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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OF ARIZONA, Respondent, v. TERRY LYN MCCUTCHEON, Petitioner.	2 CA-CR 2013-0230-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR13495

Honorable Catherine M. Woods, Judge

REVIEW GRANTED; RELIEF DENIED

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V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Terry McCutcheon 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). McCutcheon has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, McCutcheon was convicted of two counts of armed robbery, three counts of aggravated assault, and three counts of kidnapping, all arising from a drug-store robbery in 1984. In 1987, the trial court sentenced McCutcheon to a term of life in prison without the possibility of parole for at least twenty-five years on each count, to be served concurrently. McCutcheon's convictions and sentences were affirmed on appeal. *State v. McCutcheon*, 162 Ariz. 54, 781 P.2d 31 (1989).

¶3 In January 2013, McCutcheon initiated a proceeding for post-conviction relief, arguing in his petition (1) he was sentenced improperly, (2) he is entitled to relief on the grounds of actual innocence, (3) he received ineffective assistance of trial and appellate counsel in relation to his sentence, and (4) he was being held in custody after his sentence had expired. Because McCutcheon was sentenced before September 30, 1992, and has not filed a previous petition for post-conviction relief, his notice and petition are not untimely. *See Moreno v. Gonzalez*, 192 Ariz. 131, ¶ 23, 962 P.2d 205, 209 (1998). The trial court summarily denied relief.

¶4 On review, McCutcheon repeats his claims made below and asserts the trial court erred in concluding he had failed to establish he was not on parole at the time of his offenses and rejecting his Rule 32 claims on that basis. The court did not resolve whether any of McCutcheon's claims were precluded. But we may affirm its ruling on any basis. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason). And

McCutcheon's claim of sentencing error is precluded because he failed to raise it on appeal, Ariz. R. Crim. P. 32.2(a)(3), (c).

¶5 Apparently because the trial court did not base its decision on preclusion, McCutcheon does not develop an argument as to whether his sentencing claim is precluded on review, stating he would not "repeat the arguments against preclusion" made below "[i]n the interest of brevity." We therefore could decline to address preclusion further. *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop legal argument waives argument on appeal); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review). But in any event, his arguments below are insufficient to establish that his claim falls into any exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b).

¶6 McCutcheon maintained in his petition for post-conviction relief that his sentencing claim is based on a deprivation of his due process rights, and therefore is of "sufficient constitutional magnitude" that it could not be waived. He suggests the claim could not be waived because sentencing claims remain subject to fundamental error review on appeal, even if an objection was not made timely. But, both due process claims and claims of fundamental error are subject to preclusion. *See Swoopes*, 216 Ariz. 390, ¶¶ 27, 42, 166 P.3d at 954, 958. And McCutcheon has not established that his claim is one that required his "personal knowledge" to waive. *See* Ariz. R. Crim. P. 32.2, 2002 cmt.; *Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954.

¶7 We also reject McCutcheon's claim that the alleged sentencing error constituted "clear and convincing evidence that the facts underlying the claim would be

sufficient to establish that no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt" under Rule 32.1(h). McCutcheon argued that the enhancement of his sentence "effectively created a new offense," of which no reasonable fact-finder would have found him guilty because he was not on parole at the time he committed the robbery. Rule 32.1(h), however, requires evidence that a petitioner actually is innocent of the "underlying offense." In view of our supreme court having included in the rule a separate provision for a petitioner to present evidence to show the death penalty would not have been imposed, we cannot say it intended for the "underlying offense" to encompass other sentencing enhancements or aggravators. *See State v. Tillmon*, 222 Ariz. 452, ¶ 8, 216 P.3d 1198, 1200 (App. 2009) (court interprets rules by plain meaning and read in conjunction with one another); *Marlar v. State*, 136 Ariz. 404, 411, 666 P.2d 504, 511 (App. 1983) (statute or regulation construed so no "clause, sentence or word is rendered superfluous . . . or insignificant"). Nor does McCutcheon cite any decision reaching such a construction. McCutcheon's reliance on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), for the idea that a "new offense" is created by an enhanced sentence is unpersuasive in this context. *Cf. State v. Henderson*, 210 Ariz. 561, ¶¶ 14-17, 115 P.3d 601, 606-07 (2005) (concluding *Blakely* error did not constitute structural error).

¶8 As to McCutcheon's claim of ineffective assistance of trial and appellate counsel, we cannot say the trial court abused its discretion in determining McCutcheon failed to establish that counsels' failures to raise his sentencing claim fell below prevailing professional norms. To present a colorable claim of ineffective assistance of

counsel, a defendant must show counsel's performance was deficient under prevailing professional norms and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). In this case, even assuming arguendo that McCutcheon's sentencing claim has merit, he has provided no affidavits or other evidence in the trial court suggesting counsels' failures to raise this novel issue, which he describes as requiring "detailed and sometimes technical analysis of parole regulations," fell below prevailing professional norms. *See* Ariz. R. Crim. P. 32.5 ("Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it."). He cites no authority in his petition for review, nor did he below, showing similar asserted failures by counsel have been found to constitute ineffectiveness. McCutcheon's bald assertion that counsel erred is insufficient to sustain his burden of demonstrating the first requirement of the *Strickland* test. *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions").

¶9 Finally, McCutcheon claims he is entitled to relief under Rule 32.1(d), because he "will be held in custody after his lawful sentences have expired." First, Rule 32.1(d) applies only when a defendant "remain[s] in custody when he should be free." Ariz. R. Crim. P. 32.1(d) cmt. McCutcheon does not claim he currently should be free, merely that had he been sentenced as he now asserts was proper, "his sentences would be significantly shorter than life sentences without possibility of parole after 25 years." Indeed McCutcheon's sentence—even had it been imposed improperly—has not expired.

McCutcheon has not alleged a miscalculation of the time on his current sentence or good time, but rather attacks the propriety of his sentence—a claim encompassed by Rule 32.1(c) and subject to preclusion by Rule 32.2(a).

¶10 For all these reasons, although we grant the petition for review, we deny relief.

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

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Administrative Order No. 2012-101 filed December 12, 2012.