

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

APR -9 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0468-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DONALD ROY MALONE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR057017

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Donald R. Malone

Tucson
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 In his petition for review, petitioner Donald Malone challenges the trial court's order dismissing without an evidentiary hearing his petition for post-conviction relief, which he filed pursuant to Rule 32, Ariz. R. Crim. P., and the court's denial of his motion for rehearing. "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).

¶2 Malone was convicted after a jury trial of six counts each of armed robbery, kidnapping, and aggravated assault with a deadly weapon after he and a codefendant robbed a bank. This court affirmed the convictions and the sentences, which totaled sixty-three years' imprisonment. *State v. Malone*, No. 2 CA-CR 98-0235, ¶ 1 (memorandum decision filed June 29, 1999). The trial court disposed of his first petition for post-conviction relief in 2002, granting partial relief. He then sought post-conviction relief in 2004, which the trial court denied; this court granted his petition for review of that denial but denied relief. *State v. Malone*, No. 2 CA-CR 2005-0010-PR, ¶¶ 1, 5 (decision order filed Sept. 8, 2005). In this, his third post-conviction proceeding, Malone raised a claim that the trial court presumed was a claim of newly discovered evidence under Rule 32.1(e), and a second, related claim of ineffective assistance of counsel.

¶3 In a clear, thorough minute entry order, the trial court reviewed the procedural history of this matter and identified the claims raised in this proceeding. It correctly determined Malone's claim that the stop of his vehicle had been "pretextual" was not based on evidence that could be characterized as newly discovered under the rule and applicable case law. The court also correctly concluded Malone's claim that trial

counsel had been ineffective for not challenging the stop was precluded because it could have been raised in Malone's first post-conviction proceeding. The court denied Malone's motion for rehearing as well, clarifying that it had not denied relief on the claim of newly discovered evidence on the ground that it was precluded, but because Malone was not entitled to relief under Rule 32.1(e).

¶4 The trial court's minute entry clearly addresses and correctly resolves the claims Malone raised in the petition for post-conviction relief. Because Malone has not established on review that the court abused its discretion in denying relief and dismissing the petition or denying the motion for rehearing, we adopt the court's rulings. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Thus, although we grant Malone's petition for review, we deny relief.

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

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge