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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ARNOLDO HENRY PETERSON, Petitioner.	2 CA-CR 2011-0007-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR29462

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Arnoldo H. Peterson
Tucson
In Propria Persona

E C K E R S T R O M, Judge.

¶1 Petitioner Arnoldo Peterson seeks review of the trial court's denial of his "Motion for 'Nunc Pro Tunc Order'" in which he asked the court to amend his sentence to reflect 335 days' credit for presentence incarceration. The court appears to have

construed Peterson's motion as a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. We likewise construe Peterson's "appeal" from the court's ruling as a petition for review of that decision pursuant to Rule 32.9.

¶2 After a jury trial in 1990, Peterson was convicted of first-degree murder and an unlawful offer to sell a narcotic drug. The trial court sentenced him to a term of life imprisonment on the murder conviction and to a presumptive, concurrent, seven-year term on the drug conviction. We affirmed his convictions and sentences on appeal. *State v. Peterson*, No. 2 CA-CR 90-0799 (memorandum decision filed June 23, 1992). Peterson filed his first Rule 32 petition in 1998; the court denied relief and we denied relief on review. *State v. Peterson*, No. 2 CA-CR 98-0424-PR (memorandum decision filed July 29, 1999). Peterson initiated at least one other post-conviction proceeding, in 2003, and was denied relief in that proceeding as well.[1] Peterson did not challenge, in any of these previous proceedings, the trial court's determination at sentencing that he was entitled to only two days' credit for time "spent in custody pursuant to" his offenses of conviction. 1978 Ariz. Sess. Laws, ch. 201, § 104 (former A.R.S. § 13-709(B)).[2]

¶3 In October 2010, Peterson sought a post-conviction amendment to his sentence, arguing the trial court had calculated his presentence incarceration credit erroneously. The state maintained Peterson's claim was precluded because it could have been raised on appeal or in his previous post-trial proceedings. According to the state, the court's calculation had been "based on information in the pre-sentence report . . . showing that two days after his arrest in the instant case, the Cochise County Probation

[1]It appears Peterson did not seek our review of the trial court's denial of relief in his 2003 Rule 32 proceeding.

[2]The text of this sentencing statute is found in 1977 Ariz. Sess. Laws, ch. 142, § 57, former A.R.S. § 13-905.

Department placed a hold on [Peterson] which did not expire until he was sentenced by [the trial] court." After a status conference, the court denied relief, finding there was "no basis for [Peterson]'s motion." This petition for review followed.

¶4 On review, Peterson contends the trial court erred in denying him "[b]acktime [c]redits" for his pretrial detention. He maintains the denial was based on the court's mistaken impression that he had been held in Cochise County before trial and argues he was "entitled to [credit for] the full 335-days" of his pretrial incarceration because he was never prosecuted by Cochise County for an alleged probation violation. We review a 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). We find no abuse of discretion here.

¶5 We need not address Peterson's arguments regarding the merits of his claim, because the claim is precluded. *See* Ariz. R. Crim. P. 32.2(c) ("[A]ny court on review of the record may determine and hold that an issue is precluded . . . ."). His claim is grounded in Rule 32.1(c) (excessive or otherwise unauthorized sentence) and could have been raised on appeal. Because he failed to raise this claim on appeal or in his previous post-conviction proceedings, it is precluded by waiver. *See* Ariz. R. Crim. P. 32.2(a)(3) (defendant precluded from relief based on any ground "waived at trial, on appeal, or in any previous collateral proceeding").

¶6 In the trial court, Peterson argued his claim was excepted from preclusion based on a significant change in the law that, if determined to apply to his case, would likely have changed his convictions or sentences. *See* Ariz. R. Crim. P. 32.1(g) (allowing relief when significant change in law "would probably overturn the defendant's conviction or sentence"); Ariz. R. Crim. P. 32.2(b) (preclusion under Rule 32.2(a) does

not apply to claims based on Rule 32.1(d), (e), (f), (g), or (h)).[3] He maintains amendments made in 2002 to A.R.S. §§ 41-1604.07 and 41-1604.09 altered the manner in which the Arizona Department of Corrections calculated early release credits and rendered him eligible for credit for his pretrial incarceration. *See* 2002 Ariz. Sess. Laws, ch. 321, §§ 3-4. But even if Peterson were correct that the amendments had such an effect, it would not have affected the issue Peterson raises here—that, at sentencing, the court had erroneously reduced his credit for time served in pretrial incarceration based on a probation hold. The claim could have been raised on direct appeal, was not, and has been waived.

¶7 Because Peterson's claim was precluded, the trial court did not abuse its discretion in denying relief. Accordingly, we grant review but deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[3]In his petition for post-conviction relief, Peterson also suggested his claim was excepted from preclusion because it involved "newly discovered material facts" within the meaning of Rule 32.1(e). But he cites only his recent discovery of the statutory amendments, which are not material facts within the purview of Rule 32.1(e).