

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

GILBERT GONZALES OLIVAS,
Petitioner.

No. 2 CA-CR 2014-0350-PR
Filed January 28, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20102517002

The Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

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Gilbert Gonzales Olivas, Florence
In Propria Persona

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which Presiding Judge Kelly and Judge Howard concurred.

VÁSQUEZ, Judge:

¶1 Gilbert Olivas seeks review of the trial court's order summarily denying, in part, 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. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Olivas has not met his burden of demonstrating such abuse here.

¶2 Olivas was convicted after a jury trial of two counts of aggravated assault with a deadly weapon or dangerous instrument, theft of a means of transportation, armed robbery, and aggravated robbery. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling forty-three years. Olivas appealed, waiving his right to appellate counsel and choosing to represent himself. His appeal was dismissed, however, after he failed to timely file his opening brief despite having been granted several extensions of time in which to do so.

¶3 Olivas sought post-conviction relief, again electing to proceed pro se. He filed a petition raising numerous claims of trial error, specifically that: (1) no reasonable fact-finder could have found him guilty as an accomplice to the robberies or aggravated assaults, apparently in part because there was exculpatory evidence the state did not present at trial; (2) the trial court violated his due process and other constitutional rights when it failed to conduct oral argument or expressly rule on his request to waive his right to counsel and represent himself at trial; and (3) his rights were

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violated by the use of his handwritten motions filed in another case as handwriting exemplars. He additionally raised several claims of sentencing error,¹ specifically that the court had erred in sentencing him as a dangerous offender for aggravated robbery, in imposing enhanced sentences on several of his other convictions, and in imposing a criminal restitution order (CRO) at sentencing.

¶4 Olivas also claimed trial counsel had been ineffective in failing to raise the above arguments, and for stipulating to the admission of a recording of a 9-1-1 call made by one of the victims because it allegedly contained “false material evidence.” Olivas further asserted the Arizona Department of Corrections (ADOC) had improperly interfered with his ability to timely file his opening brief on appeal. The trial court summarily denied relief on all but two of Olivas’s sentencing claims, determining he should be resentenced on his aggravated robbery conviction and vacating the CRO. This petition for review followed the court’s denial of Olivas’s motion for rehearing.

¶5 On review, Olivas restates his claims of trial and sentencing error. We first note that several of Olivas’s claims of trial error are precluded because he could have raised them on appeal but failed to do so. *See* Ariz. R. Crim. P. 32.2(a)(1), (3). Thus, we do not address the merits of his sentencing claim nor his claims related to his request to proceed without counsel or concerning the use of his handwritten motions as handwriting exemplars.

¶6 However, we address his claim regarding the sufficiency of the evidence because it arguably falls within Rule 32.1(h) and thus is not subject to preclusion. *See* Ariz. R. Crim. P. 32.2(b). To obtain relief pursuant to Rule 32.1(h), Olivas was required to demonstrate “by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the

¹Olivas initially was appointed counsel, who filed a petition raising the sentencing claims. Olivas integrated those claims into his pro se petition.

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underlying offense beyond a reasonable doubt.” Olivas has not met this burden. We agree with the trial court that sufficient evidence supported his convictions for the robberies and aggravated assaults. And the “exculpatory” evidence Olivas refers to – an interview with one of the victims – is not inconsistent with a finding of accomplice liability and is of little, if any, exculpatory value.

¶7 Olivas also reurges several of his claims of ineffective assistance of counsel. “To state a colorable claim of ineffective assistance of counsel,” Olivas was required to “show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced [him].” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As we noted above, although Olivas claims counsel failed to introduce exculpatory evidence, he has not identified any such evidence. And his claims that counsel failed “to argue and object to the insufficiency of evidence” also fail in light of our conclusion that sufficient evidence supported his convictions.

¶8 Nor has Olivas made a colorable claim that counsel was deficient in failing to object to the use of Olivas’s handwritten motions from another case as handwriting exemplars. He has identified no meritorious argument counsel could have made. As the trial court correctly noted, those documents are a matter of public record. *See* Ariz. R. Sup. Ct. 123(c)(1) (“[T]he records in all courts and administrative offices of the Judicial Department of the State of Arizona are presumed to be open to any member of the public for inspection or to obtain copies.”). And we reject Olivas’s argument that the use of court records as handwriting exemplars violates his due process rights or right to petition the government – the use of court records as evidence cannot reasonably be construed as interference with or punishment for Olivas’s exercise of his constitutional rights. *See generally Ruiz v. Hull*, 191 Ariz. 441, ¶ 61, 957 P.2d 984, 1000 (1998) (“The right to petition bars state action interfering with access to . . . the judicial branch.”). Nor are motions filed in a trial court exempt from disclosure as legal work product by Rule 15.4(b), Ariz. R. Crim. P., as Olivas suggests.

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¶9 Olivas next claims his counsel was deficient in stipulating to the admission into evidence of a recording of the 9-1-1 call made by one of the victims, repeating his assertion that the call contained “false material” evidence because it was inconsistent with other testimony at trial. But Olivas has identified no legal basis upon which counsel could have objected to admission of the 9-1-1 call, nor any reasonable possibility that excluding the recording would have changed the verdict. Thus, this claim of ineffective assistance fails.

¶10 Olivas additionally repeats his claim that the ADOC improperly interfered with his attempts to timely file his opening brief on appeal. This claim does not pertain to the validity of his conviction or sentence, but rather the alleged post-trial denial of his rights, and thus is not cognizable pursuant to Rule 32. *See* Ariz. R. Crim. P. 32.1. We therefore do not address it.

¶11 Although we grant review, we deny relief.