

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DANNY STEVEN WOOD,
Petitioner.

No. 2 CA-CR 2015-0270-PR
Filed November 5, 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NOT FOR PUBLICATION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 Navajo County
No. CR87009386
The Honorable Robert J. Higgins, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Brad Carlyon, Navajo County Attorney
By Galen H. Wilkes, Deputy County Attorney, Holbrook
Counsel for Respondent

Danny S. Wood, Florence
In Propria Persona

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly¹ concurred.

H O W A R D, Judge:

¶1 In 1987, petitioner Danny Wood was convicted pursuant to a plea agreement of attempted sexual conduct with a minor under the age of fifteen, and the trial court suspended the imposition of sentence, placing him on lifetime probation. In January 2012, after Wood admitted violating the conditions of his probation, the trial court revoked probation and sentenced him to the minimum prison term of five years. Over a year later, Wood filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court dismissed as untimely. The court denied Wood’s motion for reconsideration, and this pro se petition for review followed.

¶2 Ronald Wood, Wood’s former counsel, filed a notice of post-conviction relief on July 26, 2013, in which he stated Wood intended to seek relief pursuant to Rule 32.1(d), “in that at the time of his change of plea, he was told that he would earn release credits at the rate of one day for each two days he served,” based on the law in 1985, when he committed the offense. The notice also stated Wood was “being told these release credits are denied to him due to the new law being imposed,” which “violates due process and the plea agreement.” Counsel asked the trial court to “set a hearing to determine the nature of the relief to be granted,” requested that an attorney be appointed to represent Wood, and asked that Wood be permitted to file a supplemental brief.

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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¶3 In his pro se reply to the state's response to the notice, Wood conceded that, as the state had argued, the notice did not comply with Rule 32.5, which specifies the requirements of a petition for post-conviction relief. Wood clarified what had been filed was not a petition; rather it was his notice, "signaling the commencement of Petition for Post-conviction relief proceedings." Again he asked that counsel be appointed to represent him. He also made clear the nature of the claim he wished to raise, noting that at sentencing he had been told by Ronald Wood that he would be required to serve fifty percent of the sentence imposed; the court did not correct counsel nor did the state object. Wood stated that although he and his family had believed he would be released in July 2013, he was still in prison in October 2013.

¶4 The state filed a response to the reply in which it argued the claim was actually a claim of ineffective assistance of counsel, which was time-barred, and the trial court should dismiss the proceeding without ordering preparation of the transcripts. In his reply to this response, Wood again stated he simply was trying to commence the proceeding based on his claim he was entitled to be released from prison, again requesting that counsel be appointed to represent him.

¶5 The trial court denied the "Rule 32 motion" as untimely on the ground that it had been filed "more than a year after the Defendant was sentenced." In his motion for reconsideration, Wood argued the notice was not untimely because it could not have been filed until July 2013, "the day after he was legally entitled to be released." He asserted that he had not forfeited his release credits and should have been released to parole in July 2013. The court denied the motion finding Wood's "[m]otion does not raise a permitted claim for relief under Rule 32."

¶6 In his petition for review, Wood contends the trial court erred by not permitting his "Rule 32 petition to move forward because Arizona's post-conviction relief process is generally the proper vehicle for correcting unlawful incarceration above and

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beyond that which may be lawfully required.” Again he contends he was entitled to be released in July 2013.

¶7 Wood’s notice made clear he wished to assert a claim pursuant to Rule 32.1(d), which provides as a ground for relief that “[t]he person is being held in custody after the sentence imposed has expired.” The time limits of Rule 32.4(a) do not apply to a claim under this subsection. Ariz. R. Crim. P. 32.4(a). The trial court therefore erred by dismissing the notice as untimely filed, particularly without appointing counsel as Wood requested, given that this was his first post-conviction proceeding following the revocation of probation. *See* Ariz. R. Crim. P. 32.4(c)(2).

¶8 Similarly, in denying Wood’s motion for reconsideration, the court simply stated he had not “raise[d] a permitted claim for relief under Rule 32.” Again, Wood was attempting to assert a claim pursuant to Rule 32.1(d) that based on application of release credits he was being held after completing his sentence. This claim is cognizable under that subsection and could not, as Wood contends, be brought until the time for his alleged release had passed. Nevertheless, for the reasons set forth below, we see no purpose in granting relief.

¶9 As the state has informed this court and the documents it provided reflect, Wood commenced another post-conviction proceeding, again arguing he was entitled to release after he had served one-half of the five-year sentence.² This time, the trial court

²Because it appeared to this court there had been a parole hearing in this matter on December 2, 2014, potentially rendering moot the issue raised in this proceeding, we ordered the state to file a memorandum providing an update of the status of the matter and addressing the effect, if any, of the result of any such hearing on this proceeding. Based on the memorandum and accompanying exhibits the state filed, it appears the Board of Executive Clemency granted Wood home arrest, but he rejected it for financial reasons, claiming he “could not do [it] financially,” presumably implying he could not work. We do not know the results of another parole hearing that was scheduled for October 21, 2015.

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did not summarily dismiss the notice or the petition, rather it denied relief on July 20, 2015, after an evidentiary hearing. He currently is seeking this court's review of that ruling. *State v. Wood*, No. 1 CA-CR 15-0668-PRPC. If we were to grant relief in this case, it would be to direct the trial court to appoint counsel to represent Wood, permit him to file a petition, and address the claim on the merits which has occurred in the second proceeding. The claim was not precluded in that successive proceeding, nor will it be, given the circumstances of this case. *See* Ariz. R. Crim. P. 32.2(a)(3) (finding waived and precluded claim not raised in prior collateral proceeding).

¶10 Therefore, although we grant review and find the trial court abused its discretion, *see State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007), we deny relief.