IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ISAAC BONELLI,
Petitioner.

No. 2 CA-CR 2015-0435-PR
Filed April 15, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20022348
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Isaac Bonelli, Florence
In Propria Persona

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 Isaac Bonelli petitions for review of the trial court's summary denial of his untimely, of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

¶2 Pursuant to a 2002 plea agreement, Bonelli was found "guilty except insane," A.R.S. § 13-502, of two counts of aggravated assault with a firearm, both involving "a substantial threat of death or physical injury to another person," after he fired a rifle multiple times at two Pima County Sheriff's deputies. The trial court committed him to the Arizona State Hospital and placed him under the jurisdiction of the Psychiatric Security Review Board ("the Board") for two consecutive 7.5-year terms to begin on December 13, 2002, and to end on December 13, 2017. Although Bonelli remains under the Board's jurisdiction until 2017, he was "unconditionally released" from confinement in June 2013.

¶3 Bonelli filed an untimely, pro se notice of post-conviction relief on December 3, 2014. Although he had also filed a pro se petition for post-conviction relief on the same day, his notice included a request for counsel, which the trial court granted.[1]

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[1]In his pro se petition, Bonelli alleged he was unaware of his rights of review under Rule 32 until 2013. By appointing counsel, the trial court appears to have found his delay in filing a notice of post-conviction relief of-right was "without fault on [his] part" under Rule 32.1(f). *See State v. Harden*, 228 Ariz. 131, ¶ 11, 263 P.3d 680, 683 (App. 2011) (court need not appoint counsel for defendant who has failed to show meritorious reasons for delay in filing Rule

¶4 In his counselled petition, Bonelli asserted he "was not insane at the time of the offense but rather, in a drug induced mental state, making him ineligible for an insanity defense." He acknowledged that two doctors who had examined him before he pleaded guilty concluded he was competent to stand trial but had been "suffering from a mental disease o[r] defect which made him unable to determine the difference from right or wrong, and . . . was legally insane at the time of the offense[s]." But he alleged that in later evaluations, conducted from 2006 through 2012, four psychiatrists had concluded he "did not have a mental disorder, but had been suffering from a drug induced psychosis" when he committed the offenses and when he pleaded guilty.

¶5 Bonelli argued his plea agreement and disposition were unlawful because, at the time of his plea, there "had been no determination by a mental health professional that [his] insanity at the time of the offense was not the result of voluntary drug use or any [other] exceptions set forth" in § 13-502.[2] And he maintained trial counsel therefore had performed deficiently by "allow[ing Bonelli] to enter a change of plea to guilty except insane without a sufficient factual basis for the plea." He also alleged "[t]he terms of the plea were breached by the Board when [he] was not released after he was determined not to have a mental illness." Finally, Rule 32 counsel sought to incorporate an attached "supplemental" pro se petition in which Bonelli argued, based on the same facts, that his sentence was illegal and "outside the statutory range."

¶6 The trial court summarily dismissed Bonelli's petition, determining he had failed to state a colorable claim for relief. The

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32 notice). Accordingly, we do not consider whether Bonelli's claims are precluded as untimely. *See* Ariz. R. Crim. P. 32.4(a) (untimely notice "may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)").

[2] We cite to the current version of the statutes when no material changes have been made to the subsections at issue since the offense was committed.

court stated "[d]iagnoses obtained years later in a different setting do not detract from the findings of the Rule 11 experts or defense counsel's reliance on them," and it "wondered how and why the state hospital psychiatrists knew of the defendant's ingestion of drugs and the Rule 11 examiners did not." The court found Bonelli's claim "that the state hospital breached the terms of the plea agreement" to be "outside of the scope of Rule 32 and, based on the defendant's unconditional release, moot."

¶7 In his pro se petition for review, Bonelli argues the trial court abused its discretion in dismissing his claims without a hearing and based on "insufficient evidence," in "committing errors of law," in failing to enter "separate findings of fact," in "striking pleadings," and in denying, as outside the scope of Rule 32 and as moot, his claim of wrongful confinement before his release by the Board in June 2013. "We review for abuse of discretion the superior court's denial of post-conviction relief based on lack of a colorable claim." *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶8 Rule 32.6(c) provides for a court to summarily dismiss a petition for post-conviction relief if it determines, "[o]n reviewing the petition, response, reply, files and records," that a defendant has raised only precluded or non-colorable claims—that is, if it determines no claim "presents a material issue of fact or law which would entitle the defendant to relief under [Rule 32] and that no purpose would be served by any further proceedings." Ariz. R. Crim. P. 32.6(c). Thus, "a petition that fails to state a colorable claim may be dismissed without an evidentiary hearing," *State v. Kolmann*, No. CR-15-0172-PR, ¶ 8, 2016 WL 1039031 (Ariz. Mar. 16, 2016), and no "separate findings of fact" are required in a dismissal order, *see* Ariz. R. Crim. P. 32.6(c). As our supreme court has explained, the relevant inquiry is whether the defendant "'has alleged facts which, if true, would *probably* have changed the verdict or sentence. If the alleged facts would not have probably changed the verdict or sentence, then the claim is subject to summary dismissal.'" *Kolmann*, 2016 WL 1039031, ¶ 8, *quoting State v. Amaral*, No. CR-15-0090-PR, ¶ 11, 2016 WL 423761 (Ariz. Feb. 4, 2016) (alterations in *Kolmann*).

¶9 As an initial matter, we see no evidence of the trial court's "striking" Bonelli's "pleadings," "claim[s]," or "argument[s]," as he asserts on review. We note that in his counselled petition, Bonelli asked only that the court consider, as a matter of "hybrid" representation, his attached pro se "supplemental" petition, and not the pro se petition he filed, along with his notice requesting counsel, in December 2014. *See State v. Murray*, 184 Ariz. 9, 27, 906 P.2d 542, 560 (1995) ("hybrid representation" denotes concurrent or alternate representation by counsel and pro per defendant). There is no constitutional or other right to hybrid representation, *id.*, and whether to permit it "remains within the sound discretion of the trial judge." *State v. Cornell*, 179 Ariz. 314, 325, 878 P.2d 1352, 1363 (1994).

¶10 In arguing the trial court did not sufficiently address certain issues—including whether he had been competent and whether counsel had rendered ineffective assistance in advising him about the plea agreement—Bonelli appears to be referring to arguments made in his December 2014 pro se petition. But he develops no arguments on the merits of these claims; he merely lists them as claims improperly "str[uck]" by the court.

¶11 Rule 32.9 prohibits the incorporation by reference of any document not filed in an appendix, and we need not address arguments that fail to comply with that rule. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv); *see also State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000) (summarily rejecting claims for failure to comply with Rule 32.9), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002); *cf. State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives review on direct appeal). Even if these arguments had not been waived by non-compliance, however, we would find no basis for relief. To state a colorable claim for Rule 32 relief, a defendant must do more than simply contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998). Bonelli failed to meet that burden with respect to claims that he was incompetent when he entered his plea or did not understand his plea agreement's terms.

¶12 For example, Bonelli argued, in his December 2014 pro se petition, that counsel had "misle[]d" him "into signing the plea agreement by false promises" that he "would be given an unconditional release" from the Arizona State Hospital after one-hundred-eighty days. But according to the transcript at his change-of-plea hearing, he was told he would receive a review hearing after one-hundred-twenty days and, if not released then, would have "to wait [twenty] months" before he could again petition for release. The court asked Bonelli several times whether he understood the provisions described, and he told the court he did. Bonelli also agreed, when asked, that he had read and understood the plea agreement and had a full opportunity to speak with counsel about it and explore his options. Bonelli's bald assertions about counsel's communications during plea negotiations are insufficient to state a colorable claim. *See Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d at 952.

¶13 Similarly, Bonelli failed to state a colorable claim of incompetence at the time of his plea agreement. He asserted that psychiatrists who had examined him after 2005 reported he was suffering from a "drug induced psychosis" when he entered his plea. Bonelli did not file these evaluation reports with his petition, but even if he has characterized them accurately, they would have had little bearing on the trial court's competency determination, based on specific opinions offered by a psychologist and a psychiatrist shortly before Bonelli's guilty plea, that he was competent. *See State v. Djerf*, 191 Ariz. 583, ¶ 35, 959 P.2d 1274, 1285 (1998) (finding of competence to enter plea sustained if reasonable evidence supports it); *State v. Harding*, 137 Ariz. 278, 286, 670 P.2d 383, 391 (1983) ("mere diagnosis of a mental disease or disorder does not mean that the defendant is unable to make rational decisions regarding his case"); *cf. State v. Mendoza-Tapia*, 229 Ariz. 224, ¶ 24, 273 P.3d 676, 683 (App. 2012) (affirming denial of post-trial motion for retroactive determination of competency during trial).

¶14 Nor do we find fault with the trial court's conclusion that allegations about "[d]iagnoses obtained years later in a different setting" were insufficient to support a colorable claim of ineffective assistance or an illegal sentence. "A person may be found guilty except insane if at the time of the commission of the criminal act the

person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong," § 13-502(A), and a court may accept a plea of guilty except insane upon finding "a reasonable basis exists to support [it]," § 13-502(B).[3] Although a "[m]ental disease or defect does not include disorders that result from acute voluntary intoxication," § 13-502(A), we are aware of no authority that supports Bonelli's suggestion that, before a court may rely on a medical diagnosis of a mental disease, a defendant must present evidence that his symptoms were not the result of voluntary intoxication. The sentence was not illegal, and the factual basis was sufficient to support the plea. Counsel did not "allow[]" Bonelli to plead guilty except insane "without a sufficient factual basis," and Bonelli's claim that counsel performed deficiently is not colorable. And, to the extent he suggests his allegations about post-conviction diagnoses constitute newly discovered evidence that invalidate his plea, *see* Ariz. R. Crim. P. 32.1(e), the court expressed its doubt about the relative probative value of retrospective assessments, conducted years later, of Bonelli's sanity at the time he committed these offenses, implicitly finding the post-conviction evaluations were unlikely to have changed its decision to accept Bonelli's plea of guilty except insane. *See Amaral*, 2016 WL 423761, ¶ 11.

¶15 Finally, Bonelli argues his claim that the Board had "breached" the terms of his plea agreement by failing to release him from confinement before June 2013 is "not beyond the scope of a Rule 32[] proceeding, nor is the issue moot." He argues the claim is capable of repetition, and therefore not moot, as evinced by an October 2013 order from the Board, attached to his petition, in which the Board directs any law enforcement officer to transport him to the

[3] According to Bonelli's presentence report, the psychiatrist who examined him in October 2002 concluded he was "a seriously ill young man who suffers from a schizophrenic spectrum disorder punctuated by paranoid ideation and delusional thinking as well as hallucinations[, who] is fully capable of acting in a highly aggressive and potentially homicidal way while under the influence of such psychotic thinking."

Arizona State Hospital for evaluation and treatment, pursuant to A.R.S. § 13-3994(M), based on cause to believe his "mental health may have deteriorated."

¶16 But Bonelli's plea agreement provided only that he "remain under [the Board's] jurisdiction for a period of fifteen years," and that jurisdiction does not expire until 2017. Although Rule 32.1(d) provides a ground for relief if a petitioner "is being held in custody after the sentence imposed has expired," Bonelli's sentence has not expired, nor, apparently, is he currently confined in a mental health facility. To the extent Bonelli seeks to compel a particular action by the Board, on the ground it has abused its discretion in the performance of its jurisdictional duty, the proper means of review is by petition for special action. *See Blake v. Schwartz*, 202 Ariz. 120, ¶ 36, 42 P.3d 6, 13 (App. 2002). The order attached to Bonelli's petition was not before the trial court, and is not properly before us on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issues not presented to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶17 For the foregoing reasons, although the petition for review is granted, relief is denied.