

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

BILLY WAYNE TOLLISON,
Petitioner.

No. 2 CA-CR 2015-0445-PR
Filed May 26, 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NOT FOR PUBLICATION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. CR20100583001
The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Billy W. Tollison, Florence
In Propria Persona

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MEMORANDUM DECISION

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

H O W A R D, Presiding Judge:

¶1 Petitioner Billy Tollison seeks review of the trial court’s order dismissing 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). We find no such abuse here.

¶2 After a jury trial, Tollison was convicted of indecent exposure to a minor under fifteen, two counts of sexual conduct with a minor under fifteen, five counts of child molestation, and seven counts of sexual exploitation of a minor under fifteen. The trial court imposed fifteen consecutive prison terms, including a term of life imprisonment without the possibility of release for thirty-five years. We affirmed Tollison’s convictions and sentences on appeal. *State v. Tollison*, 2 CA-CR 2012-0010, ¶ 30 (memorandum decision filed Apr. 11, 2013).

¶3 Tollison initiated a Rule 32 proceeding in December 2013, and after appointed counsel filed a notice of completion of post-conviction review noting he was unable to find any claims to raise in a petition for post-conviction relief, the trial court permitted Tollison to file a supplemental, pro se petition. In that petition, filed in June 2015, Tollison asserted ten claims of trial error; alleged he had received ineffective assistance of trial, appellate and Rule 32 counsel; and maintained he was entitled to an evidentiary hearing and a new trial.

¶4 In its ruling summarily dismissing Tollison’s claims, the trial court correctly determined that because Tollison could have

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raised the first ten issues on appeal, they were precluded under Rule 32.2(a), and thus noted it “normally [would] not consider them any further.” However, because Tollison also asserted appellate counsel was ineffective for failing to point out trial counsel’s deficient conduct related to those claims, the court reviewed them “for the limited purpose of determining whether appellate counsel performed effectively.”

¶5 After reviewing Tollison’s claims of ineffective assistance of counsel in detail, the trial court concluded that Tollison had failed to establish that trial counsel was ineffective. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (to establish colorable claim of ineffective assistance, defendant must show counsel’s performance fell below objectively reasonable standards and outcome of case would have been different but for deficient performance), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court also determined that appellate counsel was not ineffective for failing to raise these issues and further noted that appellate counsel’s choice of what issues to raise on appeal was properly based on trial strategy. *See State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005) (“strategic decision to ‘winnow[] out weaker arguments on appeal and focus[] on’ those more likely to prevail is an acceptable exercise of professional judgment”), *quoting Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

¶6 On review, Tollison asserts the trial court improperly denied his request for the appointment of counsel on review. We disagree. A non-pleading defendant like Tollison has no constitutional right to appointed counsel when pursuing discretionary review to this court in post-conviction proceedings. *See State v. Escareno-Meraz*, 232 Ariz. 586, ¶ 4, 307 P.3d 1013, 1014 (App. 2013); *see also State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996). And, to the extent Tollison also asserts he was denied his constitutional right to counsel in the Rule 32 proceedings below and asks that we “revert this case back to the trial court and order that court to appoint counsel,” we note that merely because appointed counsel was unable to find any meritorious issues to raise does not mean counsel did not “represent” him. *See Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995) (when appointed counsel

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unable to find claims to raise in Rule 32 petition, counsel may ask that petitioner be permitted to file pro se petition).

¶7 Similarly, to the extent Tollison relies on *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), to argue either that he was denied representation by an effective attorney below, or that a new attorney should have been appointed “once the [trial] court reviewed the PCR claims submitted by the petitioner [in his pro se petition] to determine if they had merit and felt they did,” we disagree. Put simply, the trial court appointed an attorney to represent Tollison in the Rule 32 proceeding below, and he is not entitled to the appointment of another attorney to further review those claims despite his belief that they are meritorious. Additionally, to the extent Tollison asserts, without legal or factual support, that the length of the court’s six-page ruling denying post-conviction relief somehow establishes that his claims are meritorious, we flatly reject his argument.

¶8 Tollison also argues the trial court erred by finding his claims precluded absent his express agreement not to raise them on appeal. However, an appellate attorney is not ineffective for failing to obtain a knowing waiver or approval from his client before selecting the issues to raise on appeal. *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (generally, when appellate counsel narrows issue to raise on appeal, such “waiver of other possible issues binds the defendant, and those waived issues cannot be resurrected in post-conviction proceedings”); *see also State v. Stanley*, 123 Ariz. 95, 106, 597 P.2d 998, 1009 (App. 1979) (“[T]he determination of what issues are appealable in view of the trial record is a matter of [appellate] counsel’s judgment . . .”).

¶9 Moreover, to the extent Tollison challenges on review the trial court’s summary dismissal of his claims of ineffective assistance of counsel, we note that the “Issues” section of his petition for review consists solely of the following: “The issues and the arguments presented on those issues are clearly stated in the petitioner[’]s Rule 32 which he incorporates in this petition for review. Appendix ‘C.’” And, “Appendix C” consists of thirty-seven pages copied from Tollison’s Rule 32 petition. Accordingly, to the

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extent Tollison maintains on review that the court improperly denied his claims of ineffective assistance of counsel, we decline to address that argument which repeats, word-for-word, the arguments he raised below. *See* Ariz. R. Crim. P. 32.9(C)(1)(iv) (petition for review shall contain “reasons why the petition should be granted”). Tollison has failed to sustain his burden of showing the court abused its discretion in dismissing his petition in this regard.

¶10 Finally, Tollison asserts the trial court improperly “agreed with its own rulings” rather than submitting the issues to this court for a “full appellate review.” However, pursuant to Rule 32.6(c), the trial court, and not this court, reviews the Rule 32 petition in the first instance to determine whether summary dismissal is proper, which is exactly what the court did here.

¶11 Accordingly, we grant Tollison’s petition for review but deny relief.