

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ADAM ARTHUR BORJA,
Petitioner.

No. 2 CA-CR 2013-0475-PR
Filed January 28, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2006145356001DT
The Honorable Larry Grant, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Catherine Leisch, Deputy County Attorney, Phoenix
Counsel for Respondent

STATE v. BORJA
Decision of the Court

Adam Arthur Borja, Winslow
In Propria Persona

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Judge Espinosa and Judge Vásquez concurred.

ECKERSTROM, Judge:

¶1 Petitioner Adam Borja seeks review of the trial court’s order dismissing 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). Borja has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Borja was convicted of first-degree murder, burglary, and arson of an occupied structure. The trial court sentenced him to concurrent terms of imprisonment, the longest of which was a life sentence without possibility of release for twenty-five years. His convictions and sentences were affirmed on appeal. *State v. Borja*, No. 1 CA-CR 08-0290 (memorandum decision filed June 4, 2009).

¶3 Borja initiated a proceeding for post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record and was “unable to find any colorable claims for relief to raise in post-conviction relief proceedings.” In a pro se petition, however, Borja raised several claims, including multiple claims of trial error and a claim that trial counsel provided ineffective assistance by entering into an evidentiary stipulation. The trial court summarily denied relief, concluding Borja’s claims were precluded by his failure to raise them on appeal.

STATE v. BORJA
Decision of the Court

¶4 On review, Borja contends he “did not knowingly []or willingly waive the issues presented in the Rule 32 pro se brief” because his appellate attorney had informed him he was not required to file a supplemental brief after she had filed an *Anders*¹ brief. As Borja notes, his counsel on appeal filed a brief in compliance with *Anders*. Thereafter, Borja was provided an opportunity to file a pro se supplemental brief, but failed to do so. And upon affirming Borja’s convictions and sentences after reviewing for reversible error, this court also expressly granted Borja thirty days in which to file a pro se motion for reconsideration, but he failed to do so.

¶5 On review, Borja contends he was not to blame for his failure to raise on appeal the issues presented in his Rule 32 proceeding, asserting the failure arose from appellate counsel’s communications with him.² He maintains counsel had informed him he was “not obligated to file a supplement to the ‘Ander’s Brief’” and “the issues he wished to raise were not Rule 31 issues, but Rule 32 issues.” However, the correspondence Borja included in his reply does not support his argument.

¶6 Appellate counsel initially requested that Borja notify her “in writing of the issues” he thought should be raised on appeal. She then stated that if she determined “there are no arguable issues to present to the court,” she would file an *Anders* brief and Borja would “then have an opportunity to raise your issues in a supplemental brief.” In a subsequent letter, counsel informed Borja that she had concluded there were “no viable issues that appear meritorious” and would file an *Anders* brief. She explained that she

¹*Anders v. California*, 386 U.S. 738 (1967).

²To the extent this argument could be read as a claim of ineffective assistance of appellate counsel, Borja has not presented any evidence or legal authority to support a claim that counsel’s communications to him fell below prevailing professional standards. 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”).

STATE v. BORJA
Decision of the Court

had requested time in which Borja could file a supplemental brief and provided him with the record in his case. When this court set a due date for the supplemental brief, counsel informed Borja of the date and explained that the brief was “optional” and that he was “not required to file this brief.” But, she further explained to Borja, “[I]f you wish to raise in your own words additional points for the court to consider, you may do so.”

¶7 In general, when appellate counsel winnows issues to be raised on appeal, such a “waiver of other possible issues binds the defendant, and those waived issues cannot be resurrected in post-conviction proceedings.” *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). But as counsel properly explained in her correspondence to Borja, when counsel finds no arguable issues on appeal and files an *Anders* brief, Arizona practice allows a defendant to file a supplemental brief if he or she wishes. *See, e.g., State v. Clark*, 196 Ariz. 530, ¶ 30, 2 P.3d 89, 96 (App. 1999). Borja did not file such a brief, nor did he file a motion for reconsideration, even when expressly invited to do so by the court. Thus, as the trial court properly concluded, any claims that could have been raised on appeal are now precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶8 We note, however, that Borja appears to have asserted a claim of ineffective assistance of trial counsel in relation to counsel’s decision to enter a stipulation for the admission of certain evidence. Such a claim was not precluded, because it could not have been raised on appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Borja does not, however, argue this claim on review; rather, he merely refers to his “Rule 32 pro se brief in its entirety.” We therefore do not consider that claim. *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,” but shall not “incorporate any document by reference, except the appendices”); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on appeal); *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*

STATE v. BORJA
Decision of the Court

grounds by Stewart v. Smith, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002).

¶9 Thus, although the petition for review is granted, relief is denied.