IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 04-13-2010
PHILIP G. URRY, CLERK
BY: GH

MARK LLOYD GOMES, Petitioner, v. THE HONORABLE DEREK CARLISLE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MOHAVE, Respondent Judge, STATE OF ARIZONA ex rel. MATTHEW J. SMITH, Mohave County Attorney, Real Party in Interest.	)	1 CA-SA 10-0057 DEPARTMENT A Mohave County Superior Court No. CR 2000-795 **D E C I S I O N** **O R D E R**

Mark Lloyd Gomes ("Petitioner") filed a petition for special action challenging the denial of his request to have transcripts prepared so that he could file a petition for post-conviction relief. The Real Party in Interest did not respond to the petition. Presiding Judge Maurice Portley, and Judges Lawrence F. Winthrop and Margaret H. Downie, have considered the petition, and for the reasons stated, grant jurisdiction and

relief, and remand this matter to the superior court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Petitioner pled guilty to possession of marijuana for sale, and was sentenced to two years in prison. He filed a notice of post-conviction relief alleging ineffective assistance of counsel, and counsel was appointed. Counsel requested a copy of the change of plea and sentencing proceedings. The request was denied because Petitioner had indicated that he was only claiming that his trial lawyer had been ineffective, and the trial court was convinced that the transcripts of the change of plea and sentencing hearings were unnecessary.[1]

JURISDICTION

Special action jurisdiction is appropriate if a party does not have a plain, adequate, or speedy remedy by appeal. *See* Ariz. R.P. Spec. Act. 1(a); *Patterson v. Mahoney*, 219 Ariz. 453, 455, ¶ 5, 199 P.3d 708, 710 (App. 2008). Because there is no appeal from a petition for post-conviction relief where

[1] Counsel subsequently reviewed the court's file and spoke with her client. Counsel discovered that Petitioner was unhappy with the manner in which trial counsel had handled an evidentiary hearing that resulted in the denial of a suppression motion. Counsel did not file a motion for reconsideration or separately seek the suppression hearing transcript.

Petitioner could argue the impact of the denial of the request for a transcript, we accept jurisdiction. *See State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 5, 210 P.3d 1283, 1285 (App. 2009).

DISCUSSION

The notice of post-conviction relief was Petitioner's first, or his "of right" petition. Ariz. R. Crim. P. 32.1. Generally, once a defendant has filed a notice of post-conviction relief pursuant to Rule 32.4(a), he is required to raise all issues or may be subsequently precluded from raising omitted issues. Ariz. R. Crim. P. 32.2(a). In fact, if he is entitled to counsel, counsel "shall investigate the defendant's case for any and all colorable claims." Ariz. R. Crim. P. 32.4(c)(2). Counsel is entitled to review the applicable portions of the transcript to resolve "the issues to be raised in the petition." Ariz. R. Crim. P. 32.4(d).

Here, Petitioner filed his notice and was appointed counsel. Counsel reviewed the notice and knew her client was challenging the effectiveness of trial counsel. Although a claim for ineffective assistance of counsel is not one of the Rule 32.1 enumerated grounds for relief, it is recognized as falling within the Rule 32.1 grounds for relief. *See State v.*

Herrera, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995). As a result, counsel was required to search the record for all colorable claims.

Although a trial judge can "order only those transcripts prepared that it deems necessary to resolve the issues to be raised in the petition," Ariz. R. Crim. P. 32.4(d), the judge should not limit the ability of counsel to review the file, read the transcript and investigate any possible claims. Instead, and mindful that counsel is required to investigate the total record for any and all colorable claims regardless of the claims that were noticed, the court should ensure that whatever claims a defendant and counsel can find and want to raise are raised during the "of right" process.

Here, even though the trial court might correctly surmise from the minute entries that the plea and sentencing proceedings were properly handled, counsel is required by the supreme court rule to have access to the transcripts of those proceedings to determine whether there were any ineffective assistance issues that could be revealed and raised. For example, and regardless of the plea agreement or colloquy, if trial counsel told Petitioner something different about the plea agreement, plea process, or the resultant sentence, counsel

would have to investigate the issue and raise it, or it would be forever precluded by Rule 32.2. Consequently, the trial judge should have ordered the preparation of the plea and sentencing transcripts so that counsel could investigate any ineffective assistance of counsel or related issues.

CONCLUSION

Based on the foregoing, we accept jurisdiction over the special action and grant the requested relief to get the transcript of the plea and sentencing proceedings.[2]

/s/
_____
MAURICE PORTLEY, Presiding Judge

[2] Petitioner also asks that we address whether the trial court should also order the transcription of the suppression hearing. Because Petitioner has not requested the trial court for that portion of the record, and will have the opportunity to do so, we will not address the issue before the court is given the opportunity.