)
)
Respondent,)
)
v.)
)
JEFFREY NOEM VETA,)
)
Petitioner.)
_____)

2 CA-CR 2006-0069-PR
DEPARTMENT B
MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-52826

Honorable Christopher C. Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Jeffrey Noem Veta

Florence
In Propria Persona

V Á S Q U E Z, Judge.

¶1 In May 2004 a jury found petitioner Jeffrey Noem Veta guilty of continuous sexual abuse of a child, involving or using minors in drug offenses, and two counts of sexual conduct with a minor under the age of fifteen. On July 6, 2004, the trial court sentenced Veta to consecutive, presumptive prison terms of twenty years on each count. In this petition for review, Veta challenges the trial court's order denying the relief he requested in

the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P., alleging trial counsel had been ineffective by waiving Veta's speedy trial rights and at sentencing. "An appellate court will reverse a trial court's summary dismissal only if an abuse of discretion affirmatively appears." *State v. Bowers*, 192 Ariz. 419, ¶ 10, 966 P.2d 1023, 1026 (App. 1998). We find no such abuse here.

¶2 To be entitled to relief based on ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient in that it fell below prevailing professional norms and that this deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient showing on either prong of the *Strickland* test, the claim fails. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). To avoid summary dismissal of a petition, a defendant must raise a colorable claim for relief, that is, one "that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶3 As he does on review, Veta claimed below that trial counsel had been ineffective because he failed to assert Veta's speedy trial rights under Rule 8, Ariz. R. Crim. P., and the Interstate Agreement on Detainers, A.R.S. § 31-481 (IAD). Rejecting that claim, the trial court found that Veta had failed to establish counsel's performance had been deficient in this regard or that Veta had been prejudiced in any event. Relying on *New York v. Hill*, 528 U.S. 110, 120 S. Ct. 659 (2000), on which Veta relied as well, the trial court

found Veta was bound by counsel's agreement that trial could be conducted outside the 180-day period within which he was required to be tried under article III of the IAD. The court further found that, even assuming counsel had performed deficiently by agreeing Veta could be tried more than 180 days after he was transported to this state, Veta was not prejudiced by any such delay.

¶4 We note at the outset that Veta has not provided us with sufficient information on review to establish that his trial was, in fact, conducted outside the time limit. Moreover, there is vast confusion about which provision of the IAD applied—the 180-day time limit of article III(a) or the 120-day limit of article IV(c).¹ In any event, Veta has not sustained

¹Rule 8.3(a), Ariz. R. Crim. P., provides the following with respect to a person who is outside the state:

Within 90 days after receipt of a written request from any person charged with a crime and incarcerated without the state, or within a reasonable time after otherwise learning of such person's incarceration without the state, the prosecutor shall take action as required by law to obtain such person's presence for trial. Within 90 days after the defendant has been delivered into the temporary custody of the appropriate authority of this state, he or she shall be brought to trial.

Article IV(c) of the IAD provides:

In respect of any proceeding made possible by this [a]rticle, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

his burden on review of establishing that the trial court abused its discretion when it rejected this claim. We agree with the trial court that *Hill* defeats rather than supports Veta's claim and that Veta did not meaningfully distinguish that case from his. Nor has Veta established that his rights under the Sixth Amendment were violated.

¶5 The record shows that in its minute entry of June 28, 2002, the trial court denied Veta's motion to dismiss the charges based on a violation of the IAD. The court noted that Veta had been indicted in 1996; that a bench warrant had issued, resulting in his extradition from Kentucky pursuant to article IV of the IAD; and that, pursuant to article IV(c) of the IAD, his trial had to be held within 120 days of his arrival in Arizona on February 20, 2002. The trial court further noted, and the record reflects, that, at a pretrial conference on April 19, 2002, the court set the case for trial "at Defendant's Counsel's request and in Defendant's presence, for July 9, 2002." The court added, "in setting the trial date, neither the Court nor Defense Counsel nor the Deputy County Attorney was aware that the 120-day limit pursuant to [a]rticle IV, rather than the 180-day limit pursuant to [a]rticle III of the IAD was applicable." The trial court relied on *Hill*, in which the Supreme Court stated that "scheduling matters are plainly among those for which agreement by counsel generally controls" and that "[r]equiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time to no apparent purpose." 528 U.S. at 115, 120 S. Ct. at 664. The trial court also noted Veta had

been present when trial was set and the fact that he had become “unhappy with what Counsel has done makes it no less binding upon him.”

¶6 Although counsel told the court at the pretrial conference on April 19, 2002, that Veta was not waiving his speedy trial rights, he and Veta then agreed the case could be set for trial in July, apparently beyond the time allowed under the IAD and Rule 8.3(a). Even assuming as true Veta’s assertion that counsel did this as a result of “inexperience, lack of preparation, and ineptitude,” the trial court found that he was not thereby prejudiced. Veta does not challenge that finding. Moreover, even if counsel had pointed out to the court the impending deadline, at best, trial would have been set for an earlier date. Nor has Veta established how he was prejudiced by the minimal delay between the 120-day deadline and the July 2002 trial date. Indeed, on June 19, 2002, when Larry Rosenthal was permitted to withdraw as counsel for Veta and Chris Kimminau was appointed as advisory counsel upon Veta’s request, Veta opposed any acceleration of the trial date. Additionally, the trial court granted numerous continuances on Veta’s request, and the trial was not held until April 2004, demonstrating that Veta was not ready for trial in July 2002, much less before then. When trial began, Veta did not raise this issue.

¶7 And if Rosenthal had pointed out the impending deadline, the trial court could have found “good cause” to set the trial beyond the deadline. *See* § 31-481, arts. III(a), IV(c). In summary, we agree with the trial court that Veta has not established he was prejudiced, even assuming Rosenthal performed deficiently by not being aware of the IAD

deadline and calling it to the attention of the trial court. *Cf. State v. Engram*, 171 Ariz. 363, 368, 831 P.2d 366, 367 (App. 1991) (rejecting claim trial counsel had been ineffective in not filing motion to dismiss for violation of Rule 8 because continuances were granted on defendant's request and motion would not have been granted). *See also State v. Parker*, 116 Ariz. 3, 8, 567 P.2d 319, 324 (1977) (to determine whether speedy trial rights violated, court must consider length of delay, reasons for delay, defendant's assertion of right, and prejudice).

¶8 Nor has Veta established the trial court abused its discretion by rejecting his challenges to his sentence, most of which were based on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). First, the sentencing errors Veta raises are precluded. At Veta's request, this court stayed his direct appeal in July 2005 pending the outcome of this post-conviction proceeding. In February 2006, we consolidated this petition for review of the denial of post-conviction relief with the appeal, which we reinstated. But, after granting Veta multiple extensions of time for filing his opening brief, we dismissed the appeal in July 2007, allowing this petition for review to proceed. Although we denied Veta's motion to reinstate the appeal, his motion for reconsideration of that order is pending. Consequently, his sentencing claims are precluded, either because Veta has waived them by not prosecuting his appeal and raising them there or, if this court reinstates the appeal, because the claims are then properly raisable on appeal. *See Ariz. R. Crim. P. 32.2(a)(1), (3)*.

¶9 Second, even assuming arguendo the sentencing claims are not precluded because they fall within Rule 32.1(g) as being based on a significant change in the law, *see* Rule 32.2(b), the trial court did not abuse its discretion in denying relief on these claims. The trial court clearly identified Veta’s claims and resolved them correctly, and because no purpose would be served by rehashing the court’s order here, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶10 Veta summarily states in his petition for review that counsel was ineffective at sentencing. His incorporation by reference of the petition filed below does not comply with the requirements of Rule 32.9 because he fails to support this claim with argument, citations to the record, or authority.

¶11 Although we grant Veta’s petition for review, for the reasons stated herein, we deny him relief from the trial court’s order.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge