

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

NOV 14 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0360-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
GLEN ALAN HUGGINS,)	the Supreme Court
aka GLEN ALLEN HUGGINS,)	
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20050498

Honorable Robert Duber II, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By Ramai L. Alvarez

Globe
Attorneys for Respondent

Glen A. Huggins

Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 In 2006, petitioner Glen Huggins pled guilty to hindering prosecution, conspiracy to hinder prosecution, and destruction of evidence. The trial court sentenced him to concurrent, presumptive prison terms, the longest of which are 3.5 years, to be

served consecutively to the sentences in another matter. After filing a notice of appeal, which we dismissed in 2007, Huggins filed a notice of post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P., which the court dismissed in 2008 after appointed counsel notified the court Huggins did “not want to pursue a Rule 32 for the instant case.”

¶2 More than three years later, Huggins filed a petition for post-conviction relief,¹ asserting (1) trial counsel had been ineffective for having represented both Huggins and his mother and for failing to reevaluate his clients’ waiver of any possible conflict of interest and (2) the prosecutor committed misconduct by promising to dismiss charges against Huggins’s mother in exchange for his guilty plea. The trial court denied post-conviction relief, and this pro se petition for review followed. We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of the court’s discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶3 On review, Huggins essentially reasserts the claims he raised below, to wit, that trial counsel Jerry DeRose had a conflict of interest because he represented both Huggins and his mother, a decision Huggins asserts DeRose should have reevaluated for a possible conflict, and that the prosecutor agreed to dismiss charges against Huggins’s mother in exchange for his guilty plea, essentially coercing him to plead guilty. To

¹Following a series of motions and orders, the trial court appointed counsel to represent Huggins in the underlying post-conviction proceeding. Although the court seemed to suggest the most recent notice of post-conviction relief, filed years after the court had dismissed Huggins’s first notice of post-conviction relief, was untimely, the court nonetheless permitted him to file the underlying petition and addressed it on its merits.

support his claims, Huggins relies on a March 1, 2007 letter written to DeRose by Gila County Attorney Daisy Flores:

Glen Huggins plead[ed] on September 1, 2006 and was sentenced on September 11, 2006. I informed you I would file a Motion to Dismiss with Prejudice on Mary Huggins [Glen Huggins's mother] as soon as Glen Huggins' appeal time was up as I would not proceed on her unless consolidated with Glen[] Huggins. Evidently Glen[] filed an appeal of both his cases, even though he cannot appeal a guilty plea. He also filed a letter challenging some of the priors used against him. We may need to revisit the matter as to Mrs. Huggins should Glen[] Huggins prevail on any of these issues.

¶4 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and also that there is a reasonable probability the outcome of the case would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A conflict of interest exists if "representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." ER 1.7(a)(1), (2), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. To the extent Huggins's claims rest on a conflict of interest, he "must show first that there was an actual conflict, and second that the conflict had an adverse effect" on counsel's performance in his case. *State v. Jenkins*, 148 Ariz. 463, 466, 715 P.2d 716, 719 (1986).

¶5 Huggins has provided no basis for us to conclude the trial court erred in denying his petition for post-conviction relief, nor has he shown how he was affected adversely by the purported conflict of interest. At the change-of-plea hearing, the court explained that although the state “inten[ded]” to dismiss the charges against Huggins’s mother, an intention the prosecutor confirmed by explaining, “I have no intention of proceeding with [the mother] alone because I don’t believe I can succeed[] with her on her own,” that intended conduct did not constitute a promise. Huggins told the court, “I don’t have [a] long time to go, so I figured it doesn’t really matter. I might as well just go ahead and say I am guilty.” The court clarified at least twice that the state had not promised him the charges against his mother would be dismissed if he pled guilty, and it further explained, “There are legal and ethical reasons why . . . prosecutors . . . can’t charge criminal offenses against somebody and then say to somebody else if you will plead, then I will let them go. That’s an unfair extraction of a plea of guilty.”

¶6 In addition, it is undisputed that Huggins and his mother “knowingly, voluntarily and intelligently waive[d] any conflict,” orally and in writing.² In its order denying post-conviction relief, the trial court referred to the March 1 letter from the prosecutor to DeRose, and found: “Considering the statements made at the Change of Plea proceeding . . . the Court concludes that the State was simply reiterating that if Defendant was to be retried, the prospect of successful prosecution of Defendant’s

²As part of the post-conviction proceeding, the parties stipulated that Huggins and his mother had signed a written document waiving any conflict of interest based on DeRose’s dual representation of them. Although that document does not appear to be part of the record on review, Huggins apparently does not dispute its existence.

mother would be enhanced and the prosecution might be sought because of that.” The court thus concluded it “d[id] not believe that Defendant has demonstrated had there been additional disclosures that he would not have followed through with the Change of Plea proceeding.” Based on the record before us, the court was entitled to infer that DeRose, by having permitted his clients to waive any conflict of interest, saw no such conflict. *Cf. State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973) (attorney representing codefendants “is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop,” and “trial court should give great weight to a representation by counsel that there is a conflict”). And, although DeRose could not recall if he reevaluated any potential conflict of interest after Huggins and his mother initially had waived such a conflict, Huggins has not provided any evidence that a conflict developed after DeRose’s initial evaluation, or that he has been affected adversely by such an event.

¶7 Finally, to the extent Huggins has attempted to raise a claim pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), for the first time on review, a claim he concedes was not raised in the petition for post-conviction relief filed by his attorney below, we decline to address it.³ *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review limited to “issues which were decided by the trial court”); *State v. Ramirez*, 126

³Although Huggins referred to *Donald* in the pro se amended petition for post-conviction relief he filed approximately five months before the petition counsel filed on his behalf, the ruling which is the subject of this petition for review is based solely on the latter petition.

Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not be raised properly for first time in petition for review).

¶8 We grant the petition for review but deny relief.⁴

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

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.

⁴By so ruling, we also deny relief on Huggins’s “supplement to petition for review and to notify the court of a transcript error,” filed on October 18, 2012.