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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THE STATE OF ARIZONA, Respondent, v. JOHN PERSSON, Petitioner.	2 CA-CR 2013-0277-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF YUMA COUNTY

Cause No. S1400CR9701148

Honorable Lawrence C. Kenworthy, Judge

REVIEW GRANTED; RELIEF GRANTED

Jon R. Smith, Yuma County Attorney
By Charles Platt
Yuma
Attorneys for Respondent

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Attorney for Petitioner

K E L L Y, Presiding Judge.

¶1 John Persson petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32,

Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In 1998, Persson pled guilty to sexual abuse of a child and attempted child molestation. The trial court sentenced him to an aggravated, 7.5-year prison term for sexual abuse to be followed by lifetime probation for attempted child molestation. Persson's probation was revoked in 2007 after he admitted violating the terms of his probation by having several unapproved contacts with minors and frequenting two bars. The trial court announced it was sentencing Persson to presumptive, concurrent, ten-year prison terms for sexual abuse and attempted child molestation, but acknowledged the sentence for attempted child molestation had "expired," meaning "there isn't [a sentence], as long as everybody understands that."

¶3 Persson sought post-conviction relief, arguing that his trial counsel had been ineffective in failing to properly obtain and present mitigating evidence, particularly a psychosexual evaluation. That evaluation, according to Persson, would have shown he had a low risk of recidivism and an absence of paraphilia, that his difficulties in complying with probation resulted from depression that his therapist should have diagnosed during probation, and that his probation violations were "technical" in nature. He further claimed his "rights of Confrontation" were violated because, during the sentencing hearing, his therapist refused to bring relevant treatment notes. The trial court summarily denied relief, concluding Persson had not demonstrated he would have received a mitigated sentence "if counsel had provided effective assistance." The court noted that Persson did not wish to be reinstated on probation and had not argued in his

petition for review that his probation should not have been revoked. It also stated that the sentencing court "was aware" of the information that Persson claimed should have been presented via the psychosexual evaluation.

¶4 On review, Persson generally complains that the trial court, in denying relief, "indicated that [Persson] was to blame for his difficulties with this therapist" and that the court "ignored" the mitigating factors presented. He provides no citations to the record beyond several cursory references to his petition and exhibits filed below, cites no authority, and does not meaningfully develop an argument that the court erred in rejecting his claim. He instead focuses his petition for review on an allegation that while preparing the petition, counsel had learned several facts which called into question the ethics and performance of Persson's therapist. Counsel claims he obtained the information "from two clients" to whom he "has promised confidentiality" and asks that this court "remand the matter under seal" to the Yuma County Superior Court Presiding Judge "to be allowed to expand the record in the trial court." Related to that claim, he filed a separate motion to seal the petition. After receiving the state's response, we denied the motion to seal and rejected Persson's request that we remand the case to the trial court. We instructed Persson to seek post-conviction relief in the trial court if he believed the information constituted newly discovered evidence.

¶5 We otherwise accepted his petition for review as filed. In his reply to the state's response, Persson challenges for the first time the trial court's determination that he had argued in his petition for conviction relief only that the sentencing court should have imposed a mitigated sentence and not that he could have been reinstated on

probation. He further argues counsel could not have had a strategic reason to decline to seek a psychosexual evaluation. And, he asserts, without citation or explanation, that the sentencing court had been "unaware of mitigating factors" that it could have obtained only from that evaluation.

¶6 Persson's failure to comply with Rule 32.9(c) or to develop any meaningful legal argument in his petition for review would justify our decision to summarily deny review. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must contain "reasons why the petition should be granted" and either appendix or "specific references to the record"); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review); *State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000) (summarily rejecting claims not complying with rules governing form and content of petitions for review), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002). And we need not address claims raised for the first time in a reply. *See State v. Cohen*, 191 Ariz. 471, ¶ 13, 957 P.2d 1014, 1017 (App. 1998). But the decision whether to accept review is discretionary, *see* Ariz. R. Crim. P. 32.9(f), and several apparent errors in the proceedings below compel us to grant relief here. *Cf. Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, ¶ 147, 98 P.3d 572, 614 (App. 2004) (Arizona courts "prefer to dispose of cases on their merits").

¶7 In evaluating Persson's petition for post-conviction relief, the trial court determined, relying on the transcript of the mitigation hearing that had been conducted by a different judge, that Persson had a "preference to be sentenced to prison" due to

"difficulties" he had with his probation officer and therapist. Thus, the court rejected as a possible mitigating factor that, had Persson's therapist "performed his duties ethically and competently," Persson might have remained compliant with his probationary terms. Based on the transcript cited by the court, however, we cannot agree Persson expressed a preference for prison rather than reinstatement on probation. Although Persson's attorney stated that he believed the sentencing court should sentence Persson to "time served," Persson repeatedly informed the court that he could be successful on probation, even with his current probation officer and therapist.

¶8 As we noted above, the trial court rejected Persson's claim of ineffective assistance of counsel because it determined that Persson had not demonstrated prejudice resulting from counsel's conduct—specifically, that he would have received a lesser sentence. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (to state colorable claim of ineffective assistance, defendant must show counsel's performance fell below reasonable standards, resulting in prejudice to defendant). It is not clear from the court's ruling how much, if any, its view of Persson's preference—and thus its view of one of the possible mitigating factors—influenced that determination. It also is not clear if the court determined Persson had made a colorable claim that his counsel's conduct fell below prevailing professional norms. We therefore remand the case to the trial court for reevaluation of Persson's claim. *Cf. State v. Ojeda*, 159 Ariz. 560, 561-62, 769 P.2d 1006, 1007-08 (1989) (remand appropriate when trial court relied on inappropriate factors in reaching decision). We do not suggest, however, that Persson necessarily is entitled to an evidentiary hearing.

¶9 In April 2011, Persson filed a pro se letter with the trial court stating he had received ten-year prison terms for both sexual abuse and attempted child molestation even though he already had served a 7.5-year prison term for sexual abuse. We find nothing in the record suggesting the trial court addressed this issue. The sentencing minute entry states that Persson was given two ten-year prison terms—which cannot be correct in light of his having already served a sentence for his conviction of sexual abuse. It appears the sentencing court attempted to address this issue, mistakenly stating at sentencing that Persson's sentence for attempted child molestation had "expired." But that is incorrect—Persson had not yet served a sentence for attempted child molestation, only for sexual abuse. We therefore instruct the trial court, on remand, to correct the sentencing minute entry accordingly.

¶10 For the reasons stated, we grant both review and relief, and remand the case to the trial court for further proceedings consistent with this decision.

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

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

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