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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OF ARIZONA, Respondent, v. DONALD WAYNE HUGGINS, Petitioner.	2 CA-CR 2008-0280-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause Nos. CR 96-0057 and CR 96-0091 (Consolidated)

Honorable Robert Duber, II, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By June Ava Florescue
Globe
Attorneys for Respondent

David Alan Darby
Tucson
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Following a jury trial in 1996, petitioner Donald Huggins was convicted of possession of a dangerous drug for sale, transportation of a dangerous drug for sale, possession of a narcotic drug, transfer of a narcotic drug, participation in a criminal syndicate, and manslaughter. The trial court sentenced him to concurrent and consecutive, mitigated and presumptive terms of imprisonment, and to an enhanced term of life imprisonment without the possibility of release for twenty-five years pursuant to the serious drug offender statute, A.R.S. § 13-3410. We affirmed Huggins's convictions and sentences on appeal. *State v. Huggins*, Nos. 2 CA-CR 97-0356, 2 CA-CR 97-0357 (consolidated) (memorandum decision filed Feb. 9, 1999).

¶2 A summary of the procedural history in this matter is helpful. In August 2002, attorney Marc Victor filed Huggins's first petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in which he raised assorted claims, including ineffective assistance of trial counsel, Michael Vaughn.[1] In January 2003, the trial court denied all of Huggins's claims except those related to Vaughn's alleged ineffective assistance at trial. Following a September 2003 evidentiary hearing, the court denied those claims as well. In September 2004, Huggins filed his second petition for post-conviction relief, in propria persona. In it, he raised a claim for relief under *Blakely v. Washington*, 542 U.S. 296 (2004), which the trial court denied.

[1]Although the actual notice of post-conviction relief has not been included in the record, it appears from the index of record on appeal that a notice was filed in September 1999.

¶3 In the interim, Huggins filed various requests for leave to file a delayed petition for review from the denial of the 2002 petition for post-conviction relief. In February 2005, we dismissed Huggins's February 2004 petition for review as untimely. Huggins again sought leave to file a delayed petition for review, this time asserting he had never received the transcripts of the September 2003 evidentiary hearing, rendering him unable to file a timely petition for review. He ultimately petitioned this court for special action relief, which we granted in February 2006, ordering the trial court to assure that Huggins was provided with the transcripts of the 2003 evidentiary hearing and granting him thirty days from receipt thereof to file his petition for review. Although Huggins received the transcripts in February 2006, he filed this petition for review in September 2008, after having received various extensions of time from the trial court to do so.

¶4 In the interim, Huggins filed a pro se motion for rehearing in July 2006, reasserting the first two claims he now raises on review, which he had already raised in his 2002 petition for post-conviction relief, and requesting leave to amend the 2002 petition to include a claim that Vaughn had been ineffective for failing to notify him of a favorable plea offer. The trial court denied the motion for rehearing a few weeks later but ordered the state to respond to Huggins's claim regarding the plea offer. Following a November 2007 evidentiary hearing held solely to address the plea offer, the court denied relief on that claim as well.

¶5 Huggins raises three claims on review: (1) the jury instructions on § 13-3410(B) were faulty and did not apply to him, (2) the life sentence imposed pursuant to § 13-

3410(B) is excessive and constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, and (3) as a result of Vaughn's having taken pain medication during the trial, he was ineffective and thus failed to raise the aforementioned claims at trial or to disclose the plea agreement to Huggins. Notably, at the conclusion of the 2003 evidentiary hearing on the ineffective assistance claim, the trial court found there was insufficient evidence Vaughn had been taking medication during the trial. The court also found "there [was] not an iota of evidence to support a conclusion that [Vaughn's] functioning as a trial lawyer fell below the standard of unreasonably effective counsel," a ruling which was supported by Vaughn's testimony at the hearing, by his affidavit,[2] and by the testimony of one of the two prosecutors who opined that Vaughn had been a "formidable opponent" at trial and had presented a "vigorous and zealous" defense on Huggins's behalf.

¶6 We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here. In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance caused prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

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[2]Vaughn's unsigned affidavit was attached as an exhibit to the state's response to the 2002 petition for post-conviction relief.

¶7 On appeal, Huggins raised a nearly identical claim to the first claim now before us, that the jury instructions concerning § 13-3410 were deficient and did not apply to him; we rejected that claim as waived because he had not objected to the instructions at trial. *Huggins*, Nos. 2 CA-CR 97-0356 & 97-0357, n.4. Although he raises the current claim as one of ineffective assistance of trial counsel, in the ten pages of his petition for review devoted to this claim, Huggins does not mention Vaughn's conduct even once. Later in the petition, he briefly mentions that Vaughn was ineffective in failing to raise the "foregoing issues at trial and sentencing" and that Huggins was prejudiced thereby. Similarly, at the 2003 evidentiary hearing, Huggins pointed out to the trial court that an evidentiary hearing on the ineffective assistance claim might not be necessary if the court agreed with his legal argument about the jury instructions. In short, although Huggins has attempted to characterize this claim as one of ineffective assistance of counsel, a careful reading of his petition for review and the transcript of the 2003 evidentiary hearing suggests otherwise. Rather, it appears Huggins has simply attempted to present this claim under the guise of ineffective assistance in an attempt to avoid our finding it precluded. *See* Ariz. R. Crim. P. 32.2(a)(2) and (3) (defendant precluded from relief on any ground adjudicated or waived on appeal or waived at trial).

¶8 However, even assuming Huggins has raised a claim of ineffective assistance of counsel that is not otherwise precluded, we conclude the trial court's denial of any such claim was correct, and in any event, we find this claim untimely. *See* Ariz. R. Crim. P. 32.9(c) (petition for review must be filed within thirty days of trial court's ruling on petition

for post-conviction relief or motion for rehearing). Although the court denied relief on this claim in September 2003, Huggins arguably could not have presented it on review until he received the transcripts of the 2003 evidentiary hearing in February 2006 or until the trial court denied his motion for rehearing in July 2006. He nonetheless filed this petition more than two years after the trial court's July 2006 ruling. Notably absent from the record is any explanation why he waited so long to do so. Although Huggins was granted leave to pursue an ineffective assistance claim regarding the plea agreement, as well as extensions of time to file a petition for review of the court's denial of that claim, the fact remains that the trial court had rendered a final ruling on the claim concerning the jury instructions, at the latest, when it denied the motion for rehearing in July 2006. Accordingly, we find this claim untimely.

¶9 In addition, to the extent Huggins suggests he was entitled to post-conviction relief because there was insufficient evidence to support the application of § 13-3410 to his case, we reject any such claim as waived and precluded. On appeal, we addressed and rejected similar claims arising from the trial court's denial of Huggins's motion for judgment of acquittal. *Huggins*, Nos. 2 CA-CR 97-0356 & 97-0357, ¶¶ 10-18. We likewise reject the claim, apparently made for the first time on review, that fundamental error occurred.

¶10 Huggins next contends his life sentence, imposed pursuant to § 13-3410, is cruel and unusual, ostensibly raising this claim as one of ineffective assistance. At the trial court's suggestion, Huggins petitioned the Board of Executive Clemency to commute his sentence, a request the Board denied following a hearing in October 1997. When Huggins

raised this issue on appeal, we found it waived because he had neither raised it at trial nor asserted it as fundamental error. *Huggins*, Nos. 2 CA-CR 97-0356 & 97-0357, n.1. At the 2003 evidentiary hearing, Rule 32 counsel did not present this claim as one of ineffective assistance of counsel. Nor did counsel question Vaughn, who was present at that hearing, about this claim.[3] The trial court ultimately denied post-conviction relief on this same claim, couched as a claim of ineffective assistance, noting that the sentence had been imposed in accordance with the applicable statute. In addition, as previously noted, although the trial court denied relief on this claim in September 2003 and again on rehearing in July 2006, Huggins waited, without explanation, more than five years after the initial ruling and more than two years after his receipt of the transcripts and the denial of his motion for rehearing to file this petition for review. Because Huggins's claim does not appear to be based on ineffective assistance of counsel, it is precluded. Because it is untimely, in any event, we conclude the trial court correctly denied relief.

¶11 Finally, Huggins contends Vaughn was ineffective in failing to tell him about a plea offer proposing a fifteen-year sentence, the claim that was the subject of the 2007 evidentiary hearing. Huggins asks, as he did below, that the plea offer be reinstated pursuant to *State v. Donald*, 198 Ariz. 406, ¶¶ 14, 44, 10 P.3d 1193, 1200, 1205 (App. 2000). At the conclusion of the 2007 hearing, the trial court stated that, although it was unclear if Huggins was claiming that the plea offer was newly discovered evidence pursuant to Rule 32.1(e) or that he had failed to file a timely claim through no fault of his own pursuant to Rule 32.1(f),

[3]Vaughn is now deceased.

the court rejected his claim on the ground that, by Huggins's own admission, he had known about the plea offer "nine or ten" years earlier. The court found, in any event, that it simply did not believe Vaughn would have failed to convey the offer to Huggins.

¶12 Notably, Huggins acknowledged that approximately ten years earlier he had received and read the transcript of his hearing before the Board of Executive Clemency in 1997, at which Deputy Gila County Attorney DeRose had testified about the fifteen-year plea offer, and that his mother had highlighted for him that portion of the transcript in which the plea offer was discussed. Huggins nonetheless had asserted in his 2002 reply to his first petition for post-conviction relief that "it is difficult to believe that such a plea was offered." It is undisputed that Huggins knew about the plea offer as early as 1997. But he did nothing to assert this claim for ten years, nor has he offered an explanation for his delay. For all of these reasons, we conclude the trial court correctly denied this claim.

¶13 Although we grant the petition for review, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge