

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

TRISTIAN EARL CHAMBERS,
Petitioner.

No. 2 CA-CR 2015-0453-PR
Filed February 4, 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NOT FOR PUBLICATION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 Maricopa County
No. CR2012007426001DT
The Honorable William L. Brotherton Jr., Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

Tristian E. Chambers, Florence
In Propria Persona

STATE v. CHAMBERS
Decision of the Court

MEMORANDUM DECISION

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

STARING, Judge:

¶1 Tristian Chambers petitions for 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., and its order denying reconsideration of that ruling. For the following reasons, we grant review, but we deny relief.

¶2 Pursuant to a plea agreement, Chambers was convicted of aggravated assault against a peace officer which caused a temporary but substantial loss or impairment, a class 3 felony. The plea agreement provided that he be sentenced as a category two repetitive offender, with one historical prior felony conviction, and receive a prison sentence "not to exceed ten (10) years." Under the terms of the agreement, Chambers waived his right to a jury determination of "any fact used to impose a sentence within the range stated" and "consent[ed] to judicial fact finding by preponderance of the evidence as to any aspect or enhancement of sentence." Among other considerations at sentencing, the trial court found harm to the victim and Chambers's possession of a gun as aggravating circumstances and sentenced him to ten years in prison.

¶3 Chambers filed a timely notice of post-conviction relief, and appointed counsel notified the court that she could find no claim to raise in Rule 32 proceedings. Chambers then filed a pro se petition in which he appears to have alleged Fourth Amendment violations by the police, ineffective assistance of trial counsel, and sentencing error. The trial court summarily denied relief and denied the motion for reconsideration that followed.

STATE v. CHAMBERS
Decision of the Court

¶4 In his petition for review, Chambers maintains the trial court abused its discretion in denying his claims. He argues the court improperly aggravated his sentence based on harm to the victim and possession of a gun because both were “factors . . . necessary to establish elements of the underlying crime” and were not supported by the evidence, and he contends counsel was ineffective in failing to object to these findings by the court. He also argues, for the first time in his petition for review, that (1) counsel was ineffective for failing to file a motion to suppress on the ground that he had been detained without reasonable suspicion, (2) the court abused its discretion in receiving testimony from two police officers at the sentencing hearing because they were not “the victim or the victim’s immediate family” specified in A.R.S. § 13-701(G); and (3) the court abused its discretion in finding Chambers “had not accepted full responsibility” for his offense. Finally, he states that he “incorporates his additional ineffective assistance of counsel arguments” asserted in his petition and motion for reconsideration below.

¶5 We review a trial court’s summary denial of post-conviction relief for an abuse of discretion, *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find none here. The court did not improperly aggravate Chambers’s sentence by “double-count[ing]” elements of the offense, as Chambers alleges. Chambers is correct that a court may not aggravate a sentence based on the “infliction . . . of serious physical injury,” or the “[u]se . . . or possession of a deadly weapon . . . during the commission” of the offense if such circumstance “is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under § 13-704.” § 13-701(D)(1), (2). But according to the allegations in his indictment and plea agreement, Chambers was not convicted based on his having “cause[d] serious physical injury to another,” A.R.S. § 13-1204(A)(1), or having “use[d] a deadly weapon,” § 13-1204(A)(2); his conviction was based on his having assaulted a peace officer using “force that cause[d] temporary but substantial disfigurement [or] temporary but substantial [physical] loss or impairment,” § 13-1204(A)(3), (E). Nor was his sentence enhanced based on his commission of a dangerous offense pursuant to A.R.S. § 13-704. Thus, the exceptions cited by Chambers do not apply.

STATE v. CHAMBERS
Decision of the Court

¶6 Moreover, the trial court did not find “serious physical injury,” § 13-701(D)(1), to be an aggravating circumstance, but instead cited “harm to the victim.” Pursuant to § 13-701(D)(9), the court was required to consider, as an aggravating circumstance, whether “[t]he victim . . . suffered physical, emotional or financial harm.” The victim testified about the emotional and financial harm, as well as physical harm, caused by Chambers’s offense, and also testified that Chambers had a gun at the time. This testimony was sufficient to support the court’s findings, by a preponderance of the evidence, of these two aggravating factors, consistent with the terms of Chambers’s plea agreement. Because the court’s findings were permissible, counsel was not ineffective for failing to argue they were not. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (holding counsel not ineffective “for failing to make an essentially futile request”).

¶7 We do not consider issues raised for the first time on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”). Nor may a Rule 32 petitioner incorporate arguments made below by reference, as Chambers purports to do here. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv). Even if his claim below, that his Fourth Amendment rights were violated, could be construed to include a claim that counsel had been ineffective for failing to file a motion to suppress, or if that allegation could be read to encompass his claim below of Fourth Amendment violations, neither claim would warrant relief. Counsel did file a motion to suppress on the ground suggested, which was denied by the trial court. In addition, a pleading defendant waives all non-jurisdictional defects, including alleged Fourth Amendment violations. *State v. Lerner*, 113 Ariz. 284, 284-85, 551 P.2d 553, 553-54 (1976); *State v. Flewellen*, 127 Ariz. 342, 345, 621 P.2d 29, 32 (1980) (any error in court’s pretrial ruling regarding admissibility of evidence waived by guilty plea).

¶8 For the foregoing reasons, although we grant review, we deny relief.