

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 23 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0201-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
PHILLIP J. MCMULLEN,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YAVAPAI COUNTY

Cause No. P1300CR20040493

Honorable Warren R. Darrow, Judge

REVIEW GRANTED; RELIEF DENIED

Sheila Polk, Yavapai County Attorney
By Steven A. Young

Prescott
Attorneys for Respondent

Phillip J. McMullen

Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Phillip McMullen 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 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). McMullen has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, McMullen was convicted of child molestation, a dangerous crime against children. The trial court imposed a presumptive sentence of seventeen years’ imprisonment. This court affirmed McMullen’s conviction and sentence on appeal. *State v. McMullen*, No. 1 CA-CR 05-0187 (memorandum decision filed Aug. 22, 2006). Thereafter, McMullen filed a notice of post-conviction relief, which the trial court deemed untimely and dismissed because McMullen had failed to “set forth reasons for not raising the claims in a timely manner.” McMullen then filed a second notice, explaining he had not raised his claims in a timely manner because he had not received notice of the decision on appeal. Citing Rule 32.1(f), the court concluded McMullen’s “failure to file a timely notice of post-conviction relief was without fault on his part,” and deemed the second notice timely.

¶3 Appointed counsel informed the trial court that he could find no “claims for relief to raise in th[e] post-conviction relief proceeding,” and asked that McMullen be given time to file a pro-se petition. In that petition, McMullen argued that he had received ineffective assistance of counsel and that the county attorney had engaged in prosecutorial misconduct when, inter alia, he and an investigating detective had “willfully and knowingly suborn[ed] and commit[ted] perjury.” The trial court summarily denied relief. On review, McMullen argues the court abused its discretion in denying relief, reasserting the arguments he made below that trial and appellate counsel had been

ineffective. He also states that he “has asserted actual innocence at every stage of the proceedings.”

¶4 First, although the trial court concluded otherwise, McMullen’s claims of ineffective assistance of counsel are precluded. *See* Ariz. R. Crim. P. 32.2(c) (any court on review may determine issue precluded). As noted above, the court deemed McMullen’s second notice of post-conviction relief timely pursuant to Rule 32.1(f). But that provision provides relief only to a defendant who has failed to timely file a notice of appeal or an of-right notice of post-conviction relief. Ariz. R. Crim. P. 32.1(f). It could not, therefore, be applied to McMullen’s second notice of post-conviction relief. Because ineffective assistance of trial counsel claims are not claims made pursuant to Rule 32.1(d), (e), (f), (g), or (h), those claims are precluded by McMullen’s failure to raise them in a timely, first post-conviction relief proceeding. *See* Ariz. R. Crim. P. 32.4(a), 32.2(a)(3), (b). Thus, although its denial was based on different reasons, the court did not err in denying McMullen relief on those claims. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court is obliged to affirm trial court’s ruling if result was legally correct for any reason).

¶5 Next, as he did below, McMullen asserts he is “actually innocent of the charges” of which he was convicted. Apparently on the basis of that statement, the trial court addressed and rejected a claim of “actual innocence” under Rule 32.1(h). But, on review, McMullen clarifies that he did not intend to raise a Rule 32.1(h) claim and urges that the state’s addressing such a claim on review “is misguided and must be disregarded.” We therefore do not address that issue. *Cf. Ariz. R. Crim. P. 32.9(c)(1)*

(petition for review shall contain “[t]he reasons why the petition should be granted” and “specific references to the record”); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶6 Finally, to the extent McMullen has raised claims of prosecutorial misconduct or perjury by the state’s witnesses independent of his claims of ineffective assistance of counsel, we agree with the trial court that those claims are precluded. *See* Ariz. R. Crim. P. 32.2(a)(2),(3). For all these reasons, although we grant the petition for review, relief is denied.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge