NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
JUN 29 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0099-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
EDWARD E. NORIEGA,	)	the Supreme Court
	)	
Petitioner.	)	
	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200501566

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Edward E. Noriega — Tucson, In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Edward Noriega seeks review of the trial court's order denying 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). Noriega has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Noriega was convicted of two counts of attempted child molestation. The trial court imposed an aggravated, twelve-year sentence on one count and suspended the imposition of sentence and placed Noriega on lifetime probation for the other. It also ordered Noriega to register as a sex offender.

¶3 Noriega thereafter initiated Rule 32 proceedings. Counsel, John Schaus, filed a notice stating he had reviewed the matter and was "unable to identify any issues upon which to base a claim for relief." He requested an extension of time for Noriega to file a pro se petition and asked to withdraw as counsel. The court granted Schaus's motion to withdraw and allowed Noriega approximately sixty days to file a petition. Before the petition was due, Noriega indicated several times that he had not received his file or transcripts from counsel. He did, however, file a petition, and the court again appointed counsel—first Harriette Levitt, then Michael Villarreal, and finally Andrew Diodati.

¶4 In January 2009, the trial court granted counsel about sixty days to file "any supplemental pleading." No such pleading was filed and, on July 8, 2009, the court denied relief. Noriega filed a pro per "motion for reconsideration" in which he argued "the plain language of A.R.S. [§] 13-604.01" did not "encompass 'attempted molestation

of a child in the second degree,'" the crime to which he had pled guilty. Thus, he reasoned, he was improperly sentenced and should not have been placed on lifetime probation or required to register as a sex offender. On June 23, 2010, the court denied the motion as untimely filed, and stated it was "without merit as [Noriega's] claims were fairly presented and decided." The court also ordered Diodati to provide Noriega with his "file" within thirty days and granted Noriega forty-five days from the date of receipt to file a pro per petition for post-conviction relief. Noriega instead petitioned this court for review on July 12, 2010. We granted review, but denied relief on his petition, concluding we would not address the sentencing claims as they had been untimely presented to, and therefore not considered by, the trial court. *State v. Noriega*, No. 2 CA-CR 2010-0237-PR, ¶¶ 9-10 (memorandum decision filed Nov. 16, 2010).

¶5 Meanwhile, Noriega already had initiated a second Rule 32 proceeding in January 2010. In his notice of post-conviction relief he cited Rule 32.1(e), (f), and (g) as the grounds for his claims. In explaining why his claims had not been timely brought, Noriega stated that he was "seeking relief pursuant to Rule 32.1(c)" but that "the relief being sought is also applicable to Rule 32.1(e), (f), and (g)." He then asserted that (1) the trial court had erred in allowing Schaus to withdraw because Rule 32.4(c)(2) required counsel to remain in an advisory role; (2) Diodati never had provided him with his "case file"; and (3) his original petition for post-conviction relief never had been ruled upon by the trial court.[1] He therefore requested that the court "accept[]" his petition for post-

[1]Noriega's notice of post-conviction relief was filed on January 26, 2010. He filed a pro-per petition for review challenging the trial court's ruling on his first petition for

conviction relief and grant him relief because the court had "failed to follow the correct sentencing guidelines when sentencing [him]." The court appointed Matthew Ritter to represent Noriega in the second proceeding.

¶6 In June 2010, Ritter filed a notice stating he was unable to find any meritorious issues to raise in a petition and requesting an extension of time for Noriega to file a pro per petition and to withdraw. The court granted the motion to allow Noriega to file a petition, but denied the request to withdraw, stating that Ritter "shall remain as advisory counsel pursuant to Rule 32.4(c)." Noriega filed a pro per petition for post-conviction relief in which he argued: (1) he had been "deprived of counsel, without waiver, in his first Rule 32 of-right proceeding"; (2) he had been "without his case file" until October 2010; (3) he had been improperly sentenced; (4) Schaus had been ineffective in failing to provide the file and in failing to raise his sentencing arguments in the first proceeding; and (5) later-appointed counsel was ineffective in failing to withdraw or correct Noriega's pro per petition in the first proceeding. The trial court denied relief, concluding Noriega's sentencing claims were precluded and, even if not precluded, were without merit.

¶7 In his petition for review, Noriega argues the trial court erred and his claims should not be precluded because he was without advisory counsel in filing his pro per

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post-conviction relief, which was issued on July 8, 2009, on July 12, 2010. In November 2010, Noriega filed a motion to stay the second proceeding, stating he had received notice that the court had ruled in the first proceeding and that the second proceeding "would need to include [a claim of] ineffective assistance of counsel . . . if the Court of Appeals procedurally bars the defendant from relief due to the defendant's petition being filed untimely." He filed his petition in this second proceeding shortly thereafter.

petition in his first Rule 32 proceeding and because counsel in the first proceeding was ineffective. He also reasserts his arguments about his sentence, first raised in his motion for reconsideration in the first proceeding, claiming the court could not sentence him under former A.R.S. §§ 13-604.01, 13-902(E), and 13-3821, because his crime was "not defined within the statute[s]."

¶8 We first address Noriega's argument that his claims should not be precluded despite his failure to timely raise them in his first Rule 32 proceeding because he was "without any counsel when the first [pro per] petition was ordered due." But, as the trial court correctly pointed out, although it allowed Schaus to withdraw from his representation of Noriega, it subsequently appointed new counsel to advise him. Although new advisory counsel was appointed after Noriega filed his pro per petition, more than a year passed between the appointment of Levitt in May 2008 and the court's denial of Noriega's petition in July 2009. Thus, Noriega had sufficient time to consult with counsel and to supplement or withdraw and replace his petition.

¶9 Noriega is correct that a petitioner is entitled to advisory counsel while filing his pro per petition in a Rule 32 proceeding. *Lammie v. Barker*, 185 Ariz. 263, 264, 915 P.2d 662, 663 (1996). He has cited no authority, however, to support the proposition that a defendant's right to counsel is violated by the absence of appointed counsel for a brief period during the pendency of the proceeding, long before the court ultimately ruled, or that such a violation would except a claim from preclusion.

¶10 Noriega also maintains his claims should not be precluded because he "was without his trial record when he was required to submit his first [pro per] petition." But,

even accepting Noriega's assertion he was entitled to the unspecified documents counsel had not provided to him, we cannot say the trial court erred in implicitly rejecting this basis for an exception to preclusion. Noriega first raised the sentencing claims presented here in his motion for reconsideration in his first Rule 32 proceeding, filed in February 2010, eight months before he averred he ultimately received his "case file." Noriega has not therefore adequately shown that his failure to receive these unspecified documents prevented him from timely raising his sentencing claims.

¶11 Although Noriega's sentencing claims are precluded based on his failure to timely raise them in the first proceeding, Ariz. R. Crim. P. 32.2(a)(3), he is entitled, as a pleading defendant, to raise a claim of ineffectiveness of Rule 32 counsel based on counsel's actions in his first, of-right proceeding. *See State v. Pruett*, 185 Ariz. 128, 130-31, 912 P.2d 1357, 1359-60 (App. 1995). The trial court did not, however, abuse its discretion in implicitly rejecting Noriega's claim of ineffective assistance of counsel.

¶12 "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *citing Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim." *Id.* A "strong presumption exists" that counsel provided effective assistance, and a defendant has the burden of overcoming that presumption. *Id.* ¶ 22. Here, even accepting arguendo that counsel's performance in Noriega's first proceeding was deficient, Noriega cannot establish he was prejudiced thereby because the

arguments he contends counsel either failed to assert or caused him to fail to assert in his pro per petition by withholding his file, are without merit.

¶13 As the trial court summarized, Noriega's argument is essentially "that Molestation of a Child in the second degree is a preparatory offense and that, therefore, pleading to Attempted Molestation of a Child in the second degree is a plea to attempting to commit a preparatory offense." On that basis, Noriega claims he could not properly be sentenced under former §§ 13-604.01, 13-902, or 13-3821.[2] But, as this court has noted, attempt is a "preparatory offense[]." *State v. Tellez*, 165 Ariz. 381, 383, 799 P.2d 1, 3 (App. 1989). Noriega's plea agreement stated he was pleading guilty to "Attempted Molestation of a Child, a class 3 felony and dangerous crime against children in the second degree." In other words, he pled guilty to an attempt, or preparatory offense, to molest, which is a dangerous crime against children in the second degree.

¶14 Noriega ignores the fact that the phrase "a class 3 felony and dangerous crime against children in the second degree," merely modified the offense of "Attempted Molestation of a Child" to which he pled guilty. Instead he argues his crime was "'attempted' molestation of a child in the second degree," a characterization of his conviction which, as we previously pointed out, has no basis in the record. *Noriega*, No. 2 CA-CR 2010-0237-PR, n.4. Because Noriega's legal arguments are without merit, counsel's performance could not have changed the outcome of his first proceeding. *See State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004) ("A colorable claim of

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[2] 2005 Ariz. Sess. Laws, ch. 282, § 1; 2005 Ariz. Sess. Laws, ch. 320, § 1; 2005 Ariz. Sess. Laws, ch. 282, § 3.

post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'"), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Therefore, although we grant the petition for review, we deny relief.

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

CONCURRING:

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

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