

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

OCT -4 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0224-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LOUIS ELVEN WAY SPEAR,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112319001

Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery

Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Louis Spear seeks review of the trial court's order summarily dismissing his of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Spear pled guilty to two counts of second-degree burglary. The plea agreement provided that “[t]here is no agreement as to whether the sentence imposed in this cause number shall run consecutively or concurrently to any other sentence[] imposed . . . unless otherwise stated in the special terms.” The special terms of the agreement stated that “the sentence in this case shall be concurrent with the sentence in Superior Court cause number CR-20101615.” The trial court sentenced Spear to consecutive seven-year prison terms, to be served concurrently “with that imposed in CR-20101615.”

¶3 In CR-20101615, Spear had been found guilty after a jury trial of theft by control and theft by controlling stolen property and was sentenced to concurrent prison terms, the longest of which was 15.75 years. After the sentence was imposed in this case, on Spear’s appeal from his convictions and sentences in CR-20101615, we reversed his conviction of theft by controlling stolen property and affirmed his conviction of theft by control, but modified the sentence for that conviction “to reflect the appropriate presumptive term of 11.25 years’ imprisonment.” *State v. Spear*, No. 2 CA-CR 2011-0127, ¶ 11 (memorandum decision filed Oct. 11, 2011).

¶4 Spear then sought post-conviction relief in this case, arguing that the imposition of consecutive sentences for the two burglary counts violated the plea agreement. He reasoned that the plea agreement “required . . . that each of [his] 7-year sentences run concurrently to each of the sentences he was serving in CR-20101615.” He concluded, therefore, that because the trial court did not give him the opportunity to withdraw from the plea before imposing consecutive sentences, he was “entitled to have the sentences modified in accordance with the plea’s terms.” The court summarily

dismissed Spear's petition, concluding it had discretion to impose consecutive sentences and such sentences did not violate the plea agreement.

¶5 On review, Spear again claims the second consecutive prison term imposed is not concurrent with the term imposed in CR-20101615 as required by the plea agreement. He reasons that, because “the second 7-year sentence would continue beyond the longer 11.25-year sentence” imposed in CR-20101615, his sentences are “only partially concurrent” with the 11.25-year term. He contends, as we understand his argument, that the concurrence requirement in the plea agreement meant that “the total incarceration imposed in this case could not exceed the shorter of the two sentences in CR-20101615.”

¶6 In support of his argument, Spear relies on a portion of § 2181 of the Criminal Law Corpus Juris Secundum (C.J.S.) defining a concurrent sentence. The portion cited by Spear states that “[c]oncurrent sentences are sentences which operate simultaneously, and each day the convict is given the privilege of serving a part of each sentence.” 24 C.J.S. *Criminal Law* § 2181 (2012) (footnote omitted). Thus, Spear concludes, because the second seven-year sentence imposed here would end after he had completed the 11.25-year prison term in CR-20101615, he would not “serv[e] a part of each sentence” during “each day” of incarceration and the sentences therefore are not concurrent.

¶7 Spear's argument ignores the totality of § 2181, which additionally notes that a prisoner is “entitled to discharge on completion of the term served under the longest sentence” as long as all sentences have terminated. That section further observes that “[w]here sentences imposed at different times or for different periods of time run concurrently, the sentences run together during the time that the periods overlap. The

new or longer term does not necessarily terminate at the same time as the prior or shorter term.” *Id.* (footnote omitted). Thus, under the authority he cites, Spear plainly is incorrect that concurrent sentences must terminate at the same time and cannot only partially overlap. And the C.J.S. definition of a concurrent sentence is entirely consistent with that discussed by this court in *Washington v. State*, 10 Ariz. App. 95, 97, 456 P.2d 415, 417 (1969), in which we stated “[c]oncurrent sentences which run simultaneously do not necessarily end and begin at the same time.” Thus, we reject his argument that his second consecutive sentence in this case is not concurrent with the 11.25-year sentence in CR-20101615.

¶8 Additionally, neither Spear nor his counsel filed an affidavit claiming that their understanding of the plea agreement required his second consecutive sentence to be coterminous with the 11.25-year term in CR-20101615. And he identifies nothing else in the record supporting his claim. Accordingly, his claim is solely based on the language of the plea agreement as a matter of law, and we have rejected it.

¶9 For the reasons stated, review is granted but relief is denied.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge