

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Petitioner,

v.

DARREN IRVING GOLDIN,
Respondent.

No. 2 CA-CR 2016-0132-PR
Filed September 13, 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NOT FOR PUBLICATION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. CR20101551001

The Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Mark Brnovich, Arizona Attorney General
Kimberly H. Ortiz, Section Chief Counsel, Phoenix
By Nicholas Klingerman, Assistant Attorney General, Tucson
Counsel for Petitioner

STATE v. GOLDIN
Decision of the Court

Law Office of Paul S. Banales, Tucson
By Paul S. Banales
Counsel for Respondent

MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 The state petitions for review of the trial court’s ruling, after remand, granting Darren Goldin’s post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., by vacating his conviction and sentence, revoking his plea agreement, and reinstating the original charge of first-degree murder. We find no abuse of discretion in the court’s resolution of Goldin’s claims. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007) (reviewing court will not disturb ruling on post-conviction relief absent clear abuse of discretion). Accordingly, although we grant review, we deny relief.

Factual and Procedural Background

¶2 The facts relevant to Goldin’s petition for post-conviction relief may be found in our earlier decision on review. *See State v. Goldin*, 239 Ariz. 12, 365 P.3d 364 (App. 2015). In sum, Goldin pleaded guilty in 2013 to second-degree murder, pursuant to an agreement that provided for a stipulated prison term of eleven calendar years, to be served consecutively to a sentence he was already serving pursuant to a conviction in Maricopa County. *Id.* ¶ 2. His expected release date for the Maricopa County conviction was June 1, 2016. At sentencing, counsel filed an addendum to the plea agreement to stipulate that “the Court shall order that Defendant’s pretrial incarceration dating from his Arraignment on June 15, 2010 be credited against his sentence of imprisonment . . . as required by Arizona law.”

STATE v. GOLDIN
Decision of the Court

¶3 In his petition for post-conviction relief, Goldin claimed his counsel had been ineffective in informing him his sentence under the plea agreement “would start to run” in mid-2010, such that he would be eligible for release for the instant conviction in 2021. But, according to the Arizona Department of Corrections (ADOC), he would not begin serving this sentence until June 2016, after release from his sentence in the Maricopa County case, and, after application of the presentence incarceration credit ordered by the court, he would not be eligible for release until September 2024. In an affidavit attached to his petition, Goldin averred he had accepted the plea agreement based on his attorney’s representation that his sentence would begin in 2010 and, “without that” representation, he “would never have accepted the plea.”

¶4 After an evidentiary hearing, the trial court denied relief on the ground that Goldin’s ineffective assistance of counsel claim was precluded under Rule 32.2(a) and time-barred pursuant to Rule 32.4(a). On review, we remanded the matter for the trial court to reconsider, in light of *State v. Diaz*, 236 Ariz. 361, 340 P.3d 1069 (2014), whether Goldin had waived his claim of ineffective assistance of counsel or, instead, whether his failure to file a timely of-right notice of post-conviction relief was “without fault on [his] part,” Ariz. R. Crim. P. 32.1(f). *Goldin*, 239 Ariz. 12, ¶ 26, 365 P.3d at 370. If the court determined Rule 32.1(f) relief was warranted, we directed that it rule on the merits of Goldin’s claim, including whether he had been prejudiced by counsel’s “apparently deficient performance.” *Goldin*, 239 Ariz. 12, ¶ 26, 365 P.3d at 370.

¶5 On remand, after briefing by the parties, the trial court granted Goldin relief pursuant to Rule 32.1(f), concluding his failure to timely seek relief was without fault on his part. In considering Goldin’s claim of ineffective assistance of counsel, the court stated it was “most concerned” that the entire proceeding had been “‘infected’” by counsel’s “‘incorporat[ion] as part of the record . . . that the time credits of 988 days would come basically from the arraignment date,” lending support to Goldin’s belief that his sentence would begin in 2010. The court noted, as it had in its initial ruling, that it never would have approved the agreement had it believed—as Goldin and his counsel testified they had believed—

STATE v. GOLDIN
Decision of the Court

that it contemplated Goldin's release after he had served only five additional years in prison after completing his Maricopa County sentence.¹

¶6 The trial court also found Goldin had been prejudiced by counsel's deficient performance, stating, "that prejudice rises to the level" required to grant relief on a claim "of ineffective assistance of counsel."² The court granted relief by revoking the plea agreement, vacating Goldin's conviction and sentence, and reinstating the original charge. This petition for review followed.

Discussion

¶7 In its petition for review, the state relies on *State v. Poblete*, 227 Ariz. 537, 260 P.3d 1102 (App. 2011), to argue Goldin is not entitled to relief for failing to file a timely of-right petition for post-conviction relief in which he could have asserted a claim of ineffective assistance of counsel. The state argues the trial court's ruling granting Goldin relief pursuant to Rule 32.1(f) is contrary to *Poblete* and would "open the flood-gates" to delayed claims of ineffective assistance of counsel made by pleading defendants. According to the state, "Goldin has identified no extraordinary circumstance that prevented him from discovering his sentence during the limitations period and filing a timely notice," and his "situation is no different than any defendant who claims ignorance of appellate claims due to trial counsel's advice."

¹The trial court stated it had instead understood the sentence to be eleven years, minus 988 days' credit for presentence incarceration, for a consecutive prison term of approximately eight years.

²In its petition for review, the state noted the trial court had initially granted relief on remand without an express finding of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). We remanded the matter for the court to enter a finding on this issue, and received the court's finding of prejudice by supplemental certificate. The state has since informed us it "will not seek review of the trial court's *Strickland* prejudice findings."

STATE v. GOLDIN
Decision of the Court

¶8 In *Poblete*, the defendant sought leave to file an untimely of-right notice of post-conviction relief pursuant to Rule 32.1(f) to allege his counsel had been ineffective in failing to inform him of the specific deportation consequences of his guilty plea. 227 Ariz. 537, ¶¶ 2-3, 260 P.3d at 1103-04. *Poblete* maintained he had not been at fault for his failure to file a timely notice, because he had not discovered those consequences until years later, when an immigration attorney told him his conviction had rendered him subject to deportation. *Id.* ¶¶ 2, 6. The trial court denied relief, finding *Poblete's* delay was not excusable under Rule 32.1(f) because, regardless of any omission by counsel, the court had informed him during plea proceedings that his “plea or admission of guilt could result in [his] deportation or removal,” and *Poblete* had told the court he understood those “potential consequences.” 227 Ariz. 537, ¶ 3 & n.1, 260 P.3d at 1104 & n.1. We approved the court’s ruling, noting that *Poblete* had not alleged “that he intended to challenge the court’s decision but his attorney or someone else interfered with his timely filing of a notice.” *Id.* ¶ 7. We stated relief pursuant to Rule 32.1(f) is not warranted merely because, “based on information that later came to light, [a defendant] regret[s] having failed to challenge his conviction.” *Poblete*, 227 Ariz. 537, ¶ 7, 260 P.3d at 1104-05.

¶9 In response, Goldin relies on *State v. Stice*, 23 Ariz. App. 97, 530 P.2d 1130, *supp. op.*, 24 Ariz. App. 516, 540 P.2d 135 (1975), to argue Rule 32.1(f) relief was appropriately granted. In *Stice*, the defendant argued he was entitled to relief under Rule 32.1(f) because he had foregone his right to appeal because his probation officer told him he would be eligible to have his misdemeanor conviction set aside after he completed probation. *Supp. op.*, 24 Ariz. App. at 516-17, 540 P.2d at 135-36. The trial court denied relief, but on review, this court remanded the case for further proceedings, explaining as follows:

[I]f the probation officer advised petitioner as alleged, and if because of this erroneous advice petitioner decided to forego his appeal rights, petitioner has been deprived of a substantial right due to the action of an

STATE v. GOLDIN
Decision of the Court

officer of the court, and should now be allowed to exercise that right. We have no hesitancy in holding that if such circumstances existed, petitioner's failure to appeal within the prescribed time would have been 'without fault on his part' so as to justify relief pursuant to Rule 32.1(f)

Stice, supp. op., 24 Ariz. App. at 517, 540 P.2d at 136.

¶10 We conclude the unusual circumstances here implicate the concerns expressed in *Stice* and are easily distinguished from those in *Poblete*. In *Poblete*, the trial court had clearly and unequivocally warned the defendant of potential deportation consequences, and the alleged error by his attorney was one of omission—counsel's failure to inform him more specifically that he could or would be deported based on his guilty plea. Here, in contrast, as the trial court noted on remand, the entire proceeding appears to have been "infected" by counsel's deficient performance.

¶11 Counsel was clearly mistaken in believing that the trial court could order Goldin's sentence to begin before its pronouncement. See *State v. Pena*, 140 Ariz. 545, 548, 683 P.2d 744, 747 (App. 1983) (concluding "a sentence cannot commence before it is imposed"), *approved*, 140 Ariz. 544, 683 P.2d 743 (1984). But he believed that was what the agreement provided. Defense counsel's statements at the change-of-plea and sentencing hearings can be seen, in retrospect, to reflect those mistaken beliefs, and the prosecutor's apparent acquiescence in those statements added to the confusion. The court itself appears to have been affected by that confusion in attempting to enforce the parties' stipulation, as it imposed a consecutive sentence that the parties "stipulat[ed] is to start or commence from June 15, 2010." Relief pursuant to Rule 32.1(f) is appropriate where, as here, a defendant's delay in filing a timely of-right notice of post-conviction relief may be attributed to misstatements by "an officer of the court." *Stice, supp. op.*, 24 Ariz. App. at 517, 540 P.2d at 136.

STATE v. GOLDIN
Decision of the Court

Disposition

¶12 The trial court did not abuse its discretion in granting Goldin post-conviction relief. Accordingly, although we grant review, we deny relief.