

ANOTICE: 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



DIVISION ONE
FILED: 11/17/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0390 PRPC
)
Respondent,) DEPARTMENT A
)
v.) MARICOPA County
) Superior Court
DEANDRAY VESCHONNE LEWIS,) No. CR2006-162448-001 SE
)
Petitioner.) **DECISION ORDER**
)

Petitioner Deandray Veschonne Lewis petitions this court for review from the summary dismissal of his petition for post-conviction relief. Presiding Judge Ann A. Scott Timmer, and Judges Patrick Irvine and Daniel A. Barker, have considered this petition for review, and for the reasons stated, grant review and grant relief.

FACTS AND PROCEDURAL HISTORY

Lewis pled guilty to attempted first-degree murder. He was sentenced to an aggravated term of eighteen years' imprisonment. He timely filed his post-conviction relief "of-right," and he was appointed counsel. After reviewing the file, appointed counsel notified the court she was unable to find any claims for relief. Counsel remained as advisory counsel, and Lewis was

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permitted to file a pro se petition. In his petition, Lewis raised claims of ineffective assistance of counsel ("IAC"), prosecutorial misconduct, and an abuse by the trial court of its sentencing discretion.

The State filed its response and addressed each claim. Lewis filed a reply, and the trial court, citing the reasons set forth in the State's response, found no colorable claims and dismissed the petition. Lewis timely petitioned this court for review, but review was denied. *State v. Lewis*, 1 CA-CR 08-0826PR (Ariz. App. Feb. 3, 2010) (order).

On March 3, 2010, Lewis timely filed a notice of post-conviction relief ("PCR") in which he sought to raise a claim of ineffective assistance of his Rule 32 counsel. He requested the court appoint counsel. However, on April 29, 2010, the trial court summarily dismissed the notice of PCR as "an untimely and successive" PCR proceeding. Lewis timely petitioned this court for review.

DISCUSSION

Relying on Arizona Rule of Criminal Procedure 32.4(a) and *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995) (holding that pleading defendant may file second notice of

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PCR alleging IAC of Rule 32 "of-right" counsel within thirty days of final order by appellate court in first PCR proceeding), Lewis argues the trial court abused its discretion when it dismissed his second notice of PCR. The State concedes:

In this case, Defendant filed his second notice within the timeframe of Rule 32.4(a) and in that notice and accompanying petition his claims were characterized as ones of ineffective assistance of his first PCR counsel. For this reason, the State agrees that Defendant's second notice and PCR should not have been dismissed on timeliness grounds.

The State contends, however, the PCR was properly dismissed on other grounds. Lewis represented himself in his first PCR after appointed counsel notified the court she had found no claims to present. The State argues that Lewis may not now challenge his own asserted ineffectiveness or challenge advisory counsel's effectiveness.

This argument misses the mark. Lewis was neither challenging his own effectiveness, nor "advisory" counsel's effectiveness. He claimed in his notice of PCR that his Rule 32 counsel was ineffective for failing to find and/or raise certain issues. In other words, he claimed that counsel's failure to find any claims for relief was ineffective assistance, a

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cognizable claim. This situation is analogous to the one in which a defendant files a PCR and challenges his appellate counsel's effectiveness when counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1969). As noted by this court,

Moreover, if the defendant perceives that counsel has not effectively assisted in the presentation of his appeal, the defendant may petition for post-conviction relief under our rules. See *State v. Herrera*, 183 Ariz. 642, 905 P.2d 1377 (App. 1995) (holding that an allegation of ineffective assistance of appellate counsel is encompassed within Ariz. R. Crim. P. 32.1 as a claim that the conviction or sentence was in violation of the federal or state constitution). This procedure provides additional scrutiny of appointed counsel's and the court's determination that the appeal is frivolous.

State v. Clark, 196 Ariz. 530, 538, ¶ 35, 2 P.3d 89, 97 (App. 1999).

The State's second argument is equally unavailing. Whether the IAC claims set forth in the second notice of PCR are "identical or derivative" of those raised in the first PCR, Lewis asked for and is entitled to the appointment of counsel to review previous Rule 32 counsel's effectiveness. Ariz. R. Crim. P. 32.4(c)(2); *Pruett*, 185 Ariz. at 131, 912 P.2d at 1360.

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Because Lewis timely filed his second notice of PCR, he is entitled to have independent counsel appointed to assist him and to review previous Rule 32 counsel's effectiveness. *Osterkamp v. Browning*, 226 Ariz. 485, 488, ¶ 11, 250 P.3d 551, 554 (App. 2011) (defendant entitled to appointment of counsel to investigate and possibly assert a claim that first Rule 32 counsel had been ineffective). Therefore, it was an abuse of discretion for the trial court to summarily dismiss the second PCR.

CONCLUSION

We vacate the trial court's order of dismissal and remand this matter for reinstatement of the second PCR and for further proceedings consistent with this decision.

/s/
Ann A. Scott Timmer
Presiding Judge