

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN PATRICK KELLY,
Petitioner.

No. 2 CA-CR 2015-0046-PR
Filed June 15, 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NOT FOR PUBLICATION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 Gila County

No. S0400CR20080005

The Honorable Peter J. Cahill, Judge

REVIEW GRANTED; RELIEF GRANTED

John P. Kelly, Buckeye
In Propria Persona

STATE v. KELLY
Decision of the Court

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Judge Vásquez and Judge Brammer¹ concurred.

H O W A R D, Judge:

¶1 Petitioner John Kelly 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). Because we conclude the trial court abused its discretion in appointing the same counsel to represent Kelly on appeal and in his first Rule 32 proceeding, we grant relief.

¶2 After a jury trial, Kelly was convicted of fraudulent schemes and artifices, theft, trafficking in stolen property, attempted theft, and three counts of criminal impersonation. The trial court imposed enhanced, concurrent, aggravated and presumptive prison terms, the longest of which were twenty-two years. This court affirmed his convictions and sentences on appeal. *State v. Kelly*, No. 2 CA-CR 2011-0003, ¶ 3 (memorandum decision filed Jan. 27, 2012).

¶3 Kelly thereafter initiated a proceeding for post-conviction relief, and appointed counsel, who also had represented Kelly on appeal, filed a notice stating she had found no claims to raise in a Rule 32 proceeding. When Kelly failed to file a timely pro se supplemental petition, the trial court dismissed the proceeding. But it subsequently granted a motion for reconsideration filed by Kelly and reinstated the proceeding. In his pro se supplemental petition, Kelly raised various claims of ineffective assistance of trial

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

STATE v. KELLY
Decision of the Court

and appellate counsel. The trial court held a hearing as to some of Kelly's claims, but ultimately denied relief.

¶4 On review Kelly focuses on one claim of ineffective assistance of trial counsel, relating to an offered plea agreement. But we do not now address that claim because, as we explain below, the trial court abused its discretion in appointing as Rule 32 counsel the same attorney who had represented Kelly on appeal. Kelly raised claims of ineffective assistance of appellate counsel in his pro se supplemental petition and asserted in his reply to the state's response that counsel had a "conflict of interest" based on having represented him both on appeal and in the Rule 32 proceeding.

¶5 Pursuant to Rule 32.4(c)(2), the trial court is required to appoint counsel "[u]pon the filing of a timely or first notice in a Rule 32 proceeding." And our supreme court has stated that, just as "it is improper for appellate counsel to argue his own ineffectiveness at trial," Rule 32 counsel should not "argue his own ineffectiveness on direct appeal." *State v. Bennett*, 213 Ariz. 562, ¶ 14, 146 P.3d 63, 67 (2006). Discussing *Bennett* in the context of a pleading defendant's right to counsel in his or her second post-conviction relief proceeding and comparing that proceeding to one challenging counsel's effectiveness on appeal, this court concluded it was clear that *Bennett* required appointed counsel "be a different attorney than the one who represented the defendant in the first proceeding." *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 20, 250 P.3d 551, 557 (App. 2011). Thus, the court abused its discretion in appointing to represent Kelly in his first Rule 32 proceeding the same attorney who had represented him on appeal because she might be expected to investigate and raise in the post-conviction relief proceeding his claims of ineffective assistance of appellate counsel.

¶6 Therefore, we grant the petition for review and grant relief. We remand this matter to the trial court for appointment of new Rule 32 counsel and for further proceedings.