IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

WILYIE LOUIS MCCARTY JR.,
Petitioner.

No. 2 CA-CR 2016-0006-PR
Filed March 3, 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NOT FOR PUBLICATION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. CR2011108322001DT
The Honorable Daniel G. Martin, Judge

REVIEW GRANTED; RELIEF DENIED

Wilyie L. McCarty Jr., Florence
In Propria Persona

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Wilyie McCarty Jr. seeks review of the trial court's orders denying in part his of-right petition for post-conviction relief and denying his motion for rehearing, both filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb those orders unless the court clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). McCarty has not met his burden of demonstrating such abuse here.

¶2 McCarty pled guilty to sexual assault, kidnapping, attempted child molestation, and two counts of attempted sexual assault. The trial court sentenced him to concurrent, ten-year prison terms for sexual assault and kidnapping, to be followed by lifetime probation on the remaining counts. McCarty sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record but had found no "colorable issue to submit to the court pursuant to Rule 32."

¶3 McCarty then filed a pro se petition for post-conviction relief arguing his counsel had been ineffective and asserting various defects in his sentences, including an allegation that the court was not permitted to impose lifetime probation. He also claimed his convictions violated double jeopardy and were multiplicitous. In his reply to the state's response, McCarty further argued his conviction for attempted child molestation was barred pursuant to A.R.S. § 13-107 because the alleged offenses had occurred in 1997. Based on this argument, the court ordered the state file a supplemental memorandum addressing that issue.

¶4 In his reply to the state's supplement, McCarty acknowledged that, pursuant to *State v. Gum*, 214 Ariz. 397, 153 P.3d 418 (App. 2007), the original charge of child molestation was not barred by § 13-107. He asserted, however, that the charge of attempted child molestation, "as amended in the plea agreement, was time-barred from prosecution" and that his counsel was ineffective in failing to inform him of that fact before he entered his guilty plea. He maintained he would have prevailed at trial on the child molestation charge and, "[i]f he had been properly advised that a statute-of-limitations defense against" the lesser-included offense of attempted child molestation "would likely have succeeded," he would have raised it.

¶5 The trial court summarily rejected the bulk of McCarty's claims. In rejecting his claims related to § 13-107(A), the court cited *Gum* for the proposition that prosecution for child molestation was not barred and determined, as to attempted child molestation, that "[t]he relevant inquiry applies to the offense *as charged,* not the offense to which a guilty plea ultimately was entered." The court agreed, however, that the imposition of lifetime probation for McCarty's convictions of attempted sexual assault was improper pursuant to *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008), and ordered that the term of probation be modified to five years for those counts. This petition for review followed the court's denial of McCarty's motion for rehearing.

¶6 On review, McCarty argues only that the trial court erred in rejecting his claim that his conviction for attempted child molestation was barred by § 13-107 and that his trial counsel was ineffective in failing to inform him of that fact. We agree with the court that these claims warrant summary denial. First, to the extent McCarty suggests that his conviction for attempted child molestation is defective because prosecution was barred by § 13-107, he waived any such defense by pleading guilty. *State v. Banda*, 232 Ariz. 582, ¶¶ 8-10, 307 P.3d 1009, 1011-12 (App. 2013).

¶7 McCarty additionally asserts his counsel was ineffective for failing to inform him a statute-of-limitations defense under § 13-107 was available for attempted child molestation. To raise a

colorable claim of ineffective assistance, McCarty was required to demonstrate that his trial counsel's conduct fell below reasonable professional norms and prejudiced him. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006).

¶8 As we understand his argument, McCarty claims he would have rejected the state's plea offer had counsel told him he could successfully raise a defense to attempted child molestation based on § 13-107. When a lesser-included offense is barred by the statute of limitations, a defendant may waive that defense at trial and receive an instruction on the lesser-included offense; alternatively, that defendant may instead opt for the jury to be instructed only on the greater offense. *See Spaziano v. Florida*, 468 U.S. 447, 456-57 (1984), *overruled on other grounds by Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016). Thus, as McCarty seems to suggest, had he gone to trial, a defense to attempted child molestation based on § 13-107 might have given him the opportunity to pursue an all-or-nothing defense to the charge of child molestation.

¶9 But, even assuming § 13-107 applied to the attempt offense, McCarty has not demonstrated that pursuing an all-or-nothing defense to the molestation charge would have been a reasonable strategic choice. He has not shown a jury would have had any reason to convict him of the lesser offense but not the greater and, thus, that counsel fell below prevailing professional norms by failing to suggest an all-or-nothing defense strategy to McCarty before he plead guilty. *Cf. State v. Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d 148, 151 (2006) (lesser-included offense instruction required only when jury "could conclude that the defendant committed only the lesser offense").

¶10 And, in any event, McCarty has not demonstrated § 13-107 would have barred his prosecution for attempted child molestation. The time for the state to initiate prosecution begins to run only "after actual discovery [of the offense] by the state" or the time at which the state "should have" discovered the offense "with the exercise of reasonable diligence, whichever first occurs." § 13-107(B). Although McCarty was not charged until 2011 and the

offense was alleged to have occurred in 1997, he has identified no evidence of when the state discovered or should have discovered the offense. Nor has he established that the time would not have been tolled pursuant to § 13-107(D), either because he was absent from Arizona or had "no reasonably ascertainable place of abode" here. Thus, McCarty has not shown his trial counsel had any reason to inform him of a possible statute-of-limitations defense to attempted child molestation. In sum, McCarty has not shown that he had a statute-of-limitations defense to attempted child molestation or that his trial counsel had any reason to inform him of the possibility of such a defense.

¶11 We grant review but deny relief.