IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

THOMAS CLAYTON STERES,
Petitioner.

No. 2 CA-CR 2016-0379-PR
Filed March 30, 2017

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NOT FOR PUBLICATION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 Cochise County
No. CR201400108
The Honorable John F. Kelliher Jr., Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Rosenquist & Associates, Tucson
By Anders Rosenquist
Counsel for Petitioner

MEMORANDUM DECISION

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

H O W A R D, Presiding Judge:

¶1 Thomas Steres seeks review of the trial court's order dismissing as untimely his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review, but we deny relief.

¶2 Pursuant to a plea agreement, Steres was convicted of attempted murder, and the trial court sentenced him to fifteen years' imprisonment. In August 2015, he filed a timely notice of post-conviction relief in which he stated he was represented by counsel, and his retained counsel filed a notice of appearance.

¶3 In July 2016, he filed a petition for post-conviction relief alleging the following claims: (1) the factual basis for his guilty plea was "defective"; (2) a police detective allegedly "did not follow protocol" promulgated in *Riley v. California*, ___ U.S. ___, ___, 134 S. Ct. 2473, 2485-86 (2014), "after seizing Steres' cellphone" and allegedly "tampered with it before obtaining a search warrant"; and (3) his attorney rendered ineffective assistance in advising him to plead guilty without adequate investigation and without pursuing a motion to suppress evidence obtained from his cellphone, which he characterizes as "a critical defense that could have been pivotal" in his case. The trial court granted the state's motion to dismiss Steres's petition as untimely, and this petition for review followed.

¶4 On review, Steres argues the trial court "err[ed]" in dismissing his petition as untimely, and he reasserts the claims he raised below. We review a trial court's denial of post-conviction relief for an abuse of discretion, and we will affirm that ruling if it is legally correct for any reason. *State v. Roseberry*, 237 Ariz. 507, ¶ 7,

353 P.3d 847, 848 (2015). The court did not abuse its discretion in dismissing Steres's petition, because he failed to state a colorable claim for relief.

¶5 Steres first argues his petition was not untimely, despite a delay of nearly a year between his notice of post-conviction relief and his petition perfecting it, because the trial court had not issued a briefing schedule upon receiving his notice and because Rule 32.4(c), which provides a sixty-day deadline for the filing of a petition by a pro se defendant or "appointed" counsel, imposes no express deadline for a petition filed by retained counsel. We find it unnecessary to construe the requirements of Rule 32.4 with respect to retained counsel, however.[1] Even if the rule permitted dismissal on the ground of untimeliness, our supreme court has suggested that, in circumstances such as these, a pleading defendant who has filed a timely notice of post-conviction relief in an of-right proceeding should not have his petition dismissed based solely on his attorney's failure to file a timely petition. *See State v. Diaz*, 236 Ariz. 361, ¶ 13, 340 P.3d 1069, 1071 (2014).

¶6 But in this case, Steres's petition was also subject to summary dismissal for his failure to comply with Rule 32 procedures and failure to state a colorable claim. *See* Ariz. R. Crim. P. 32.5, 32.6(c). We affirm the trial court's ruling based on those alternate grounds. *See Roseberry*, 237 Ariz. 507, ¶ 7, 353 P.3d at 848.

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[1]We recognize the lack of clarity in Rule 32.4(c)(2) with respect to petition deadlines when counsel has been retained. On the other hand, construing the rule in the manner Steres suggests would appear to lead to the absurd result that a defendant appearing in propria persona would be required to file a petition within sixty days, while retained counsel would have an unlimited time to do so. *Cf. State v. Jones*, 182 Ariz. 432, 434, 897 P.2d 734, 736 (App. 1995) (suggesting time limits added to Rule 32.4(a) in order to "prevent unwarranted delay"). We encourage trial courts to order specific briefing schedules when a sufficient of-right notice of post-conviction relief has been filed.

¶7 As an initial matter, Steres failed to support his petition with his own declaration "stating under penalty of perjury that the information contained is true to the best of [his] knowledge and belief," as required by Rule 32.5. Nor did he file his own affidavit in support of his allegations. *See id.* (defendant required to attach to his petition "[a]ffidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition"). As our supreme court has made clear, "Petitioners must strictly comply with Rule 32 or be denied relief." *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984).

¶8 In addition, Rule 32.6(c) provides for summary dismissal if a trial court determines, after elimination of all precluded claims, that no remaining claim states a material issue of fact or law that would entitle the defendant to relief. On review of this record, we conclude Steres has failed to state any colorable, non-precluded claim for relief.

¶9 For example, in asserting the factual basis for his guilty plea was "defective," Steres does not suggest his admissions fail to support a guilty finding on each element of attempted murder. *See State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994) ("the trial court must determine whether a factual basis exists for each element of the crime to which defendant pleads" before entering judgment on guilty plea). Instead, without benefit of a supporting affidavit, he argues his admissions at his change of plea hearing were "false" because he had "t[aken] the blame" for his girlfriend.

¶10 After pleading guilty, "a defendant may not thereafter question the legal sufficiency of the evidence against him." *State v. Martinez*, 102 Ariz. 215, 216, 427 P.2d 533, 534 (1967); *cf. State v. Rubiano*, 214 Ariz. 184, ¶ 10, 150 P.3d 271, 273-74 (App. 2007) (corpus delicti rule does not apply to defendant's in-court guilty plea; sworn admissions sufficient without independent corroborating evidence). Thus, a defendant's "[s]olemn declarations in open court carry a strong presumption of verity," and "constitute a formidable barrier" in a subsequent challenge to the validity of the plea. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Accordingly, a defendant's assertion disclaiming his sworn statements at a change of plea

hearing is subject to summary dismissal when, as here, it is based on "conclusory allegations unsupported by specifics." *Id.* at 74.

¶11 Although Steres maintains his attorney performed deficiently in failing to "discover or pursue" his post-conviction allegation that evidence was illegally obtained from his cellular telephone, he fails to even identify what that evidence was, much less explain how its suppression was "critical" to his defense, particularly in light of the various admissions he made to police officers investigating the crime. He has thus failed to make a colorable showing that counsel performed deficiently. *See Premo v. Moore*, 562 U.S. 115, 125-26 (2011) ("strict adherence" to deference required by *Strickland* "all the more essential" when reviewing claims of ineffective assistance at plea bargaining that may "lack necessary foundation"; rejecting conclusion that counsel necessarily ineffective in advising defendant to plead guilty before filing motion to suppress); *Tollett v. Henderson*, 411 U.S. 258, 267 (voluntary and intelligent guilty plea "may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry).

¶12 Similarly, a pleading defendant waives all claims of ineffective assistance of counsel "except those that relate to the validity of a plea." *State v. Banda*, 232 Ariz. 582, ¶ 12, 307 P.3d 1009, 1012 (App. 2013). A defendant, however, may obtain post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to accept or reject a plea bargain, thereby making his or her decision involuntary. *Id*. But Steres has neither alleged nor averred that, but for his attorney's conduct, he would not have pleaded guilty and would have insisted on a trial. In the absence of such an averment, his ineffective assistance claim was subject to summary dismissal. *See Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (pleading defendant's failure to allege he would have insisted on trial but for counsel's misadvice rendered petition's allegations "insufficient" to satisfy prejudice requirement of *Strickland*).

¶13 Finally, Stere's independent, substantive claim of a Fourth Amendment violation, related to the seizure and allegedly illegal search of his cellular telephone, was waived by the terms of his plea agreement and by operation of law. *See State v. Murphy*, 97 Ariz. 14, 15, 396 P.2d 250, 250–51 (1964) (defendant's knowing and voluntary guilty plea "constitutes a waiver of all nonjurisdictional defenses" and "foreclose[s] any inquiry into the matter of [an] alleged illegal search and seizure").[2]

¶14 Steres has failed to establish the trial court abused its discretion in summarily dismissing his petition for post-conviction relief. Accordingly, although we grant review, we deny relief.

[2]In his petition for review, Steres encourages this court to consider his claims as constituting newly discovered evidence, *see* Ariz. R. Crim. P. 32.1(e), or as based on a significant change in the law, *see* Ariz. R. Crim. P. 32.1(g). These issues were not presented to the trial court, and we will not consider them on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).